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IMMUNITIES AS MERE PROPOSITIONS ABOUT THE LAW

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It is recognised here that normative systems do not confer the position of not being targeted by an agent without power, which then implies that nobody can properly claim, from the internal perspective, to be the holder of an immunity. In its Hohfeldian meaning, the word "immunity" is just a mere linguistic resource used to describe some consequences coming from the absence of power. Since there is no normative way to confer an immunity, namely because a "norm of incompetence" is not a norm, speaking about an immunity as a legal position is to confuse norms with norm propositions. And once an immunity is seen as a mere deontic nothingness, there is no possible use of the word beyond the description of such a normative absence.

I. Meanings of "Immunity" and the Main Claim

Within the legal domain (or even within the larger domain of normative systems), it is common to see the word "immunity" used with two different meanings: (i) a broad one, closer to its colloquial usage, in which it describes a sort of shield against any kind of interference from others (irrespective of the normative settings that could ground such interference); and (ii) a narrow one, of technical nature, in which it makes reference to a specific atomic legal position; the one an agent holds whenever it faces another without power over her.[1] Therefore, while the former is expressing a very imprecise idea, the latter is mentioning something that can be rigorously described.

It is only this second meaning of "immunity" that is under consideration here. The claim put forward in the next pages, denying the deontic existence of "such a thing", only covers the position Hohfeld has labelled that way.[2] Hence, the use of the word with the first meaning is not at stake here. Actually, such a broad meaning

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1 Using the word with the first meaning: Thomas Nagel, Concealment and Exposure (Oxford: Oxford University Press, 2002) at 41; Gopal Sreenivasan, "Public Goods, Individual Rights and Third-Party Benefits" in Mark McBride (Ed), *New Essays on the Nature of Rights* (Oxford: Hart Publishing, 2017) 127 at 128. Using the word with the second meaning: Kit Baker, "Private Law, Analytical Philosophy and the Modern Value of Wesley Newcombe Hohfeld: A Centennial Appraisal" (2018) 38(3) Oxford J Leg Stud 585 at 589; Beatriz Arriagada, "Immunidades Fuertes y Débiles: el Imperio Contraataca" (2020) 33(1) Revista de Derecho (Valdivia) 9 at 22 [Arriagada, "Immunidades Fuertes y Débiles"].

2 Though Hohfeld, on immunities, only used terminology already adopted. See David Lemmings, *Oxford Edition of Blackstone: Commentaries on the Laws of England*, *Book 1: Of the Rights of Persons* (Oxford: Oxford University Press, 2016) at 87; John Salmond, *Jurisprudence*, 4th Ed (London: Steven and Haynes, 1913) at 194.

serves useful communicative purposes: it is an efficient way to reference normative situations in which an agent is somehow protected.[3] However, the problem is that, in the narrow sense, an "immunity" aims much more than to be a mere description of a normative scenario: it allegedly references an effective legal position. It is exactly such "deontic pretension" that will be rejected here.

The main claim, therefore, is that normative systems do not confer a position of not being targeted by an agent without power, which also implies that nobody can properly claim, from the internal perspective, to be the holder of an immunity.[4] In its Hohfeldian meaning, the word is just a mere linguistic resource used to describe some consequences coming from an absence of power. And, if this is somehow correct, it follows that an immunity, different from a duty or a liability, is just the description of a deontic nothingness. Speaking about an immunity as a legal position is, then, to confuse norms with norm propositions: there is no possible use of the word beyond the description of a certain normative state of affairs.[5]

II. The Hohfeldian Strategy and the Norm-Based Approach

Departing from his purpose to disambiguate the word "right", Hohfeld arrived at a table of eight atomic legal positions divided into two levels: (i) first order, encompassing duties, claim-rights, liberties and no-rights; and (ii) second order, encompassing powers, liabilities, disabilities and immunities.[6] For Hohfeld, the difference is clear: the first level regards positions on the plain action of agents while the second one regards actions that change the former (and probably also the latter, although Hohfeld never said so).[7] Therefore, it is clear that Hohfeld's second order atomic legal positions are positions specifically related to the modification of law and the legal positions law gives to agents.

As with the first order table, Hohfeld also built the second order one under his famous strategy of correlatives and contradictories.[8] Therefore, two times two pairs of positions can be observed here. First, the pair of correlatives: a liability is the

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[3] Which is common in the technical and the not so technical literatures. For instance, see Anthony Honoré, "Rights of Exclusion and Immunities Against Divesting" (1959–1960) 34(3) Tul L Rev 453 at 466; Alfred Mele, "Motivational Strength" in Timothy O'Connor and Constantine Sandis (eds), *A Companion to the Philosophy of Action* (Chichester, West Sussex: Wiley-Blackwell, 2010) 259 at 263. For an extremely broad usage of the word, see Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007) at 46.

[4] On the internal perspective, see HLA Hart, *The Concept of Law*, 2nd Ed (Oxford: Clarendon Press, 1994) at 89 [Hart, "The Concept of Law"]; Joseph Raz, *The Authority of Law*, 2nd Ed (Oxford: Oxford University Press, 2009) at 154. On the other hand, it is relevant to note that this claim is evidently extensible to disabilities. The focus on immunities is justified just because they are purportedly another kind of right (with all the emotional charge usually associated).

[5] On the distinction between norms and norm propositions, see Eugenio Bulygin, "Objectivity of Law in the View of Legal Positivism" (2004) Analisi e Diritto 219 at 221; Jorge Rodríguez, *Teoría Analítica del Derecho* (Madrid: Marcial Pons, 2021) at 57 [Jorge Rodríguez, "Teoría Analítica del Derecho"].

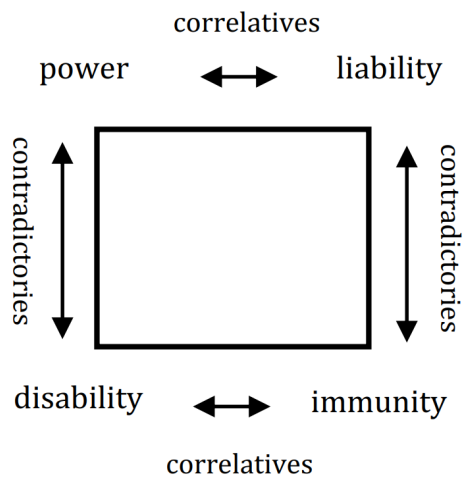
[6] Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Legal Essays* (New Haven: Yale University Press, 1919) at 36.

[7] *Ibid* at 51. See also Heidi Hurd and Michael Moore, "The Hohfeldian Analysis of Rights" (2018) 63(2) The American Journal of Jurisprudence 295 at 301; Réka Markovich, "The Hohfeldian Conceptions and Their Conditional Consequences" (2020) 108 Studia Logica 129 at 131.

[8] Actually, Hohfeld mentioned "opposites" instead of "contradictories": Hohfeld, *supra* note 6 at 43.

correlative of a power as an immunity is the correlative of a disability. Second, the pair of contradictories: a disability is the contradictory of a power as an immunity is the contradictory of a liability. And it is not difficult to see that Hohfeld conceived this table based on power: if a liability is entailed in power, a disability is just its negation and an immunity is none other than the correlative of the latter.[9] Directly or indirectly, all of them follow from power.

(i) The two pairs of two correlatives and two contradictories can be seen in the table below:



Still, the main issue is to know where does power come from. And the obvious answer is that power is conferred by a norm: a power-conferring norm (or norm of competence).[10] So, be it a natural person or a body belonging to a specific legal person (public or private), an agent has power on the necessary condition of being the primary addressee of a power-conferring norm enacted within a normative legal system.[11] Therefore, to be the holder of power is exactly to be in such crossroads

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[9] Giovanni Sartor, "Fundamental Legal Concepts: A Formal and Teleological Characterisation" (2006) 14 AI & L 101 at 123; Andrew Halpin, "Rights, Duties, Liabilities and Hohfeld" (2007) 13(1) Leg Theory 23 at 26.

[10] Riccardo Guastini (translated by Álvaro Núñez Vaquero), *La Sintaxis del Derecho* (Madrid: Marcial Pons, 2016) at 95; Åke Frändberg, *The Legal Order: Studies in the Foundations of Juridical Thinking* (Cham: Springer International Publishing, 2018) at 44. On the other hand, power and competence (as power-conferring norms and norms of competence) are used here synonymously. For a similar usage, see Lars Lindahl and David Reidhav, "Legal Power: The Basic Definition" (2017) 30(2) Ratio Juris 158 at 158. For a different usage, see Jaap Hage, "Capabilities, Powers and Competences" in Gonzalo Villa-Rosas and Torben Spaak (eds), *Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories* (Cham: Springer International Publishing, 2023) 23 at 37 [Hage, "Capabilities, Powers and Competences"].

[11] On the normative duality of addressees given by correlativity (primary and secondary), see David Duarte, "Structuring Addressees in Fundamental Rights Norms: An Application" in Kenneth Himma and Bojan Spaic (eds), *Fundamental Rights Justification and Interpretation* (The Hague: Eleven International Publishing, 2016) 83 at 84. On the duality of agents correlativity implies, see Robert Alexy (translated by Julian Rivers), *Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) at 120.

of normative variables: (i) there must be a normative system; (ii) in which there is a norm attributing to some agent; (iii) the capability to create deontic consequences; (iv) on some material domain (no matter which).

And the point is valid in both private law and public law. In the latter case, a normative authority (exercising competence) usually enacts a statute that creates a legal person and its bodies, setting out lists of competences linked to each one of those bodies.[12] In the former case, there is usually a general competence norm, be it enshrined in a civil code or merely customary, that gives agents the "possibility" to enter into contracts and other similar deontic actions.[13] So, no matter the area of law or the specific design of such norms, the point is that power, as an atomic legal position, is conferred by a norm: a norm that works as a necessary condition for creating deontic consequences.[14]

The connection established between power and its conferring norm is not exclusive of that central second order legal position. Actually, if by "legal position" one means a deontic situation given by law (legal) in which an agent is placed towards others (position), then it follows that, somehow, all legal positions must be norm-based. That is, for an agent to be the holder of a legal position there has to be a norm that, in some way, puts the agent in some specific deontic situation. Otherwise, and already ignoring Hume's guillotine, one would have to accept that either normative systems contain other "entities" besides just norms or that the predicate "legal" (= norms) brings nothing to the noun "position".[15]

(ii) If Dryas bears the duty to walk his sheep through the mountains, that only occurs because the normative system has a norm such as the one in "shepherds shall walk their sheep through the mountains"; without such a general norm, Dryas would not bear the duty.

(iii) If Daphnis owes Chloe €50, that is because they agreed that Chloe would sell him one of her sheep for such amount of money; it is the corresponding clause

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[12] Lindahl and Reidhav, *supra* note 10 at 172; Jorge Fabra-Zamora, "A Hartian Account of Legal Officials" in Gonzalo Villa-Rosas and Torben Spaak (eds), *Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories* (Cham: Springer International Publishing, 2023) 207 at 228.

[13] Jaap Hage, *Foundations and Building Blocks of Law* (The Hague: Eleven International Publishing, 2018) at 202; Carla Huerta, "On the Function of Competence Norms in a Legal System" in Gonzalo Villa-Rosas and Torben Spaak (eds), *Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories* (Cham: Springer International Publishing, 2023) 111 at 120.

[14] And this also means that the "existence" of a competence norm is the way the normative system has to provide for its own dynamic, not only at the level of general norms enacted by normative authorities, but also at the level of the particular norms agents create among themselves.

[15] Two exclusive alternatives that both seem to be unacceptable. The first one because normative systems contain, by definition, only norms: so, no other "entities" can sustain the attribution of legal positions (because they do not exist). The second one because a position is "legal" for the reason that it is given by law. And since law is composed of norms, only norms can confer legal positions. On Hume's guillotine (that here blocks the possibility of a legal position attributed from somewhere within the empirical domain), see Max Black, "The Gap Between 'Is' and 'Ought'" (1964) 73(2) The Philosophical Review 165 at 166; Georg Von Wright, "Is and Ought" in MC Doeser and JN Kraay (eds), *Facts and Values: Philosophical Reflections from Western and Non-Western Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1986) 31 at 32 [Von Wright, "Is and Ought"].

> in the contract that they have entered into that sustains his duty; without such a particular norm, Daphnis would not bear the duty.

Yet, a crucial "anti-Hohfeldian" point necessarily follows. The criterion for composing a table of atomic legal positions cannot be their logical relations but, differently, and under an operative criterion of norm individuation, the deontic situations that every possible type of norm can confer.[16] Accordingly, once it is assumed that atomic legal positions are positions given by norms within a normative system, it has to be assumed as well that only norms can ground a consistent and exhaustive catalogue of them. So, the conclusion is that a table of atomic legal positions must comprehend only and no other than the various types of positions effectively given by the norms that a normative system contains.

At the level of first order atomic legal positions, such a norm-based approach leads to two main positions: (i) duty; and (ii) liberty. A duty is the position that follows from an imposition (or a prohibition, which is just its contrary). When a norm imposes some action φ (or ~φ) to a primary addressee, then this agent bears a duty to φ (or to ~φ). A liberty is the position that follows from a permissive norm. A primary addressee of such a norm holds a liberty: such an agent is free to do φ and ~φ (assuming the permission is bilateral). With correlativity, these two positions become four: the claim-right is added to the duty and the no-right is added to the liberty (in both cases held by secondary addressees).[17]

(iv) Mandatory norms confer duties and permissive norms confer liberties:

$$O\varphi \longrightarrow \text{duty}\varphi \quad P\varphi \wedge \sim\varphi \longrightarrow \text{liberty to } \varphi \wedge \sim\varphi$$

(v) First order legal positions are conferred by mandatory and permissive norms:

$$O\varphi \longrightarrow (\text{duty}_{\{\text{primary addressees}\}}\varphi \longleftrightarrow \text{claim-right}_{\{\text{secondary addressees}\}}\varphi)$$

$$P\varphi \wedge \sim\varphi \longrightarrow (\text{liberty}_{\{\text{primary addressees}\}}\varphi \wedge \sim\varphi \longleftrightarrow \text{no-right}_{\{\text{secondary addressees}\}}\varphi \wedge \sim\varphi)$$

Yet, the "immunity issue" does not arise within this first order table (which is, despite the no-right difficulty, more or less undisputed); it arises in the second order table and concerns the whole disability ↔ immunity correlativity line, which is, as it is known, the basis for another kind of Hohfeldian right: the immunity. As will be justified below, such a correlativity line does not survive a norm-based approach:

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[16] On the "logical relations" of the Hohfeldian table, see Rowan Cruft, "Rights: Beyond Interest Theory and Will Theory?" (2004) 23(4) Law & Phil 347 at 351; Pierfrancesco Biasetti, "Hohfeldian Normative Systems" (2015) 43(4) Philosophia 951 at 952.

[17] Since impositions and permissions exhaust the range of deontic modalities (including prohibitions in the former and considering only the bilateral ones in the latter), it becomes clear that a table of first order atomic legal positions cannot have any others than the four mentioned above. On the other hand, to consider the "no-right" as the position correlated with a liberty is a debatable matter (Lars Lindahl, *Position and Change: A Study in Law and Logic* (Dordrecht: Reidel Publishing Company, 1977) at 126; Heidi Hurd and Michael Moore, "Replying to Halpin and Kramer: Agreements, Disagreements and No-Agreements" (2019) 64(2) The American Journal of Jurisprudence 259 at 266). However, and for the present purposes, the issue is somehow irrelevant.

normative systems do not have any type of norm capable of conferring disabilities and immunities. And since a "norm of incompetence" is only a normative proposition (and not a norm), the right known in the Hohfeldian tradition as an "immunity" just does not have any "deontic existence".

III. Norms of Competence: Individuation and Constitutivity

A normative system regulates human behaviour and all its norms are about action. Be it the crystal clear cases of plain overt actions (such as speaking or walking), the more distant cases of "ought to be" norms (actions appropriate to achieve a certain state of affairs) or even the significant group of norms regarding mental actions (as with conceptual norms), action is a necessary condition of a norm.[18] So, one cannot properly speak about norms whenever there is no action: usually dependent on some circumstances and for a universe of agents (and their correlatives), a norm is precisely the deontic modalisation of some form of doing something (an action or an omission, which are taken here as the same).[19]

> (vi) The norm (N_1) enacted in "shepherds shall walk their sheep through the mountains" is a norm about action: more precisely, the plain action of "walking the sheep".
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> (vii) The norm (N_2) enacted in "shepherds shall keep their sheep in good health" is also about action: it imposes the actions suitable to reach the aimed state of affairs.
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> (viii) The norm (N_3) enacted in "for the purposes of N_1, goats count as sheep" is also about action: it imposes the mental action of qualifying "goats as sheep" (relevant to apply N_1 to "goats").

A norm of competence is no exception to such a universal proposition: norms that confer power are about action as well. Though, they are related to a specific kind of action-type: creating deontic consequences. And it is a specific kind of action-type essentially for two reasons. The first one is because it is a "deontic action": that is, an action that directly has effects on the legal domain, changing the law and modifying pre-existing legal positions. It differs, consequently, from mere "ontic actions",

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[18] On "ought to be" norms (as opposed to "ought to do"), see Hector-Neri Castañeda, "On the Semantics of the Ought-To-Do" in Donald Davidson and Gilbert Harman (eds), *Semantics of Natural Languages* (Dordrecht: Reidel Publishing) 675 at 675. On conceptual norms as norms about mental actions, see David Duarte, "Conceptual Norms: Contrasting Theories" (2023) 58 Insomnia Revista de Teoría y Filosofía del Derecho 32 at 43 [Duarte, "Conceptual Norms"].

[19] Omission as an action of not doing something possible and in accordance with a norm (different from not doing nothing *simpliciter*). See Randolph Clarke, "What is an Omission?" (2012) 22(1) Philosophical Issues 127 at 137; Sara Bernstein, "Omission Impossible" (2016) 173(1) Philosophical Studies 2575 at 2577.

which are those that occur in the empirical world and do not affect the law directly (even though they can affect it indirectly).[20] So, creating deontic consequences is what is "done" under a norm of competence.

(ix) "Philetas is competent on sheep" contains a competence norm and it is about action: specifically, the action of creating deontic consequences on the topic at hand ("sheep"); when Philetas enacted "shepherds shall walk their sheep through the mountains", he carried out a "deontic action".

(x) Walking the sheep is an "ontic action": it does not create deontic consequences, and if it does (*eg*, if the sheep damage some third-party property), those consequences come from norms the system already has (the ontic action fills the antecedent of a norm).

The second reason is related to the fact that creating deontic consequences is not an action that humans, given their natural capabilities, are biologically apt to carry out. Being an action that has direct results at the ought level of the law, an agent can only create deontic consequences if such capability is given to her.[21] Unsurprisingly, such capability is given by a norm of competence, which is also the reason underlying the qualification of that category of norms as constitutive: they confer on some agent the capability to carry out tokens of an action-type that otherwise would be impossible. It is exactly the norm of competence that makes it possible for an agent to exercise the action normatively foreseen.[22]

A norm of competence is usually enacted through a norm sentence uttered by a normative authority: for instance, "Philetas is competent on sheep" or "the power to regulate sheep is assigned to Philetas". As it happens in most cases, the text uttered is only a part of the complete norm effectively enacted: necessary conditions for the regulation of behavior are absent in such wording. That is what immediately happens with the possibility condition, an implicit one that follows from the axiom "ought implies can" (to each action-type): since a holder of power can only exercise

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[20] The difference between "deontic actions" and "ontic actions" turns out to be quite similar to von Wright's distinction between "normative action" and "action *stricto sensu*": Georg Von Wright, *Norm and Action: A Logical Enquiry* (London: Routledge & Kegan Paul, 1963) at 75 [Von Wright, "Norm and Action"].

[21] Jordi Ferrer, *Las Normas de Competencia: Un Aspecto de la Dinámica Jurídica* (Madrid: Centro de Estudios Políticos y Constitucionales, 2000) at 130; Hage, "Capabilities, Powers and Competences", *supra* note 10 at 30.

[22] Constitutivity of norms of competence is a (more or less) stabilised matter (for instance, see Torben Spaak, "Norms that Confer Competence" (2003) 16(1) Ratio Juris 89 at 96 [Spaak, "Norms that Confer Competence"]; Josep Juan Moreso, "Institutions and Constitutive Rules" in Gonzalo Villa-Rosas and Torben Spaak (eds), *Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories* (Cham: Springer International Publishing, 2023) 143 at 157. However, it is important to note that there is constitutivity within the deontic field beyond norms of competence. For instance, with norms that contain definitions or with norms that create "things" (Corrado Roversi, "Regolare e Costituire. Sul Carattere Tecnico delle Regole Costitutive" (2011) Analisi e Diritto 269 at 269; David Duarte, "Conceptual Norms", *supra* note 18 at 33).

it if there is an (internal) opportunity to act, a norm of competence also contains in its antecedent such an implicit condition.[23]

> (xi) With "Philetas is competent on sheep", Philetas holds power to carry out deontic actions on the topic "sheep"; though, to act depends on acting being possible (he cannot enact a norm if he is in a comatose state). Hence, the norm in "Philetas is competent on sheep" has an implicit condition of opportunity, which is, actually, a condition about the "internal possibility" that the agent has to act.

Yet, the most relevant omission in the sentence "Philetas is competent on sheep" (regarding the norm effectively enacted) is the deontic modalisation of the action at hand. Even without entering into the discussion the topic always brings with it, it is relevant to point out (for the sake of completeness) that norms of competence are understood here as "constitutive permissions".[24] Two reasons justify such a claim: (i) since a norm of competence regards an action as not generally forbidden, it follows that such an action is at least weakly permitted; and (ii) since a competence norm is an explicit one, it follows that the normative authority, while "creating" an action (or making it possible), is "authorising" its exercise.[25]

It is worth noticing, though, that the permissive character of power-conferring norms solely regards the action-type. As a matter of fact, nothing prevents the normative system to have other norms that forbid or impose some tokens of creating deontic consequences. So, whenever the normative system contains a norm forbidding or imposing specific deontic consequences in the material domain at hand, it follows that such an exercise of power ceases to be permitted. Actually, this is quite common in normative systems, even with other actions in other norms: a normative system can contain both "freedom of speech" and a norm forbidding slander. Here, similarly, the action-type is permitted and a token is not.[26]

> (xii) With "everyone has freedom of expression", Lamon is free to say whatever he wants. However, if the system contains "slander is forbidden", Lamon may

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[23] On the opportunity condition, see Von Wright, "Norm and Action", *supra* note 20 at 73. It is relevant to say that such a condition has nothing to do with the "possibility" given by competence norms: it is one thing to become capable of carrying out an action that is otherwise impossible; it is another totally different thing to have such capability, but, for some reason, be limited to act.

[24] On that discussion, see Eugenio Bulygin, "On Norms of Competence" (1992) 11(3) Law & Phil 201 at 206 [Bulygin, "On Norms of Competence"]; Spaak, "Norms that Confer Competence", *supra* note 22 at 95.

[25] It is also sustaining competence norms as permissions: Von Wright, "Norm and Action", *supra* note 20 at 192; Jan Sieckmann, "Structures of Legal Competence" in Gonzalo Villa-Rosas and Torben Spaak (eds), *Legal Power and Legal Competence: Meaning, Normativity, Officials and Theories* (Cham: Springer International Publishing, 2023) 69 at 83.

[26] It is exactly this difference between the permission of the action-type and the possible prohibition of some tokens that annuls the famous "thief argument" (Lars Lindahl, "Stig Kanger's Theory of Rights" in Ghita Holmström-Hintikka, Sten Lindström and Rysiek Sliwinski (eds), *Collected Papers of Stig Kanger with Essays on his Life and Work* (Dordrecht: Kluwer Academic Publishers, 2001) 151 at 160; Torben Spaak, "Explicating the Concept of Competence" in Jap Hage and Dietmar von der Pforden, *Concepts in Law* (Cham: Springer, 2009) 67 at 74).

not damage Chloe's reputation and, therefore, he is forbidden from saying anything that might have such effect.

(xiii) With "Philetas is competent on sheep", Philetas can and may create deontic consequences on anything related to "sheep"; though, if the system contains "it is forbidden to treat animals cruelly" (as a superior norm), Philetas may not enact "sheep torture is allowed".

Viewed from the perspective of its individuation, a competence norm is then a structure with an antecedent and a consequence intermediated by a deontic operator. As seen, its antecedent comprises the opportunity condition and the material domain of competence. On the other hand, its consequence is quite peculiar. Besides the action-type and the deontic modalisation of such an action, a norm of competence also confers "possibility": the mentioned capability to create deontic consequences. As with any other norm, a norm of this category also has a universe of primary addressees, which are the holders of power, and a universe of secondary addressees (holders of the correlative position).

(xiv) The norm of competence expressed in "Philetas is competent on sheep" can be formalised, then, as: "$ip \wedge s \Rightarrow (\Diamond\, dc) \wedge (P_{\{Philetas\}}\ dc_{\{secondary\ addressees\}})$", in which "ip" stands for the "internal possibility condition", "s" for the material domain (here, "sheep"), and "dc" for "deontic consequences"; as a norm of competence, it confers both capability (possibility = $\Diamond$) and permission (P) to act.

Such individuation of a norm of competence ignores aspects that are usually and intimately related to power, namely space (the territorial scope of power) and time (from when to when is the holder of power competent). However, to not consider them seems to be the most appropriate solution. Once it is taken into account that the oneness of a norm should be formed only by what is specific to it, then one can see that space and time should be left out: they usually predicate several norms. It follows from this individuation guideline, then, that space and time are normatively better understood as the objects of secondary norms.[27] That is, norms that compel agents to consider the scope of other norms as such and such.

(xv) A norm such as "$ip \wedge s \Rightarrow (\Diamond\, dc) \wedge (P_{\{Philetas\}}\ dc_{\{secondary\ addressees\}})$" confers power solely within the island of Lesbos. However, since many other norms (possibly) have the same territorial scope, the system is better understood (and explained) as considering it to have a third-norm such as the one expressed in "norms of the system shall have force only in the island of Lesbos".

It is clear that the present composition of a power-conferring norm expresses a narrow understanding of what power is and, therefore, of what can be properly qualified as a norm of competence. And that becomes clearer when such a composition is contrasted with others, particularly those that have a definitory understanding of

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[27] On this individuation guideline (avoid repetition), see Joseph Raz, *The Concept of a Legal System*, 2nd Ed (Oxford: Clarendon Press, 1980) at 142 .

power.[28] Such theories, even if accepting power as the capability to change the law, as it is also sustained here, make a complete overlap between competence and validity and, therefore, see the former as the sum of the necessary and jointly sufficient conditions for creating deontic consequences. Somehow, they assume procedural requirements and material limitations as part of power.[29]

Such a broad understanding of competence is, though, theoretically defective. Two main reasons justify this claim.[30] The first one is that such a conception of power leads to an inclusion in a power-conferring norm of "other norms" that are manifestly autonomous. If a norm of competence contains (or is) the sum of the necessary and jointly sufficient conditions for the creation of deontic consequences, then a norm that imposes a procedural hearing and one that forbids certain deontic actions are not "different norms".[31] Such a conception challenges any acceptable criteria of norm individuation and, somehow, is still a consequence of Hart's confusion between definitions (conceptual norms) and norms of competence.[32]

(xvi) The system has: N_1 in "Philetas is competent on sheep", N_2 in "Philetas shall listen to Dorcon before enacting norms" and N_3 in "it is forbidden to treat animals cruelly" (a superior norm).

(xvii) If N_1, N_2 and N_3 are conditions of validity of the norms enacted by Philetas, then, and for the broad conception of competence, together they all form a "norm of competence".

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[28] For instance, see Bulygin, "On Norms of Competence", *supra* note 24 at 215; Jorge Rodríguez, "Teoría Analítica del Derecho", *supra* note 5 at 259.

[29] Which immediately follows from the idea that "norms of competence are those that establish this ability by stating the conditions necessary for its exercise. These conditions determine the personal, procedural, and substantial competence" (Bulygin, "On Norms of Competence", *supra* note 24 at 203).

[30] For other reasons, see Jordi Ferrer, *supra* note 21 at 101.

[31] It is indeed difficult to understand how the superior norm expressed in "everyone has freedom of expression" (a condition of validity to any exercise of a lower competence about speech) can be included in competence. It is a crystal clear example of a pure regulative norm. However, that inclusion is explicitly admitted by the broad conception of competence. For instance, see Carlos Alchourrón and Eugenio Bulygin, "Permisos y Normas Permisivas" in Carlos Alchourrón and Eugenio Bulygin, *Análisis Lógico y Derecho* (Madrid: Centro de Estudios Constitucionales, 1991) 215 at 237; Daniel Mendonca, *Exploraciones Normativas*, 2d Ed (Ciudad de México: Fontanamara, 2001) at 44. It is important to note that Ross, although also a defender of the broad conception of power, explicitly denied material limits to be a part of power (Alf Ross, *Directives and Norms* (London: Routledge & Kegan Paul, 1968) at 131). For a merely terminological attempt to solve the problem (that turns out to be a sort of acceptance of the narrow concept of power), see Beatriz Arriagada, "Normas de Competencia y Normas Acerca de la Competencia. Eludiendo las Reglas Constitutivas" (2017) 40 Revista Doxa, Cuadernos de Filosofía del Derecho (Universidad de Alicante) 93 at 117 .

[32] As is known, Hart sustained that the definition of a will is a power-conferring norm (Hart, "The Concept of Law", *supra* note 4 at 27), a claim that has been widely accepted (for instance, see Bulygin, "On Norms of Competence", *supra* note 24 at 205; Jorge Rodríguez, "Teoría Analítica del Derecho", *supra* note 5 at 254). However, the norm in "no will shall be valid unless signed by its author and in the presence of two witnesses" (a short version of section 9 of the British Wills Act 1837 (c 26) (UK)) is clearly not a competence norm: by identifying the necessary conditions for creating some deontic consequences, it says nothing about competence. If for some reason such norm co-existed with "minors have no power to make wills" (changing the private law general competence norm), then a will enacted by a minor and satisfying all the requirements of section 9 would still be invalid (which aims to show that power is totally absent from the content of this provision).

(xviii) It seems strange that norms on different actions and with different deontic modalisations (N_2 and N_3 are pure regulative norms) can be considered as just one: a competence norm.

(xix) As such, Philetas' power would be described as "Philetas is competent on sheep, obliged to hear Dorcon and forbidden to enact norms allowing cruelty towards animals".

The second reason is that it is totally possible to isolate power from other conditions of validity, an exercise that shows power as an autonomous necessary condition. If in a normative system all conditions of validity of a specific deontic action are removed, but the agent keeps her power on the matter, then power becomes a sufficient condition. In such a normative framework, it becomes evident that the action "to create deontic consequences" only depends on power. But power will not be changed if any other validity requirement is added again afterwards: they only affect its exercise (on the validity of the norms enacted). So, with or without those other validity requirements, power always stays unchanged.[33]

(xx) The system has: N_1 in "Philetas is competent on sheep", N_2 in "Philetas shall listen to Dorcon before enacting norms" and N_3 in "it is forbidden to treat animals cruelly" (a superior norm).

(xxi) When N_2 and N_3 are removed, the power conferred by N_1 becomes a sufficient condition for validity: to create deontic consequences on "sheep" does not depend on any other requirement.

(xxii) When N_2 and N_3 are enacted again, there are now other validity requirements, but power remained as it was; these validity requirements do not target power: they target the norms to be enacted.

(xxiii) Even if Philetas enacts a certain N_4 violating N_2, the proposition in "he is the competent body on sheep" would still be true: it just follows from the match between such a proposition and N_1.

Once power is narrowed to its irreducible area, one can say that a norm of competence is a very specific normative unit that just confers to its primary addressee a capability such addressee would not otherwise have. And if this grounds the constitutivity of such a norm, it also shows that the creation of deontic consequences is impossible whenever the agent does not hold power: one cannot do something one does not have the capability to do. So, whenever the normative system has no other specific norms applicable, it follows that (alleged) deontic consequences coming

[33] As the following example tries to show. On the other hand, this seems to be a problem also related to the ambiguity of "validity". Actually, much of this relies on understanding "validity" either to mean membership or in accordance with the norms of the system and dependent on the sanctions such system foresees.

from powerless agents are simply non-existent. Without a competence norm, the agent has no power and neither changes the law nor any legal position.[34]

IV. A "Norm of Incompetence" is a Proposition about the Law

A situation such as not holding competence means the incompetence of the agent at hand: deontic consequences on some material domain cannot be created. And such a situation of not holding competence evidently comes from the absence of a power-conferring norm: regarding some material domain, no norm in the system gives power to the agent. Therefore, an absence of power is a situation that has no normative support in the system: it results exactly from the non-existence of such norm. Accordingly, the incompetent agent is positioned at a sort of "legal nothingness": given the constitutivity of competence norms, their absence creates a void not normatively filled by any other norm the system might contain.[35]

This is specific to second order legal positions. In the first order ones, whenever an agent does not bear a duty to φ, such an agent holds a liberty not to φ. Be it because the agent at stake is the primary addressee of a permissive norm or because there is no norm on φ and, consequently, such an agent occupies a space of pragmatic permission (from a weak permission, leading to a "vacuum liberty").[36] And, conversely, if the agent does not hold a liberty to φ, that is surely because φ is mandatory (or forbidden). However, in second order legal positions, such "completeness" does not occur: the constitutivity of a competence norm implies that its absence amounts to the non-existence of any legal position.[37]

One could accept, though, that nothing prevents a normative authority from enacting a provision such as "Philetas has no competence on sheep", which would amount to a "norm of incompetence": with such a norm sentence, the normative authority would be conferring on the agent the legal position Hohfeld designated as a "disability".[38] However, it does not work that way. A norm sentence such as that

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[34] Evidently under the assumption that the normative system at hand does not have any norms that, in some situations, specifically recognise effects to the deontic consequences produced by incompetent agents.

[35] Not having power exists as an idea (and immediately for being the negation of something), but it does not exist as a "thing" created in any way (see, Willard Quine, "On What There Is" (1948) 2(5) The Review of Metaphysics 21 at 22). It is in this sense that such absence is a legal nothingness. On thinking (and having ideas) about inexistent things, see Andrea Marchesi, "A Radical Relationist Solution to the Problem of Intentional Inexistence" (2021) 199(3–4) Synthese 7509 at 7520. That a Hohfeldian immunity mirrors the "inexistent" was a point already advanced by Albert Kocourek (Albert Kocourek, "Non-Legal Content Relations Recombated" (1923) 5(3) Ill LQ 150 at 154).

[36] By "vacuum liberty" it is meant the liberty that follows from the absence of any norm (a state of weak permission). It has nothing to do with the Benthamian "naked liberty": a liberty (either following from a strong or a weak permission) that is not re-enforced by prohibitions of interference (Jeremy Bentham, "Pannomial Fragments" in John Bowring (ed), *The Works of Jeremy Bentham*, Vol 2 (Edinburgh: William Tait, 1843) 211 at 218).

[37] Which is the reason why speaking about weak immunities makes no sense (besides the general criticism strong immunities already deserve). A weak immunity is just the legal nothingness that follows from the absence of power. For the distinction between strong and weak immunities, see Arriagada, "Immunidades Fuertes y Débiles", *supra* note 1 at 22.

[38] Hohfeld, *supra* note 6 at 50.

one, even if formally enacted by a normative authority, does not express a norm: a "norm of incompetence" is not a norm. Since no deontic consequences are being created (and no previous legal positions are being changed), that enactment is no other than a descriptive sentence about the system.[39]

A "norm of incompetence" (which is not a norm) should not be confused, though, with "real" norms that address (and impact) competence. That is what happens with: (i) norms that extinguish competence; and (ii) norms that modify competence. In the former case, the normative authority revokes (or extinguishes in any way) a previous position of competence. By doing so, the authority is effectively creating a deontic consequence: the law is being changed. The same also happens in the latter. When the normative authority expands or reduces the material domain of power, the law is being changed as well. In both cases, the sentences enacted express norms: the holder of power sees her position changed.

(xxiv) The system contains the norm expressed in "Philetas is competent on sheep". If the normative authority later enacts "Philetas is not competent on sheep", then the law has been changed: a competence norm has been revoked and Philetas ceases to have the power he held.

(xxv) The system contains the norm expressed in "Philetas is competent on sheep". If the normative authority later enacts "Philetas is competent on sheep and goats", then the law has been changed: a competence norm has been modified and Philetas starts to have power on the other material domain.

Yet, and again, one cannot recognise such deontic consequences with a pure "norm of incompetence" such as "Philetas has no competence on sheep". If the primary addressee of such a sentence never held power, no change whatsoever is being produced by that enactment: Philetas was incompetent and keeps being so. And as it seems clear, there is no normativity here: the system stays as it was before and the "position" held by Philetas remains unchanged. Two unavoidable conclusions follow: (i) since a "norm of incompetence" is not a norm, nothing in the system can confer a disability; and (ii) if the Hohfeldian position does not have any normative support, then immunities are not legal positions as well.[40]

It seems, thus, that Hohfeld's second line of correlativity in second order legal positions is, as already advanced, a confusion between norms and normative propositions. The fact that no possible norm can confer "disabilities" and "immunities" shows that such terms simply describe the lack of power (and its alleged correlativity

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[39] Therefore, it is just being said that the agent (Philetas, in the present examples) lacks power: by officially stating "incompetence", the normative authority is just announcing the fact that Philetas has no power on some matter.

[40] Which also shows that the problem with strong and weak immunities (Arriagada, "Immunidades Fuertes y Débiles", *supra* note 1 at 22) starts immediately with the mere possibility of the former: without demonstrating the normative character of a "norm of incompetence" strong immunities are illusions. On the other hand, once one says that incompetence is "the impossibility to validly change legal positions" (Arriagada, "Immunidades Fuertes y Débiles", *supra* note 1 at 22), it becomes clear that incompetence is not a position by itself: something "impossible" is something that, when and while impossible, does not exist.

consequences).[41] Thus, both disabilities and immunities do not survive the norm-based approach. Being conceivable as negations of powers and liabilities does not promote them to the normative realm: as mere negations of something dependent on constitutivity they only describe its absence.[42] And this is not surprising: after all, it was not in vain that Bentham never spoke about immunities.

V. What about the Usually Called Immunities (in the Narrow Sense)?

The claim that the term "immunity" merely describes a state of affairs inherent in the absence of power (exactly what is described by the term "disability") raises the question of what can be the normative explanation for the established use of the word. It is known that, besides the broad meaning of the term, as mentioned at the beginning, an "immunity" is usually taken to be a kind of right normative systems often confer.[43] However, a norm-based approach to legal positions shows that such use makes no reference to any "normative concept". Analysing how they are effectively set out in normative systems, those alleged "immunities" are rather: (i) claim-rights; or actually (ii) nothing.

The first normative situation follows from norms that forbid tokens of the action "to create deontic consequences". Since a competence norm is a "constitutive permission", a norm that forbids a token of the action-type is actually a limit to the exercise of power its holder is *prima facie* free to carry out. Therefore, the holder is under a prohibition to create some specific deontic consequences, even though they hold the power to do so. As a prohibition, it implies that the power holder has a duty, being the correlative position, and accordingly, a claim-right: those under the scope of power have a claim-right to not be affected by any deontic consequences within the material domain of the prohibition[44].

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[41] So, while the sentence "Philetas has competence on sheep" contains a norm if uttered by a normative authority and a description of a legal position (norm) if uttered by an observer, the sentence "Philetas has no competence on sheep" (if he never held it) is in any case a mere description. A "norm of incompetence" is just (and always) a mere proposition about something the law did not provide for. On norms and norm propositions, besides the references already presented, see Ilkka Niiniluoto, "Norm Propositions Defended" (1991) 4(3) Ratio Juris 367 at 372; Giovanni Tuzet, "Describir Normas: Un Enfoque Pragmático" (2018) 41 Doxa, Cuadernos de Filosofía del Derecho 49 at 50.

[42] One could argue that disabilities and immunities are "logical consequences" of positions given by norms of the system (power-conferring norms) and, consequently, that they could be for that reason part of the system through the deducibility criterion of membership (on this criterion, see Ricardo Caracciolo, "Existencia de Normas" (1997) 7 Isonomia Revista de Teoría y Filosofía del Derecho 159 at 163; Jorge Rodríguez and Pablo Navarro, *Deontic Logic and Legal Systems* (Cambridge: Cambridge University Press, 2014) at 203). However, this would be also mistaken. What follows from that criterion of membership is that the system comprises as well norms that are deducible from other norms. Though, a negation is not a deduction.

[43] Allocating specific Hohfeldian immunity rights to specific norms. See, for instance, Alison Young, "Proportionality is Dead: Long Live Proportionality" in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 43 at 56; Frederick Schauer, "On the Distinction Between Speech and Action" (2015) 65(2) Emory LJ 427 at 446.

[44] This is actually what seems to be the correct explanation for the usual (and mistaken) use of "immunity" about some amendments (namely, the First or the Fourteenth) of the United States Constitution

(xvi) With "Philetas is competent on sheep", Philetas can and may create deontic consequences on anything related to "sheep", though, if the system contains "it is forbidden to treat animals cruelly" (as a superior norm), Philetas may not enact "sheep torture is allowed".

(xvii) The prohibition to treat animals cruelly is also addressed to Philetas as a power holder; so, Philetas bears a duty to not create deontic consequences that go against the prohibition. Since Chloe and all the others are correlated agents under the prohibition, each one holds a claim-right.

(xviii) Philetas can and may create deontic consequences on anything related to "sheep", but if there is a provision such as "Philetas shall not limit the freedom to walk sheep", the same scheme applies: Philetas is under a duty not to do so and Chloe and all the others hold the correlated claim-rights.

The second normative situation follows from the mere absence of a power-conferring norm. As seen before, this can occur when an agent has never held power: here, all the others are just in a legal nothingness (not holding any legal position). But this can also happen when a normative authority narrows the scope of a competence previously assigned to an agent. With such a modification, the competent agent sees her legal position changed: the material domain of the competence at hand was decreased. However, if the correlated agents still bear a liability regarding the unchanged part of the competence, they do not start to have an immunity regarding the removed part. The holder of power becomes legally irrelevant to them.

(xxix) If the system contains the norm expressed in "Philetas is competent on sheep and goats" and then the normative authority enacts "Philetas is only competent on sheep", it follows that the law has been changed: competence has been modified and Philetas ceased to have power on "goats".

(xxx) In the first norm there is only a power holder and the liability bearers; the same applies to the second one. So, this means that those who are goatherds, besides losing a liability, did not gain any immunity with the change: now they just have no legal position regarding Philetas.

VI. Epilogue: Some Loose Ends

The claim that an immunity is just a proposition about the law, describing a legal nothingness without any specific deontic reference, might provoke objections. For instance, it can be said: (i) that a power-conferring norm, while making an

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(for instance, see Mark Weidemaier, "Balancing, Press Immunity and the Compatibility of Tort Law with the First Amendment" (1998) 82(6) Minn L Rev 1695 at 1700; Frederick Schauer, "Towards an Institutional First Amendment" (2005) 89(5) Minn L Rev 1256 at 1726 . As the last of the next examples shows, one is dealing with prohibitions to restrict and, therefore, with duties. Accordingly, the correlated agents hold claim-rights.

agent competent on some matter, is also denying competence to others; or (ii) that an immunity is a relevant position in a legal dispute and, for such reason, it is always significant. With the first objection, one is saying that competence norms are, in and of themselves, the normative basis for disabilities (they would also state who is not competent). With the second, one is saying that a court can recognise an immunity and, accordingly, that such a position has at least judicial significance.

Yet, neither the first nor the second seem to be consistent objections. About the first. There is no reason to think that a power-conferring norm is biconditional and, while making some agent competent, is also making all the others incompetent: a power-conferring norm restricts its regulation to its specific constitutivity. This is valid even when the competence norm includes an exclusivity clause.[45] Such a clause is usually redundant (exclusivity comes from constitutivity) and only acquires relevancy when there is concurrent power on the same domain. However, in such a normative scenario, that clause works as a negative limitation of the material domain of power and not as an attribution of incompetence.

(xxxi) The competence norm in "Philetas is competent on sheep" confers on Philetas the power to create deontic consequences on the matter; it says nothing about the incompetence of others.

(xxxii) The competence norm in "Philetas has the exclusive competence on sheep" adds nothing to "Philetas is competent on sheep"; he was already the sole holder of power.

(xxxiii) Such a norm is only relevant with "Lamon is competent on animals" since it works here as negative limitation of Lamon's powers; yet, no competence norm made anyone incompetent.

A main argument justifies that a competence norm restricts its regulation to its specific constitutivity: nothing prevents another norm to give the exact same power to another agent, making both competent on the same material domain. That is, not being the primary addressee of a competence norm has no conceptual implication on being incompetent.[46] On the other hand, it is also relevant to note that, at least usually, an agent that is not a primary addressee of a competence norm is actually a

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[45] Differently, see Jordi Ferrer, *supra* note 21 at 162; Rafael Hernández Marín, *Compendio de Filosofía del Derecho* (Madrid: Marcial Pons, 2012) at 96.

[46] The constitutivity of norms of competence has no parallel in other areas of legal systems. For instance, one could think that being "constituted" as a doctor leads not only to being capable of exercising medical acts, but also to preventing all the others from carrying out such acts (which would be a constitutivity parallel). But that seems mistaken. Actually, such constitutivity is realised by a specific permission (a licence) that derogates, for the licensed agent, from the general prohibition on exercising a professional activity (without such a prohibition the practice of medicine would be free). So, it is the uniqueness of the constitutivity competence norms contain (not dealing with first order legal positions) that puts incompetent agents in a very specific point of legal irrelevance.

secondary addressee (being thus under such authority): for this reason, the agent at stake holds a liability and not a disability.[47]

(xxxiv) With "Philetas is competent on sheep" the incompetence of Lamon is true if and only if he is not the primary addressee of another competence norm on the matter.

(xxxv) Consequently, a norm such as "Philetas is competent on sheep", by itself, does not make anyone (Lamon included) incompetent (it just makes Philetas competent).

(xxxvi) With "Philetas is competent on sheep" most probably Lamon is a secondary addressee of such a norm; therefore, Lamon holds a liability and not a disability.

About the second. An incompetent agent imposing on another the exercise of some duty can be challenged in a court about that imposition. When the alleged duty-bearer asks the court to state that she owes nothing, the judge will accept the claim and possibly say something like "the defendant has no power and, for such reason, the claimant holds an immunity". However, while saying so, what the judge is effectively saying is that the incompetent agent is incompetent, this being the reason for considering the duty inexistent (or null and void, depending on the system). In such a scenario, the word "immunity" was used as a statement about the law, describing consequences coming from the inexistence of power.

(xxxvii) Daphnis claims that Chloe owes him €50 (based on a norm enacted by the incompetent Lamon); Chloe asks the court to state that she does not owe Daphnis €50.

(xxxviii) The court dismisses the claim because Lamon has no power and, accordingly, the duty to pay €50 does not exist in the system; the court says that Chloe holds an "immunity".

(xxxix) Chloe's immunity is not a legal position (no norm can confer such a position); it is just a linguistic resource to describe that Chloe is not under a non-existent competence (Lamon's).

Such a judicial decision is merely declarative and has no other effect besides recognising that there is no duty (because there is no power to create it). And this is

[47] It is also relevant to note that second order legal positions do not form a complete system: in such a subset of norms there is no equivalent to weak permissions, which necessarily means that the inexistence of power does not imply any kind of contradictory position. In an imaginary normative system in which the absence of a norm would not imply a weak permission, it would also follow that the absence of a duty (without any permissive norm regarding the very same action) would amount to a legal nothingness: in such a system, if Daphnis claims that Chloe owes him €50 and she does not, a court would dismiss the claim without recognising her holding any position; the court would just say that "there is no duty", merely describing such absence without affirming a liberty not.

valid with regards to any possible legal dispute involving incompetence: since it has no deontic reference, a court will never enact a normative decision sustained on an immunity.[48] Any possible reference made to an immunity is incorrect (because it might be a claim-right, as seen before) or is a mere proposition about law. In the latter case, a court is just recognising the legal nothingness intrinsic to the negation of power. And that is what necessarily follows from the specific constitutivity (regarding the action-type) inherent to second order norms.

[48] On the distinction between declarative and normative judicial decisions, see Carlos Alchourrón and Eugenio Bulygin, *Normative Systems*, Volume 5 of Library of Exact Philosophy (Vienna: Springer-Verlag, 1971) at 148; Tecla Mazzarese, "Towards the Semantics of 'Constitutive' in Judicial Reasoning" (1999) 12(3) Ratio Juris 252 at 254.