

# CAN LEGAL THEORY BE OBJECTIVE?

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## 1 Introduction

In 1961 Hart published his most famous book, with a title, *The Concept of Law*, that is both modest in content and pretentious in its presupposition.<sup>1</sup> This presupposition is that it is possible to say something sensible about the law in general, and not only about concrete legal systems. It is a presupposition that is not only made in Hart's work, but in most legal theory, because legal theory is interested in the nature of legal phenomena in general, and not particularly in the way in which these phenomena are implemented in specific legal systems. At least the characteristics of law as such, of the basic concepts of the law, such as 'right', 'obligation', and 'juridical act', and of universal legal phenomena such as legal rules and their mode of operation, would provide a common ground on which such a general theory law can be erected. Or are even these phenomena 'coloured' in the sense that their nature depends on the legal system in which they occur?

Given the diversity of the different legal traditions of the world<sup>2</sup>, the differences between the legal families in the Western tradition<sup>3</sup>, and between the legal systems within a single family, it might seem that it is all diversity in the law. Are not the differences so profound that even a neutral terminology by means of which the comparison can be made is lacking?<sup>4</sup> Hart's presupposition would therefore not only seem pretentious, but also wrong: the only general thing that can be said about the law is that the law is very diverse.

The same verdict would then also apply to legal theory in general insofar as it aims to tell us something about the law as such. There would be no general things to say; the only noteworthy things about the law would concern the contents of particular legal systems. Objective legal theory in the sense of legal theory that can provide us with knowledge about the law in general, and not merely knowledge about the law of a particular jurisdiction, would be impossible. To the extent that legal theorists aim to provide us with such general knowledge nevertheless, their endeavour must of necessity be fruitless. Moreover, if legal theorists nevertheless provide us with 'knowledge' about the law which claims to be objective, they mislead us – probably without knowing it – because the provided knowledge must be coloured by the contents of a legal system.

Does the above argument why legal theory cannot be objective make sense? This paper hopes to show that there is certainly something to be adduced against its relativist view and that legal theory

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<sup>1</sup> HLA Hart, *The Concept of Law* (Oxford Clarendon Press, 1961).

<sup>2</sup> HP Glenn, *Legal Traditions of the World*, 2nd edn. (Oxford, Oxford University Press, 2004).

<sup>3</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn. (Oxford, Clarendon Press, 1998), 63-73; J Husa, 'Legal Families', in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Northampton, Edward Elgar Publishing, 2006), 382-392.

<sup>4</sup> See A Esin Örucü, 'Methodology of comparative law', in Smits supra fn 3, 442-454; N Jansen, 'Comparative Law and Comparative Knowledge', in M Reimann and R Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006), 305-338.

can be objective at least to some extent. To that purpose, two case studies will be discussed. The one deals with a relatively recent development in legal logic, namely the use of so-called non-monotonic logics to analyse the application of legal rules, and it aims to illustrate the extent in which the operation of legal rules can be neutral with respect to legal systems. The second case study deals with the neutrality of a central legal concept, namely the concept of competence, and gives an insight in how the neutrality of this concept can be maintained, and at what cost. Before these two case studies will be made, however, a non-legal example will be studied. This example, on the issue whether whales are fish, illustrates clearly how necessity and therewith objectivity can be created by conventional means. The two case studies will then illustrate more extensively how a comparable 'objectivity by convention' can be reached in legal theory.

## 2 Of whales and planets

'Question: Are Whales Fish?

Whales live in the ocean, can stay underwater for long periods of time and have strong tails to propel themselves. So do fish. So, are whales fish?

Answer: The short answer: whales are not fish. Whales are mammals, just like you and me. All mammals are endothermic (commonly called warm-blooded), give birth to live young and nurse their young, breathe oxygen from air, and have hair...<sup>5</sup>

'The 9th edition of Linnaeus' masterwork of classification, the *Systema Natura*, said whales were fish; the 10th edition, published only two years later, said they were not.'<sup>6</sup>

These two quotes from the modern source of all reliable knowledge, the worldwide web, give an indication of a discussion that must have taken place some centuries ago (in between the 9<sup>th</sup> edition of 1756 and the 10<sup>th</sup> edition of 1758 of the *Systema Natura*?) about the proper classification of whales. Are they fish, because they look like other fish, and live in the seas, just like other fish? Or are they not fish, because they differ from fish in the following respects<sup>7</sup>:

- Whales move their tails up-and-down, while fish move theirs from side-to-side.
- Whales breathe through their blowholes, which are basically nostrils on the top of their heads. Fish take in oxygen from the water through their gills.
- Whales give birth to live young. Fish lay eggs.
- Whales have smooth skin, while fish have scales.
- Whales are warm-blooded.

Those who are convinced that whales are not fish should also consider that phylogenetically all mammals are fish, and that therefore whales are in a sense both mammals *and* fish.<sup>8</sup>

Present day wisdom is that whales are *not* fish. And yet it can easily be seen that at some moment there must have been a discussion how to classify whales. There are both reasons to stick to what have must been the original classification of whales as fish, and reasons, based on acquired insights in biological kinds and their development, why whales are not fish. This discussion must have led to sharpening the criteria for what counts as a fish, and *on the basis of these sharpened criteria* it is now obvious that whales and fish belong to different kinds.

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<sup>5</sup> <http://marinelife.about.com/od/cetaceans/f/arewhalesfish.htm> (last consulted on May 17, 2011)

<sup>6</sup> <http://www.robmacdougall.org/blog/2008/12/are-whales-fish/> (last consulted on May 17, 2011)

<sup>7</sup> <http://marinelife.about.com/od/cetaceans/f/arewhalesfish.htm> (last consulted on May 17, 2011)

<sup>8</sup> [http://wiki.answers.com/Q/Are\\_whales\\_classified\\_as\\_fish](http://wiki.answers.com/Q/Are_whales_classified_as_fish) (last consulted on May 17, 2011)

A similar discussion was conducted much more recently, in 2006, about the nature of planets. In 2003 astronomers discovered a new 'planet' in the *Kuiper belt*, a region in our solar system extending from the orbit of Neptune to approximately 55 astronomical units<sup>9</sup> from the Sun.<sup>10</sup> This new 'planet' was called *Eris*, but its discovery almost immediately started a discussion about the nature of planets and whether this 'planet' could still be called a planet. The outcome of the discussion was that a new category was introduced, 'dwarf planets', and that both *Eris* and the already recognised planet *Pluto* would from now on be categorised as dwarf planets and – in the case of *Pluto* – not as a planet anymore.<sup>11</sup>

In both cases there was an initial uncertainty about the classification of objects (whales, satellites of the Sun), and this uncertainty was ended, not by gathering more information about the disputed objects, but by changing or sharpening the convention which defined the boundaries of a category. In doing so, the impossibility of obtaining certainty about the status of whales and planets was turned into certainty by means of conventions.

Obviously, these conventions might have been framed differently, and then the certainty that whales are not fish and that *Pluto* and *Eris* are not planets might have been the certainty that they *are* fish, respectively planets. Does this mean that there is no true answer to the questions whether whales are fish and whether *Pluto* and *Eris* are planets? No, there is a true answer, but this answer depends on conventions. Moreover, the conventions as they were actually created were arbitrary. Their formulations were informed by the most recent scientific information of their ages, and – what is in particular perspicuous in the case of the biological convention – they still stand. And with them the classification of whales as non-fish and of *Pluto* and *Eris* as dwarf planets still stand.

What is the relevancy of this all for the objectivity of legal theory? It will be argued that conventions also play an important role in legal theory, and that the use of these conventions makes it possible that legal theory is objective. Admittedly, this objectivity depends on conventions, which might have been different. But first, these conventions need not be arbitrary either, and second the fact that objectivity is based on conventions does not subtract from the fact that it is still objectivity.<sup>12</sup>

### 3 Is legal logic neutral?

According to Oliver Wendell Holmes jr, the life of law has been experience, not logic.<sup>13</sup> As a reminder that legal reasoning cannot and should not be restricted to the application of logical laws to premises which are exempted from criticism, these words of Holmes remain valuable. As soon as they are misinterpreted as stating that logic is not important for the law, however, they become dangerous, because then they suggest that valid reasoning – for which logic is the theoretical underpinning – does not play a central role in the law. Argumentation and reasoning is of crucial importance, and it even seems that the standards for legal reasoning are the same in at least the modern western legal

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<sup>9</sup> An astronomical unit is about 149,597,870.7 kilometers ([http://en.wikipedia.org/wiki/Astronomical\\_unit](http://en.wikipedia.org/wiki/Astronomical_unit); last consulted on May 17, 2011).

<sup>10</sup> [http://en.wikipedia.org/wiki/Kuiper\\_belt](http://en.wikipedia.org/wiki/Kuiper_belt) (last consulted on May 17, 2011)

<sup>11</sup> <http://www.gps.caltech.edu/~mbrown/planetlila/> (last consulted on May 17, 2011)

<sup>12</sup> To give an illustration of this point from a completely different subject area: it is by convention that the corners of a rectangle are straight, but given that convention it is objectively the case that all corners of a rectangle are equal.

<sup>13</sup> OW Holmes jr, *The Common Law* (New York, Dover Publications, 1991), 1.

systems. One might therefore claim that where the law obviously differs from system to system, the standards for legal reasoning are everywhere the same.

This claim, that the standards for legal reasoning are - within the modern western world – universal, is nevertheless false. One only has to look at the differences between the civilian and the common law tradition to see that what counts as a strong argument in the one tradition, for instance the invocation of a precedent, may be much weaker in the other tradition.<sup>14</sup> It is possible, however, to formulate a more modest claim, which has a better chance of surviving comparative criticism, and that is the claim that at least the logic of rule application is universal. Is it not everywhere the case that legal rules have a condition part and a conclusion part, and that if the facts of a case satisfy the conditions of a legal rule, the rule attaches its conclusion as a legal consequence to this case?

That it is not even that simple can be seen from the following example which has, for illustrative purposes, been stripped from all the complications that would characterise more realistic cases. Suppose that a particular jurisdiction, for hygienic reasons, disallows the presence of dogs in shops which sell food. A visually handicapped person wants to bring her guide dog into a butchery, and the question arises whether this guide dog may enter the shop. Let us assume, somewhat unrealistically, that the local legislator did not consider guide dogs in drafting the regulation. *At least* four approaches to this case are possible, which might briefly be characterised as the legalistic approach, the interpretive approach, the activist approach, and the deviant logic approach.

#### THE LEGALISTIC APPROACH

The legalistic approach is what Holmes probably wanted to fight when he stated that the life of law was not logic. On this approach the content of the law is taken on its face value, and then applied without making use of the subtle reasoning techniques which have been developed as parts of the jurist's toolbox. The argument might then run as follows: The rule disallows dogs in food selling shops. A butchery is a food selling shop and a guide dog is a dog, so guide dogs are not allowed in butcheries, not in general and therefore also not in this particular case. This argument sounds very 'logical', and maybe for that reason legalistic reasoning has been confused with the strict application of logic. Advantages of this style of reasoning are:

- that the step from the formulation of the rule in legislation to the content of the rule is minimal, because the content is precisely what the legislation says it is;
- that the conditions of the rule are given an interpretation which is in accordance with common parlance (a guide *dog* is obviously a dog); and
- that the logic of rule application is highly similar to the logic that applies to declarative sentences.<sup>15</sup>

The obvious disadvantage of this legalist approach to legal reasoning is that it apparently leaves a legal decision maker little choice (although some might consider this to be an advantage, rather than a disadvantage), and that this decision maker as a consequence cannot accommodate seemingly relevant factors, which are not taken into account in the rule formulation. In our example this is

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<sup>14</sup> A brief overview of how the standards for legal reasoning vary from the one jurisdiction to the other can be found in J.C. Hage, 'Legal reasoning', in Smits *supra* fn 3, 407-422.

<sup>15</sup> We will return to this point later in this section.

reflected in the fact that the rule does not distinguish between dogs in general and guide dogs and that the special needs of visually handicapped persons therefore seem to be ignored.

#### THE INTERPRETIVE APPROACH

Lawyers are fond of interpretation and possibly also for that reason there is so much which they call 'interpretation'. A typical example of *legal* interpretation is when a term is given a meaning which does not agree with common parlance, for instance because this agrees with the purpose of the rule. That would be the case if it were said that guide dogs are not dogs, at least not in the sense of the rule that prohibits the presence of dogs in food shops. This interpretive approach has several advantages, namely:

- that the step from the formulation of the rule in legislation to the content of the rule is minimal;
- that the logic of rule application is highly similar to the logic that applies to declarative sentences; and
- that the unusual meaning assigned to 'dog' makes it possible to treat guide dogs different from 'normal' dogs, thereby taking the special needs of visually handicapped people into account.

The disadvantage of this approach is that the term 'dogs' in the rule formulation is given a rather unusual meaning, which creates the impression that the rule is bended to make it suit the occasion.

#### THE ACTIVIST APPROACH

When rules are created by means of legislation, it is so natural to assume that the rule has precisely the formulation that was also used in the legislation by means it was created, that the idea that it might be different does not even arise. And yet this is far from obvious. The legislation is not identical to the rule, and neither does it contain the rule. Legislation is a means of creating rules and undoubtedly the formulation used in the legislation is an important factor in determining which rule precisely was created. However, it is not a priori given that the formulation in legislation is the *only* factor that determines the content of the rule that was created.

A legal decision maker who must determine the content of a rule can take a more or less activist stance towards the formulation of the rule in legislation.<sup>16</sup> The more activist the approach, the less authority she assigns to the phrasing of the rule in the legislative texts. In our example, an activist decision maker could decide that the actual rule which was created excludes guide dogs from its scope of application. The 'real' rule would then be something like 'With the exception of guide dogs which accompany visually handicapped persons, it is not allowed that dogs are present in shops in which food tends to be sold.' This activist approach has the advantages:

- that the conditions of the rule are given an interpretation which is in accordance with common parlance (a guide *dog* is a dog);
- that the logic of rule application is highly similar to the logic that applies to declarative sentences; and

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<sup>16</sup> *Mutatis mutandis* the same can be said about rules created in judicial decisions. Then the *ratio decendi* plays the role of the rule and the phrasing of the decision has the role of the legislative text.

- that the adapted formulation of the rule makes it possible to treat guide dogs different from other dogs, thereby taking the special needs of visually handicapped people into account.

The disadvantage of this approach is that the rule which is applied and which apparently is taken to be part of the law cannot borrow its authority anymore – at least not in the full degree – from the democratically legitimated legislator. Moreover, the division of powers between state organs is weakened somewhat.

#### THE DEVIANT LOGIC APPROACH

Of the four mentioned approaches to legal reasoning, the deviant logic approach is probably the least known to lawyers. This is already an indication that amongst lawyers logic is not seen as something that can be used to influence the outcome of a particular case. Logic is something fixed and if one wants a different conclusion for a legal argument, it is not the logic that can be adapted, but it is the premises that can and possibly should be changed in order to obtain a desired outcome.

And yet, the immutability of logic is not an iron cast law. In fact, lawyers often use a deviant logic and more in particular a non-monotonic logic<sup>17</sup>, for the application of legal rules, without being aware of doing so. That is for instance the case when they make an exception to a rule because application of the rule would be against the rule's purpose. That might be a viable strategy in our example case. Arguably, the prohibition for dogs is meant for standard cases, where guide dogs are not standard. Therefore it would be against the purpose of the rule to apply it to a guide dog. Since guide dogs fall under the ordinary scope of the rule (guide dogs are dogs, after all), non-application of the rule can only be realised by making an exception to the rule.

To see clearly what is involved in making exceptions to rules and how this differs from choosing a different rule formulation, it is useful to distinguish between declarative sentences and rule formulations. In formulation there does not have to be a difference between the two, but nevertheless they fulfil very different functions. The declarative sentence 'Dogs are not allowed in food selling shops' is *true or false*, depending on what the facts are, and more in particular depending on whether dogs are really disallowed in food selling shops. The rule 'Dogs are not allowed in food selling shops' is not true or false, but rather valid or invalid in a particular jurisdiction. If it is valid, it *makes* that dogs are not allowed in food selling shops, and indirectly it also makes that the declarative sentence 'Dogs are not allowed in food selling shops' is true.

Traditional logic was developed to deal with declarative sentences. It deals with the validity of arguments and an argument is considered to be valid if and only if the truth of its premises guarantees the truth of its conclusion.<sup>18</sup> The issue of exceptions does not play a role in a logic for declarative sentences, because such sentences do not allow exceptions. A true sentence with an 'exception' would not be a true sentence with an exception, but would be false. Therefore it makes no sense to deal with exceptions in traditional logic, because there are no exceptions, only false sentences.

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<sup>17</sup> A non-monotonic logic might informally be described as a logic that allows to reason with exceptions. A more precise characterization can be found in JC Hage, *Studies in Legal Logic* (Dordrecht, Springer, 2005), 7-32.

<sup>18</sup> IM Copi and C Cohen, *Introduction to Logic*, 13th edn. (New Jersey, Pearson, 2009), 26.

A valid rule with an exception does make sense however, and that is only possible because rules do not describe the world but – to some extent –determine its contents. Exceptions to rules are cases in which a rule does not ‘work’, even though it should work if one only goes by the rule conditions. An exception to a rule is not an exception clause in the rule conditions, but a type of case to which the rule does not apply even though the rule is applicable according to the rule conditions.

In the law it is assumed that such exceptions to the application of a rule are possible and this makes that it is not obvious anymore that traditional logic, which was developed with declarative sentences without exceptions in mind, is also relevant for rule application. The legal ‘syllogism’ which is used to model the application of a rule to the facts of a case is not automatically the same syllogism as is used to model arguments which consist solely of declarative sentences. In fact, it would be different if it were to allow arguments which make an exception to a rule while leaving the rule formulation unaltered.

For instance, one might argue that the rule is that dogs are not allowed in food selling shops, and that this rule remains as it is, even though it will not be applied to guide dogs. Then the ‘logic’ of rule application deviates from an ordinary syllogism which does not allow exceptions. If the law allows exceptions to rules, for whatever reasons, it uses a non-monotonic logic. Notice, however, that even if the law uses a non-monotonic logic that allows exceptions to rules, it is therewith not given under which circumstances such exceptions should be made. This is still an open matter and it is not logic, but the law which must determine in which cases there will be exceptions to rules. The non-monotonic logic only creates the possibility for the law to work with exceptions to rules.

The advantages of allowing exceptions to rules and therefore of using a non-monotonic logic for rule application are:

- that the step from the formulation of the rule in legislation to the content of the rule is minimal;
- that the conditions of the rule are given an interpretation which is in accordance with common parlance; and
- that the non-monotonic logic of rule application makes it possible to treat guide dogs different from other dogs, thereby taking the special needs of visually handicapped people into account.

The disadvantage of using a non-monotonic logic is that the seeming simplicity of rule application must give way to a more complex logic which allows for exceptions to rules.

#### LESSONS TO BE LEARNED

The first lesson to be learned from this case study about a rule that prima facie leads to unattractive results in a number of cases, is that the decision how to deal with such problematic cases is a trade-off between several alternatives. It is possible to accept the unattractive outcome, for instance in order to limit the role of legal decision makers to applying the law ‘as it is’. It is also possible to avoid unattractive outcomes by giving the rule a less traditional interpretation, by weakening the connection between the formulation of the legislation and the rule formulation, or by allowing an

exception to the rule. Which approach<sup>19</sup> is taken is a matter of the law or legal culture, and it is not a question that can be answered by 'neutral' legal theory. The choice between these different 'solutions' for the problem of unattractive rule outcomes is comparable to the choice of a convention to solve the problem of how to classify 'fish' or 'planets'.

The second lesson to be learned is that if a choice has been made, the 'rest' becomes objective. This rest includes both what the possibilities are, and what the implications of a choice are. For instance, when the four approaches to seemingly over-inclusive rules<sup>20</sup> have been identified and when it has been established that the choice between these approaches is a matter of law or legal culture, and not of a neutral legal theory, it still seems possible to describe the four approaches in a neutral way. In fact, the earlier part of this section precisely has made a brief attempt to do so.

This also holds for the logic of rule application. It is a matter of law or legal culture whether rules allow exceptions, and under which circumstances exceptions to rules, if any, should be made. However, that relativity does not subtract from the fact that the logic of rule application is fixed, given the choice for a particular model of rules. If it is presupposed that rules do not allow exceptions and that a rule applies if its conditions are satisfied and otherwise not, the implications of this assumption can be described objectively.<sup>21</sup> The same holds if it is presupposed that rules allow the occurrence of exceptions. Which of these two models of rule application is adopted is a matter of convention. The one convention may be more adequate than the other, but as conventions they are not true or false. Moreover, on the basis of such a convention, it is possible to conduct objective legal theory research, which describes the consequences of the convention that was adopted.<sup>22</sup>

#### 4 Is it possible to have a set of neutral legal concepts?

The first case study dealt with the issue whether legal theory can provide us with a neutral theory about legal reasoning, and the answer was shaded. Many aspects of legal reasoning are determined by the law of a particular jurisdiction, or by a particular legal culture. However, legal theory can describe objectively what possible choices are, and it can also describe objectively what the implications of a choice are, for instance how reasoning with rules that can have exceptions works.

The second case study, which will be conducted in this section, focuses on legal concepts. Legal rules differ from one jurisdiction to another, but these rules are framed by means of legal concepts such as duty, right, obligation, power, competence, juridical act, ownership, contract, license, disposition, crime, misdemeanour, etc. Would not it be possible that these concept, or at least a number of them, are neutral with respect to the different jurisdictions and would not it be a proper task of legal theory to analyse these concepts?

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<sup>19</sup> It is not necessary that a legal system makes an unconditional choice for one of the mentioned solutions. The choice may be conditional on additional case facts. That does not detract, however, from the fact that if *some* choice has been made, the implications of that choice become objective.

<sup>20</sup> See F Schauer, *Playing by the Rules* (Oxford, Clarendon Press, 1991), 32.

<sup>21</sup> Examples of such a descriptions can be found in Tammelo's and Weinberger's work on law and (traditional) logic. See I Tammelo, *Modern Logic in the Service of the Law* (Vienna, Springer Verlag, 1978) and O Weinberger, *Rechtslogik*, 2nd edn. (Berlin, Duncker & Humblot, 1989).

<sup>22</sup> Examples of such a descriptions can be found in Sartor's and Hage's work on law and non-monotonic logic. See JC Hage, *Reasoning with Rules* (Dordrecht, Kluwer, 1997), supra fn 17, and G Sartor, *Legal Reasoning, A Cognitive approach to the Law* (Dordrecht, Springer, 2005).

This section reports on the findings of a conceptual study about juridical acts, and in particular the role of the concepts of 'power' and 'competence' in this connection. To what extent are these concepts influenced by the law of a particular jurisdiction and to what extent are they neutral and the proper object of objective legal theory?

#### JURIDICAL ACTS

Juridical acts (*Rechtsgeschäfte*, *actes juridiques*) are acts, performed by a legal subject with the intention to bring about legal effects, to which the law attaches the intended legal effects for the reason that they were intended.<sup>23</sup> For a juridical act to be definitely valid and to have its intended legal effects, usually several conditions have to be met:

1. The actor must have intended to bring about the legal effects by means of his act.
2. Sometimes, the performance of the juridical act must satisfy certain requirements of form.
3. The intended legal effects should not have a 'wrong' content (conflict with public order, with important demands of morality, or with mandatory law).
4. The actor must have been allowed to perform this juridical act.
5. The actor should have possessed both the competence and the capacity to bring about the intended legal effects by means of a juridical act of the performed type. (This will be explained later.)

If one or more of these conditions have not been met, the juridical act in question will either not count as a juridical act at all (in extreme cases), will be considered null and void, or will be avoidable. Sometimes, however, despite the deficiency, the juridical act will be considered definitely valid. This may for instance be the case if the actor lacked the relevant intention, but created a justified expectation that he had the relevant intention, or if the performance of the juridical act was forbidden, but avoidability, not nullity, seems the appropriate sanction.

#### COMPETENCE

By means of the phenomenon of juridical acts, the law gives legal actors the power<sup>24</sup> to bring about intentional changes in the world of law, the set of facts and things which owe their existence to the law. Because not everybody should be allowed to bring about any change, the demand of competence is used.

If a legal actor is to bring about particular legal effects by means of a particular kind of juridical act, he should have received the competence to do so. This demand has as its main function to limit the kinds of juridical acts somebody can perform, or the legal effects somebody can bring about by performing a juridical act of a particular kind.<sup>25</sup> Let us consider some examples.

- Ordinary citizens lack the competence to create statutes, and attempts to do so nevertheless probably do not even count as juridical acts at all, let alone as the creation of a statute.

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<sup>23</sup> The analyses of this section are based on JC Hage, 'A model of juridical acts: parts 1 and 2 in (2011) *Artificial Intelligence and Law* 19, 23-73.

<sup>24</sup> We will return to the term 'power' later.

<sup>25</sup> The related demand of capacity focuses not so much on the content of the juridical act, but on the capability of the actor to form a well-founded intention (will).

- A municipal legislator can create rules, but presumably not rules in which constitutional rights are violated. If this is nevertheless attempted, the result will be legislation that is void, or avoidable.
- Ordinary citizens are competent to contract, but not to create by means of a contract rules that bind other persons.
- Judges are competent to take binding decisions in particular cases, but in their role of judge they are not competent to make last wills.
- A public officer has been assigned the task of granting building permits and therewith the competence to do so. She will normally not be competent to grant parking permits too.

Sometimes competences are granted broadly, to be limited by special rules. Typical examples are the competences to contract, and to make rules. These competences are limited by the demands that contracts can only 'bind' the contract parties, and that legislative powers should only be exercised for the purpose for which they were given. Some other competences are limited from the beginning, such as the competence to alienate the goods one owns (and in principle no other goods), and the competence to grant building permits.

Given its function, namely to specify the limits of what legal actors can do by means of juridical acts, it would seem obvious that if some actor transgressed the boundaries of his competence, the resulting 'juridical act' would either be non-existent ( e.g. an ordinary citizen creates a 'statute') or null and void (e.g. a non-owner 'transfers' the ownership of the Empire State Building). While this is often the case, it is not always. For instance, in Dutch administrative law, administrative dispositions which were made 'ultra vires' tend to be avoidable, not null and void from the beginning. The reason why this is the case has to do with legal certainty. The uncertainty whether an administrative disposition is valid is so undesirable that validity is assumed until the disposition has officially been avoided.

Understandable as this may be, it raises the question what this means for the concept of competence. Does the fact that administrative disposition ultra vires are 'only' avoidable mean that the administrative body which made the disposition was competent after all, or should we give up the idea that competence is a necessary condition for bringing about certain legal effects by means of a certain kind of juridical act?

This dilemma may seem at first sight only to be a minor issue in Dutch law, but it has immediate consequences for the central issue of this paper, namely whether legal theory can be objective. The demand that a legal actor needs for every juridical act a special competence might qualify as a result of 'objective' legal theory, as an insight that holds for juridical acts in general, and not only for juridical acts as they happen to be regulated in Dutch law. However, if this insight does not even hold for all parts of Dutch law, we must possibly draw the conclusion that it is not a general and neutral insight from legal theory that juridical acts require the relevant competence. Moreover, if such an 'obvious' insight turns out to be wrong, does not that illustrate that the hope for objective legal theory must be abandoned?

Dutch law seems to be 'inconsistent' by posing on the one hand for every juridical act the demand that the actor has the competence to perform this act with this content, and allowing on the other hand that some juridical acts for which the actor lacked the necessary competence are initially valid nevertheless. How should we deal with this problem? There seem to be two possibilities. On the one

hand we can stick to the demand that a valid juridical act requires the relevant competence. Then administrative decisions *ultra vires* are by definition non-existent or invalid. If a particular decision is valid nevertheless, there are again two possibilities: either it was not *ultra vires* after all, or the legal effects are attached to it, not because it was a valid juridical act, but because legal certainty required these effects to be attached to the appearance of a valid decision.

On the other hand we can drop the demand that valid juridical acts require the relevant competence. Then the seemingly neutral result of legal theory, namely that every juridical act requires a relevant competence, turns out to be at best a characteristic of a particular jurisdiction.

#### COMPETENCE AND POWER

A concept which is closely related to that of competence is the concept of 'power'. In fact, the notions of power and competence are not always sharply distinguished in common usage, so the distinction that will be made between competence and power will have a slightly stipulative nature.

To explain the distinction, it is useful to say a little about the 'world of law'. This world of law consists of those facts and things whose existence depends on the application of legal rules. Typical examples of such things and facts are courts, property rights, legal rules themselves (at least those which were explicitly made), the fact that Obama is the president of the USA, the fact that judge J is competent to decide the cases presented to her, and the fact that Jones owns Blackacre.

Closely related to things and facts which belong to the world of law are the so-called *internal legal concepts*. These concepts are used for things and facts in the world of law, and they include the concepts 'owner', 'president', 'competent', and 'right'. The applicability of these concepts depends on legal rules. If different jurisdictions have different rules for the applicability of internal concepts, the consequences is that these concepts have different scopes of application from one jurisdiction to another. Because the notion of competence will (stipulatively) be used for a special legal status which is assigned by legal rules to legal actors, being competent is such an internal legal concept, the applicability of which depends on the rules of a particular jurisdiction.

Opposed to the so-called internal legal concepts are *doctrinal concepts*. These concepts are not part of the law itself and their applicability is not defined by legal rules. A doctrinal concept is rather a concept that is used in legal doctrine to characterise legal systems. A typical example is the concept of 'sovereignty' which is to the author's knowledge seldom used as a concept within a legal system, but which is frequently used to characterise legal systems. The same counts for the concepts 'human right' and 'freedom of contract'. It also counts, it is stipulated, for the concept of power.

A person is said to have a legal power if he or she is capable to bring about legal effects by means of an act aimed at bringing about these effects. This act may be a juridical act, such as an administrative decision, or a last will. It may also be another act, such as moving from one municipality to another, thereby changing the amount of municipal taxes that he must pay. Natural persons have in general the power to influence their tax duties, and – as this example illustrates – this power does not necessarily depend on juridical acts.

The presence of a legal power depends on, and is a side-effect – intended or not – of legal rules which attach legal consequences to acts which can be performed intentionally. To the extent that the power can be exercised by means of a juridical act, a legal subject will normally need to competence

and the capacity to bring about these legal effects by means of that type of act, but the power does not coincide with this competence or this capacity. Apart from this competence and capacity, the power presupposes the presence of legal rules which attach the intended legal consequences to a juridical act. The presence of these rules has the side-effect that they can be used by a legal actor to bring about legal effects. In a sense these rules create the power, but they do not confer the power, as a misleading expression suggests, because what rules confer is a legal status, such as capacity or competence.

In general, powers are not specifically tied to the law at all. A power is a capability to do something about, or to reach a particular result. For instance, a speed skater may have the power to skate 500 meters in less than 38 seconds, and a politician may have the power to win the elections. A good salesman may have the power to sell this ruin, while most citizens have the power to buy a house. This last example illustrates that some powers may be the result from a particular legal status, but that this is not necessarily the case. Moreover, powers that result from a legal status are not really different from other powers. For every power there must be circumstances which empower to do something: a politician must have influence on the electorate; a speed skater must have exercised enough. In legal cases these circumstances happen to be legal facts, such as that there are rules which attach legal effects to events, and that somebody has the competence to perform a particular kind of juridical act.

Because 'competence' is an internal legal concept, the law of a particular jurisdiction determines:

- whether it works with this concept;
- when the concept, if it exists, is applicable;
- what the consequences are if the concept is or is not applicable in a particular case.

Legal theory can therefore not provide a neutral analysis of what the concept of 'competence' involves in a particular legal system. This does not mean that legal theory cannot say anything in general about competence. The reason is that competence in one jurisdiction will have something in common with competence in other jurisdictions, because otherwise these different 'competences' could not all be denoted by the same term 'competence'. However, these necessary similarities, although they can by and large be listed, cannot be more than approximations of what competence means in the different jurisdictions.

#### LEGAL POWERS

With the notion of power it is different. Although different legal jurisdictions may assign different powers to legal actors, this has no implication for what a power is. In general it remains true that if somebody actually brought something about, he must have had the power to do so. The main reason why the notion of power does not depend on the contents of the law of a particular jurisdiction is that it is not an internal legal concept. The conditions of applicability of the power concept are not regulated by the law. Where the law has influence on the presence of a power, it has it because it can influence whether the applicability conditions of 'power' are satisfied.

As a consequence, it is possible to say something in general about powers, including legal powers, which is not coloured by the details of specific jurisdictions. Somebody has the power to bring something about if it depends on the will of this person whether she will actually bring it about. In the law things are brought about through the application of legal rules. Some rules attach legal

effects to events, independent whether these effects were intended. For instance the rule which attaches liability to a tort creates this liability independent of whether the tortfeasor intended to become liable. Even this rule gives legal actors a power, because people can make themselves liable for damages by committing a tort.

The more usual way of bringing about things in the law, however is through juridical acts. By having rules which attach legal effects to certain acts, because these acts were performed with the intention to bring these effects about, a legal system recognises juridical acts. By recognising juridical acts, a legal system grants its actors certain powers, and because these powers rest on the operation of legal rules, one might call them 'legal powers'. Notice, however, that legal powers are related to the operation of legal rules in general, not only to the operation of rules which attach consequences to the performance of juridical acts. A legal subject will normally have the power to place himself under an obligation, both by contracting and by committing a tort. Only in the first case, the power depends on the presence of a competence.

#### LESSONS TO BE LEARNED

The above discussion of competences and powers is again an illustration of how and to which extent legal theory can be objective. By distinguishing between internal legal concepts and doctrinal concepts, legal theory can objectively demarcate what is governed by the law of a particular jurisdiction. This includes both the conditions under which a competence is assigned and what the consequences are when somebody attempt to perform a juridical act without having the competence to do so.

An analysis of the notion of 'power' is not typically a task of legal theory, because this notion is not particularly tied to the law and there is no reason to assume that powers in the law are different from powers elsewhere.

What legal theory can do, however, and apparently in an objective way, is to indicate how powers in the law are created as a side-effect of rules which attach legal consequences to events, including intentional acts. It can also indicate what this means for the relation between the possibility to perform juridical acts and the power to create legal effects which is the result from the rules which attach legal consequences to valid juridical acts. Because the validity of legal acts often depends on the competence to perform them (but this is a matter of the rules of a particular jurisdiction), legal theory can also offer an account of how the competence to perform juridical acts relates to the power to bring about certain legal effects.

More in general, we see that in relation to juridical acts, competences and powers, legal theory can help to distinguish between what depends on the contents of law, and what is 'objective' in the sense of independent from the contents of law. In connection with the latter, legal theory can help to gain this objective knowledge. And finally, legal theory can also help to spell out the consequences of the choices that were made by the law of a particular jurisdiction. It may for instance point out the consequences for the powers of legal subjects to bring about legal consequences, which follow from the choices made in positive law about the role of competence in performing valid juridical acts.

## 5 Conclusion

It is obvious that much that can be said about the law of a particular jurisdiction. The question may therefore be raised whether there remains something to be said in general about the law or about particular aspects of it. By means of the examples about whales and planets it was illustrated that the possibility to say something in general about a category of things, it may be necessary to mark off this category by means of a convention which has in part a stipulative nature. Given this convention, some things become 'true by convention'<sup>26</sup>, but the explication of what has become true by convention may nevertheless lead to new knowledge.

That such new knowledge by convention is possible can be seen from the case studies about rules which seemingly lead to unattractive consequences in some cases, and about juridical acts and the role of competences and powers in that connection. Legal theory can lead there to objective knowledge by dividing the subjects in a part which is relative to a particular jurisdiction (how the law deals with hard cases; what the role of competence is with regard to juridical acts) and a part which is objective in the sense of system independent (the distinction between four ways of dealing with hard cases, the logic of rules that allow for exceptions, the notion of a legal power and its relation to the notion of competence). Moreover, the objective part can be described in an objective way, and by combining this objective description by the conventional choices made by a particular jurisdiction, legal theory can also describe objectively whereto the choices of such a system lead.

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<sup>26</sup> WV Quine, 'Truth by Convention', in WV Quine, *The Ways of Paradox and Other Essays, Revised and Enlarged Edition* (Cambridge, Harvard University Press, 1976), 77-106.