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DO LEGAL POSITIONS EXIST?

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Assuming that the vocabulary of the so-called "legal positions" is, under certain circumstances, interchangeable with the normative vocabulary, this work reformulates the question of whether legal positions exist as the question of whether they are ontologically reducible to (dismissible and replaceable by) legal norms. Since there is no doubt that the so-called "legal positions" are part and parcel of the reality that is assumed as existent in specialized legal discourses, the question raised by this work is situated at the level of meta-legal theory. In Parts II and III two different answers to this question are reconstructed: the affirmative answer that seems to be dominant in legal theory, and the negative answer elaborated by Ross. In Part IV both answers previously reconstructed are translated into the language of reduction, where the question of whether legal positions exist is reformulated again, this time as the question of whether legal theory must consider them to exist or not. Building on the distinction between different types of reduction, the ultimate goal is to distil, refine or shape the dominant discourse of legal theory according to which legal positions must be accepted as existent.

I. Introduction

The title of this work contains an ontological question. I have no doubt that the vocabulary of the so-called "legal positions" is, under certain circumstances, interchangeable with the normative vocabulary, but the question concerning whether legal positions exist can be reformulated as the question of whether they are ontologically reducible to (dismissible and replaceable by) legal norms. This is the question I am interested in examining.

In order to dispel any ambiguity about what is at stake in such an interest, first, it is necessary to provide a meta-ontological clarification. Far from thinking that ontological theses are (reducible to) mere stipulations,[1] I share Thomasson's suggestion regarding existence from a deflationary view: the question of whether what is designated by a general term exists can be reformulated as the formal question of whether the conditions of application effectively associated with said term are satisfied.[2] From this perspective, the reference associated with words and statements

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[1] Riccardo Guastini, "Una Teoría Cognoscitiva de la Interpretación" (2008) 29 Isonomía 15 at 26–27.

[2] Amie L. Thomasson, *Ontology Made Easy* (Oxford: Oxford University Press, 2014) at 85–95.

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is set to the extent that the relevant speakers agree to use the same term to refer to the same instances.

Secondly, it is necessary to clarify that the discursive level in which the aforementioned ontological question is formulated is meta-theoretical. Legal theory can be considered as a meta-discourse that analyses the specialized legal discourses of legislators, rule-enforcement organs, lawyers, dogmatic jurists and scientific jurists, all of whom can be considered members of the so-called "internal legal culture".[3] Analysing these discourses can be aimed at distilling them from their defects, thus honing their conceptual apparatuses.[4] It may even be admitted that a significant part of the legal-philosophical activity consists of shaping, through stipulative definitions and re-definitions, the concepts used to describe the law,[5] to apply it and even to produce it. However, a legal theory that purports to have utility could not hinge on pure stipulations, nor rely on them as a point of departure.

Prior to distilling, refining and shaping, it is necessary to make explicit the concepts that are implicit or presupposed in the discourses under analysis with the purpose of reconstructing/explaining the most common intuitions of the participants in legal practice.[6]

It is important to stress that the utility of the appropriate distilling activity depends on previously taking stock of what is out there, capturing what is implicit in the beliefs, attitudes and behaviours of those who are speakers in specialized legal discourses and, in that regard, what they assume as existent and which, consequently, exists in a certain sense.[7] Legal theory elaborates models, but these are reconstructive and explanatory.[8] For this reason, the task of refining the conceptual apparatuses of legal discourses has to be conducted mainly through partial re-definitions aimed at reaching concepts of bigger explanatory power.

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[3] I use the expression "internal legal culture" in the sense of Giovanni Tarello, "La Nozione di Diritto Positivo Nella Cultura Giuiridica Italiana" in Giovanni Tarello, *Cultura jurídica y política del derech* (Spain: Comares, 2003) at 229–230, although with a slightly broader reference that, among legal specialists, includes legislators as well as lawyers, judges and jurists. María Beatriz Arriagada, "Normas Jurídicas Regulativas y Normas Jurídicas Constitutivas. Ontología, Interpretación y Cultura Jurídica" (2022) 45 Revista Doxa. Cuadernos de Filosofía del derecho 377 at 402 [Arriagada, "Normas Jurídicas Regulativas"]; Rodríguez, *Teoría Analítica del Derecho* (Madrid: Marcial Pons, 2021) at 651 [Rodríguez, *Teoría Analítica del Derecho*].

[4] Pierluigi Chiassoni, "I Precedenti Civili Sono Vincolanti? Considerazioni Sull'articolo 360–bis c.p.c." in *Diritti Umani, Sentenze Elusive, Clausole Ineffabili: Scritti di Realismo Militante* (Roma: Aracne, 2011) at 115–117.

[5] Riccardo Guastini, "Manifesto di una Filosofia Analitica del Diritto" in Riccardo Guastini, *Distinguendo Ancora* (Bogotá: Universidad Externado de Colombia, 2013) at 89–90 (cited in the Spanish translation by Pedro Caballero, "Manifiesto de una Filosofía Analítica del Derecho") [Guastini].

[6] Claudina Orunesu, Jorge L. Rodríguez & Germán Sucar, "Inconstitucionalidad y Derogación" (2001) 2 Discusiones 11 at 11; Brian H. Bix, "Legal Theory: Types and Purposes" in Peczenik, *IVR Encyclopaedia of Jurisprudence, Legal Theory, and Philosophy of Law* (Minneapolis: University of Minnesota, 2004); Carlos E. Alchourrón & Eugenio Bulygin, *Normative Systems* (Wein-New York: Springer-Verlag, 1971) at 29–30 [Alchourrón & Bulygin, *Normative Systems*].

[7] On the ontological relevance of this "internal point of view", see María Cristina Redondo & María Cristina Redondo Natella, *El Positivismo Jurídico "Interno"* (Ljubljana: Klub Revus, 2018) at Chapter V.

[8] Paolo Comanducci, "Epistemología Jurídica" in Paolo Comanducci, *Hacia una Teoría Analítica del Derecho* (Madrid: Centro de Estudios Políticos y Constitucionales, 2010) at 184–185.

There is no doubt that the so-called "legal positions" are part and parcel of the reality that is assumed as existent in specialized legal discourses.[9] The question posed by this work — whether legal positions exist — is thus placed at the level of meta-legal theory. In Parts II and III, two different answers to this question are reconstructed: the affirmative answer that seems to be dominant in legal theory, and the negative answer elaborated by Ross. In order to show that said question can be formulated as the question of whether legal positions are ontologically reducible to (and, therefore, dismissible and replaceable by) legal norms both answers previously reconstructed are translated into the language of reduction in Part IV. In this context, the question of whether legal positions exist is formulated again, this time as the question of whether legal theory must consider them to exist or not. Building on the distinction between different types of reduction, my ultimate goal is to distil, refine or shape the dominant discourse of legal theory according to which legal positions must be accepted as existent.

II. Legal Positions in General Legal Theory

When analysing the theoretical-legal discourses on the so-called "legal positions" it becomes inevitable to reference the classic essays by Hohfeld[10] whose discourse refers to the discourse of judges and jurists with an evidently reconstructive purpose.

Hohfeld's first objective is to show that the expressions "right" and "duty" are often used to designate different concepts that should be differentiated. The term "right" would be used to distinguish the concept of right properly so-called (claim) from privilege (liberty, permission), power (competence, capacity, ability) and immunity (exemption). In turn, the term "duty" would be used to distinguish the concept of duty properly so-called (obligation) from no-right (no-claim), liability and disability.[11]

Once these eight concepts are identified, Hohfeld's purpose is to analyse them connectively in a scheme of four relations of correlativity (right/duty, privilege/no-right, power/liability, and immunity/disability) and four relations of opposition (privilege/duty, right/no-right, power/disability, and immunity/ liability). From a

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[9] Bruno Celano, *Lezioni di Filosofia del Diritto* (Torino: Giappichelli, 2018) at 19; Bruno Celano, *I Diritti Nello Stato Costitutionale* (Bologna: Il Milino, 2013) (cited in the Spanish translation by F. Morales Luna, *Los Derechos en el Estado Constitucional* (Lima: Palestra, 2019) at 23) [Celano, *Lezioni di Filosofia del Diritto*]; María Beatriz Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross. La Defensa de una Teoría Analítica de las Normas Jurídicas" in Miguel Fernández Núñez, ed, *Materiales Para una Teoría de los Derechos. Ensayos de Filosofía Analítica* (Madrid: Marcial Pons, 2022) at 96–97 [Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross"].

[10] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913–1914) 23(1) Yale LJ 19 [Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning"]; Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26(8) Yale LJ 710 [Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning"].

[11] Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *supra* note 10 at 35–36. The terms in parentheses are synonyms of each of the ones not in parentheses. Some of these synonyms are admitted by Hohfeld himself and others are used by those who study his explicative model.

logical point of view, Hohfeld's strategy is to show that correlative concepts are implied by each other (are logical equivalents) and the opposite concepts are mutually exclusive (are logically contradictory). [12]

These eight concepts are, according to Hohfeld, "strictly fundamental legal relations".[13] Operative, causal or dispositive facts would be those which, under the general legal rules that are applicable, are enough to modify legal relations, this is, to create a new relation, extinguish a previous one or perform both functions simultaneously.[14]

Using as reference Hohfeld's analysis, legal theorists often assume that legal norms create, modify, extinguish and ascribe legal positions and relations to individuals or classes of individuals.[15] I am not then referring to the regularity with which legal specialists express themselves in terms of the attribution of certain "normative properties" to individuals satisfying certain conditions.[16] The focus here is on the meta-discourse of general legal theory.

As it is well known, plenty of time and thought in analytical legal theory has gone into trying to show that, within "legal norms", there can be identified at least two distinct and exclusive types:

(a) *regulative, prescriptive or conduct legal norms* qualify certain factual actions or omissions by certain subjects or classes of subjects under certain circumstances as mandatory, prohibited or permitted; and

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12 *Ibid* at 36–63; Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *supra* note 10 at 64, 73; Glanville Williams, "The Concept of Legal Liberty" (1956) 56(8) Colum L Rev 1129 at 1144–1145; George W. Rainbolt, "Rights as Normative Constraints on Others" (1993) 53(1) Philosophy and Phenomenological Research 93 at 95 [Rainbolt, "Rights as Normative Constraints on Others"]; George W. Rainbolt, *The Concept of Rights* (Dordrecht: Springer-Verlagm, 2010) [Rainbolt, *The Concept of Rights*] at 2, 4; Matthew Kramer, "Rights Without Trimmings" in Matthew Kramer, Nigel Simmonds & Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford: Oxford University Press, 2000) at 8, 24, 26, 30–31, 35, 40; Juan Antonio Cruz Parcero, *El Lenguaje de los Derechos: Ensayo Para una Teoría Estructural de los Derechos* (Madrid: Trotta, 2007) at 33–34, n 19.

13 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *supra* note 10 at 36.

14 *Ibid* at 32.

15 *Eg,* H. L. A. Hart, "Definition and Theory in Jurisprudence" in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendom Press, 1983) at 35; H. L. A. Hart, "Legal Powers" in H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) at 210–216; Williams, *supra* note 12 at 1130; Rainbolt, "Rights as Normative Constraints on Others", *supra* note 12 at 94; Kramer, *supra* note 12; Pablo E. Navarro & Jorge L. Rodríguez, *Deontic Logic and Legal Systems* (Cambridge: Cambridge University Press, 2014) at 117; Guastini, *supra* note 5 at 83–87; Pierfrancesco Biasetti, "Hohfeldian Normative Systems" (2015) 43 *Philosphia* 951; Claudina Orunesu & Jorge L. Rodríguez, "Una Revisión de la Teoría de los Conceptos Jurídicos Básicos" (2018) 36 *Revus* 81 at 10–26; Rodríguez, *Teoría Analítica del Derecho*, *supra* note 3 at 292; David Duarte, "Rights as Formal Combinations of Normative Variables" (2023) 51 Revus; Pierluigi Chiassoni, "La Teoría de los Derechos de Jeremy Bentham. Historia de una Doble Desmitificación" in Miguel Fernández Núñez, ed, *Materiales Para una Teoría de los Derechos. Ensayos de Filosofía Analítica* (Madrid: Marcial Pons, 2022) at 146. I have assumed it myself in María Beatriz Arriagada, "Fundamentality, Interdefinability and Circularity. Three Ideas on Hohfeld Examined" (2018) 35 Revus 7 [Arriagada, "Fundamentality, Interdefinability and Circularity"]; María Beatriz Arriagada, "Inmunidades Fuertes y Débiles. El Imperio Contraataca" (2020) 13(1) Revista de Derecho 9 [Arriagada, "Inmunidades Fuertes y Débiles"]; and María Beatriz Arriagada, "The Closure of the Systems of Competence Legal Norms. Episode I: the Normative Powers of Public Authorities" (2021) 43 Revus 59 [Arriagada, "The Closure of the Systems of Competence Legal Norms"].

16 Celano, *Lezioni di Filosofia del Diritto*, *supra* note 9 at 19.

(b) *legal norms of competence or about legal production* constitute or determine the conditions under which it is possible/valid for certain subjects or classes of subjects to perform normative actions through which they create, modify or extinguish norms or participate in their production, modification or derogation. Thus understood, these norms are considered to be a subtype of what are generally called "constitutive legal norms" and sometimes called "conceptual legal rules".[17]

The distinction between these two types of norms is related to the distinction between types of legal actions:

(a) *Non-normative legal actions* are those which performance or omission has not been constituted or determined by the legal norms of competence, and hence may be performed and described without reference to said norms, although they can be qualified by regulative legal norms. For instance, driving a car. The performance or omission of these actions can be licit or illicit.
(b) *Normative legal actions* (producing, modifying or derogating norms) are those which performance has been constituted or determined by norms of competence, such that they can only be performed and described according to them. For instance, enacting or derogating a statute. The performance of these actions can be valid or invalid.

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[17] H. L. A. Hart, *The Concept of Law*, 3d ed (Oxford: Oxford University Press, 2012) at 27–42, 79–99 [Hart, *The Concept of Law*]; Alf Ross, *Directives and Norms*, 1st ed (London: Humanities Press, 1968) at 53–57 [*Ross, Directives and Norms*], 130 *et seq*; Alchourrón & Bulygin, *Normative Systems*, supra note 6 at 13–15, 27–29, 34–35, 60–61; Carlos E. Alchourrón & Eugenio Bulygin, "Definiciones y Normas" in Eugenio Bulygin & Genaro R. Carrió, *El Lenguaje Del Derecho. Homenaje a Genaro Carrió* (Buenos Aires: Abeledo-Perrot, 1983); Eugenio Bulygin, "Sobre la Regla de Reconocimiento" in Carlos E. Alchourrón & Eugenio Bulygin, *Análisis Lógico y Derecho* (Madrid: Editorial Trotta, 2021) at 383–391; Eugenio Bulygin, "On Norms of Competence" (1992) 11(3) Law & Phil 201 (published in Eugenio Bulygin, *Essays in Legal Philosophy* (Oxford: Oxford University Press, 1995) at 272–283) [Bulygin, "On Norms of Competence"]; Claudina Orunesu & Jorge L. Rodríguez, "Reglas Constitutivas y Mundos Constitucionalmente Posibles" in Lorena Ramírez-Ludeña & Josep M. Vilajosana, eds, Reglas Constitutivas y Derecho (Madrid: Marcial Pons, 2022) at 187–221 [Orunesu & Rodríguez, "Reglas Constitutivas y Mundos Constitucionalmente Posibles"]; María Cristina Redondo, "Sobre el Carácter Constituido y Constitutivo del Derecho" (*ibid* at 223–252) [Redondo, "Sobre el Carácter Constituido"]; Arriagada, "Normas Jurídicas Regulativas", *supra* note 3. The distinction, thus formulated, claims to be grounded in the general theory of norms, especially in Georg Henrik von Wright's distinction between rules and principles/regulations, Georg Henrik von Wright, *Norm and Action: A Logical Inquiry* (Oxfordshire: Routledge & Kegan Paul, 1963) at 1–8, 70–92; Georg Henrik von Wright, *Explanation and Understanding* (Oxfordshire: Routledge & Kegan Paul, 1979) at 151–153; and in Searle's distinction between regulative and constitutive rules, John R. Searle, "How to Derive 'ought' from 'is'" (1964) 73(1) The Philosophical Review 43; John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969) at 33–42; John R. Searle, *The Construction of Social Reality* (New York City: Simon & Schuster, 1995); John R. Searle, "Constitutive Rules" (2018) 4(1) Argumenta 51. However, and drawing on the same authors, there is an attempt to weaken the distinction. See *eg*, Frederick Schauer, *Playing by the Rules*, 1st ed (Oxford: Oxford University Press, 1991) at 6–7; Frederick Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2015) at 26–31; Corrado Roversi, "Constitutive Rules in Context" (2010) 96(2) Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy 223; Stefano Bertea, "Constitutivism and Normativity: A Qualified Defence" (2013) 16(1) Philosophical Explorations 81 (cited for publication in University of Leicester School of Law Research, Paper No. 14–13, 2014).

A normative action can be valid or invalid depending on whether it complies or not with the norms of competence constituting it. This does not preclude qualifying validly performed normative actions as mandatory, prohibited or permitted by regulative norms[18] and, therefore, for them to be licit or illicit. Every action or omission (factual or normative) fulfilling an obligation or prohibition or availing itself of a permission is *licit* and every action or omission (factual or normative) violating an obligation, a prohibition, or a permission by exceeding its limits is *illicit.*[19]

From the view that legal norms create, modify, extinguish and ascribe positions to individuals:

(a) A regulative norm ascribes to an individual a *duty* or *obligation* and to another individual a *correlative right*, when it requires the former *vis-à-vis* the latter to perform (or omit) a given factual or normative action, such that the latter has a right that the former performs (or omits) said action.
(b) A regulative norm ascribes to an individual a *liberty, privilege* or *permission* and to another individual a *correlative no-right* when it authorizes the former *vis-à-vis* the latter to perform (or omit) a factual or normative action, or put differently, it exempts the former vis-à-vis the latter from the duty to omit (or to perform) it, such that the latter has no right (has a no-right) that the former omits (or performs) the action.[20]
(c) A norm of competence ascribes to an individual a *power* and to another individual a *correlative liability* when it attributes to the former the capacity to validly perform the normative action of producing, modifying or derogating (or participating in the production, modification or derogation of) norms that institute, modify or extinguish the *legal positions or relations* of the latter.
(d) A norm of competence ascribes to an individual a *disability* and to another a *correlative immunity* when it institutes the incapacity of the former to validly perform the normative action of producing, modifying or derogating (or participating in the production, modification or derogation of) norms that institute, modify or extinguish the *legal positions or relations* of the latter.

The foregoing shows that the usual classification of Hohfeldian positions and relations into primary or first order and secondary or second order[21] presupposes the

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[18] Hans Kelsen, *Reine Rechtslehre*, 2d ed (Berkeley: University of California Press, 1960) (cited in the English translation by Max Knight, *Pure Theory of Law*, 1st ed (Berkeley: University of California Press, 1967) at 118); Hart, *The Concept of Law*, *supra* note 17 at 29, 97; Ross, *Directives and Norms*, *supra* note 17 at 131–132; Bulygin, "On Norms of Competence", *supra* note 17 at 275–276; Manuel Atienza & Juan Ruiz Manero, *Las Piezas del Derecho* (Barcelona: Ariel, 2004) at 84; Luís Duarte d'Almeida, "Fundamental Legal Concepts: The Hohfeldian Framework" (2016) 11(10) Philosophy Compass 554 at 558–559.

[19] *Eg*, Neil MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007) at 114.

[20] *Cf* Williams, *supra* note 12 at 1135–1142.

[21] Kramer, *supra* note 12 at 20; Leif Wenar, "The Nature of Rights" (2005) 33(3) Philosophy and Public Affairs 223 at 230–233; Guastini Riccardo, *La Sintassi del Diritto*, 1st ed (Torino: Giappichelli, 2014) (cited in the translation by Ester González Bertrán & Álvaro Núñez Vaquero, *La Sintaxis del Derecho* (Madrid: Marcial Pons, 2016) at 84–87); Rainbolt, *The Concept of Rights*, *supra* note 12 at 3.

distinction between regulative legal norms and legal norms of competence, as well as the distinction between non-normative legal actions and normative legal actions.[22]

In extreme summation: (i) duties and rights are instituted by regulative norms and may refer to non-normative legal actions, in which case they are first order positions; (ii) privileges and no-rights negating duties and rights refer to the same object and, consequently, are also of first order; (iii) powers and liabilities are instituted by norms of competence that refer to normative legal actions and, therefore, legal positions and relations that are at least of second order; (iv) disabilities and immunities negating powers and liabilities refer to the same object and, therefore, have their same hierarchy.[23]

The above also shows that legal positions can be classified into active and passive. A position can be called *active* when it is defined by reference to an action or omission by its holder and a position can be called *passive* when it is defined by reference to an action or omission by the holder of the correlative position. Whereas duties, privileges, powers and disabilities are active positions, rights, no-rights, liabilities and immunities are passive positions.[24] If two positions are correlative when they are reciprocally implicated and two positions are opposed when they are contradictory, every relation of correlativity would be constituted by an active and a passive position and every relation of opposition would be constituted either by two active positions or two passive positions.[25]

The classification between active and passive positions explains that the same legal relation can be described by different, although equivalent, normative propositions:[26]

(a) to say that *X* has a *right* that *Y* perform (or omit) action *A* is equivalent to saying that *Y* has vis-à-vis *X* the *duty* to perform (or omit) action *A*;
(b) to say that *X* has vis-à-vis *Y* the *liberty* to perform (or omit) action *A*, is equivalent to saying that *Y has no right that X* omit (or perform) action *A*

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[22] Arriagada, "Fundamentality, Interdefinability and Circularity", *supra* note 15 at 17–22; Arriagada, "Inmunidades Fuertes y Débiles", *supra* note 15 at 17. As I am interested in the thesis according to which norms create, modify and extinguish legal positions and relations, I do not analyze here the possibility to consider, from the level of normative propositions, privileges/no-rights and disabilities/immunities as positions and relations whose existence depends on the respective inexistence of regulative norms and of norms of competence. For this analysis, see Arriagada, "Fundamentality, Interdefinability and Circularity, *supra* note 15 at 28–36; Arriagada, "Inmunidades Fuertes y Débiles", *supra* note 15.

[23] Of course, duties and rights instituted by regulative norms and privileges and no-rights negating them can also refer to normative legal actions.

[24] Arriagada, "Fundamentality, Interdefinability and Circularity", *supra* note 15 at 24–28; Arriagada, "Inmunidades Fuertes y Débiles", *supra* note 15 at n 26 (with support in Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *supra* note 10 at 37–39, 50–60).

[25] Arriagada, "Fundamentality, Interdefinability and Circularity", *supra* note 15 at 41.

[26] The purported logical equivalency between normative propositions using different Hohfeldian terms is based on the definitional and axiomatic nature of the Hohfeldian explicative proposal. On this nature, see Kramer, *supra* note 12 at 24, 30–31, 35, 40. In said proposal, the existence of an active position entails the existence of the correlative passive position and vice-versa. I will not address here the problem of whether Hohfeld presupposes that legal systems ascribing the positions he analyses are complete and coherent. Part of this discussion may be found in Arriagada, "Fundamentality, Interdefinability and Circularity", *supra* note 15 at 28–36.

and equivalent to saying that *X does not have* vis-à-vis *Y the duty to* omit (or perform) action *A*;

(c) to say that *X* has a *power* to perform a normative action that changes the legal position of *Y* is equivalent to saying that *Y* is *liable* to *X* performing a normative action changing its position; and

(d) to say that *X* is *incompetent* or has a *disability* to perform a normative action modifying the legal position of *Y* is equivalent to saying that *Y* has an *immunity* against the normative action by *X* and equivalent to saying that *X is incompetent or has a disability* to modify the legal position of *Y*.

From the point of view described in this part, it is presupposed that legal norms are created, modified or extinguished by speech acts fulfilling a performative or operative function. Which, however, I want to stress, also means that it is assumed that legal norms created, modified or extinguished by operative speech acts, at the same time, create, modify, extinguish and ascribe legal positions and relations to individuals.

III. Ross's Thesis: Hohfeldian Expressions as Linguistic Vehicles for Expressing Norms

A. *Legal Thinking as Magical Thinking*

When Ross analyses the discourse of normative authorities, he posits that statutory law appears to be constituted by statements that refer to an invisible world of peculiar qualities (rights and duties) created as the effects of certain facts to which a creative power is attributed. Ross's thesis asserts that, even though norms are expressed through a mechanism according to which multiple facts produce, modify or extinguish metaphysical substances or invisible effects called "rights" and "duties", the legal expressions "right" and "duty" are nothing but linguistic instruments to express the norms whose function is to influence the behaviour of people. Behind the ambiguous and ideologically charged terminology of rights and duties there would hide the different *modalities* of legal norms of conduct (claims, obligations, no-claims and liberties) and of the legal norms of competence (powers, liabilities, disabilities and immunities).[27] This thesis complements another thesis, also defended by Ross, according to which when the expressions "right" and "duty" are used by jurists, they are but *presentation tools*. Ross argues that, in the discourse of jurists, those expressions lack semantic reference, but they are used to present or showcase in abbreviated and systematic form sets of norms that, in particular legal orders, connect a disjunctive plurality of conditioning facts with an accumulative plurality of conditioned consequences. These consequences would be

[27] Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959) at Chapter V [Ross, *On Law and Justice*]; Ross, *Directives and Norms*, *supra* note 17 at 116–124.

communicable in normative modalities, that is, in terms of claims, liberties, powers, immunities, obligations, no-claims, liabilities and disabilities.[28]

With a view to showing that legal thinking has a considerable resemblance with magical thinking, Ross's strategy was to exhibit that, although many legal expressions lack a counterpart in the real world, its use, both by normative authorities as well as by jurists, causes or may cause the wrong impression that such expressions denote existing entities, when in actuality they only are: (i) linguistic vehicles for expressing norms, or (ii) tools for presenting or showcasing in abbreviated and systematic form sets of legal norms.[29]

B. *Hohfeldian Expressions as Modalities of Legal Norms*

As, according to Ross, legal language could not do without the terminology of rights and duties, the system elaborated by Hohfeld would allow one to become aware of the hidden relations behind said terminology: (i) the terms "claim", "liberty", "competence" and "immunity" and the expressions "obligation", "no-claim", "liability" and "disability" are, respectively, implicit in the expressions "right" and "duty" that are often used to express norms; and (ii) "claim", "obligation", "liberty" and "no-claim" are modalities of legal norms of conduct, whereas "power", "liability", "disability" and "immunity" are modalities of legal norms of competence. This proposal would not be an arbitrary construction, but a stylized version of the real use that would uncover that the discourse of normative authorities really operates with terms that are reciprocally linked by negation and correlation.[30]

As it is well known, the criterion according to which the distinction is to be made between legal norms of conduct and legal norms of competence is not always the same. In *On Law and Justice*, Ross asserts that legal norms can be divided into two groups, according to their immediate content: (i) norms of conduct prescribe a certain course of action and their real content is an instruction to judges; and (ii) norms of competence are norms of conduct indirectly formulated as they are instructions

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[28] Alf Ross, "Tû-tû *Comment*" (1957) 70(5) Har L Rev 812 [Ross, "Tû-tû *Comment*"]; Ross, *On Law and Justice*, *supra* note 27 at 168–174; Alf Ross, "Definition in Legal Language" (1958) 1(3/4) Logique et Analyse 139 at 143–145 [Ross, "Definition in Legal Language"].

[29] Ross, "Tû-tû *Comment*", *supra* note 28; Ross, *On Law and Justice*, *supra* note 27, at Chapters V, VI; Ross, "Definition in Legal Language", *supra* note 28; Ross, *Directives and Norms*, *supra* note 17 at 116–124. A systematic presentation of Ross's theses on the use of legal expressions, such as rights, duties, property and marriage, in the discourses of normative authorities and jurists can be found in Arriagada, *supra* note 9. Ross's theses have prompted an interesting discussion about — what Searle calls — 'institutional facts' which, in certain aspects, is similar to the one proposed in this work. See *eg*, Jaap C. Hage, "The Meaning of Legal Status Words" in Jaap C. Hage & Dietmar von der Pfordten, eds, *Concepts in Law* (Dordrecht: Springer, 2009) at 55–66; Bruno Celano, "Fatti Istituzionali: La Teoria di J. Searle" in Bruno Celano, *Fatti Istituzionali, Consuetudini, Convenzioni* (Rome: Aracne Edtitrice S.r.l., 2010) [Celano, "Fatti Istituzionali"] at 15–61; Bruno Celano, "Fatti Istituzionali e Fatti Convenzionali" (*ibid* at 81–102) [Cellano, "Fatti Istituzionali e Fatti Convenzionali"]; Paolo Comanducci, "Kelsen vs. Searle: A Tale of Two Constructivists" in Paolo Comanducci & Riccardo Guastini, eds, *Analisi e Diritto 1999: Ricerche di Giurisprudenza Analitica* (Torino: Giappichelli, 2000) at 101–115.

[30] Ross, *Directives and Norms*, *supra* note 17 at 125.

establishing that the norms created in conformity with a pre-defined procedural mode would be considered norms of conduct.[31]

In *Directive and Norms*, Ross argues that any well-developed legal system, being institutional and dynamic, contains not only norms of conduct prescribing how to act, but also norms of competence which provide how new valid and binding norms may be created through the performance of *actes juridiques*.[32]

But here the distinction of these types of legal norms is a subspecies of the wider distinction between, on the one hand, *regulative rules* prescribing behaviours whose performance is logically independent of said rules, and on the other hand, *constitutive rules* defining the logically required conditions to perform institutional actions that have no meaning or purpose outside of said rules.[33] Legal norms of conduct are, according to Ross, regulative and include norms imposing obligations (or prohibitions), as well as permissive norms whose normative function is to indicate, within a system, which are the exceptions to the norms of obligation.[34] Legal norms of competence are, conversely, constitutive in that they determine the conditions needed to produce new norms through *actes juridiques* or *acts-in-the-law* (*ie*, promises, wills, laws, trials, administrative acts) that no one can perform as part of their natural faculties, as they are only conceivable as constituted by legal rules.[35]

Despite the different way in which norms of competence are reconstructed, in both works Ross points out that it is relevant to distinguish norms of competence from norms of conduct regulating the exercise of the competence. In Ross's terms, to exceed a norm of competence produces invalidity, whereas to violate a norm of conduct regulating the exercise of a competence does not affect the validity of the *acte juridique*, but entails a responsibility.[36] On the other hand, both in *On Law and Justice* and in *Directive and Norms*, Ross underscores that norms of competence (and their modalities) are logically reducible to norms of conduct (and their modalities). Any norm of competence could be transcribed as a norm of conduct, although not vice-versa and any norm could, based on logical transformations, be expressed, without change of meaning, by any of the norms of conduct modalities.[37] To these considerations Ross adds that the eight modalities of norms are reducible to terms of duty.[38] The modality of obligation is thus considered the fundamental category.[39]

When Ross analyses the modalities of legal norms, he highlights that the terminology used is not uniform nor unequivocal. On the one hand, the modal terms would be frequently ambiguous. On the other hand, different terms could be used to designate the same modality. Ross's point is that regardless of the way in which

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31 Ross, *On Law and Justice*, *supra* note 27 at 32–33.
32 Ross, *Directives and Norms*, *supra* note 17 at 118.
33 *Ibid* at 53–54.
34 *Ibid* at 120.
35 *Ibid* at 56–57, 96, 130 *et seq*.; Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78(309) Mind 1 at 1–2.
36 Ross, *On Law and Justice*, *supra* note 27 at 167; Ross, *Directives and Norms*, *supra* note 17 at 131–132.
37 Ross, *On Law and Justice*, *supra* note 27 at 162; Ross, *Directives and Norms*, *supra* note 17 at 118, 120.
38 Ross, *On Law and Justice*, *supra* note 27 at 162.
39 Ross, *Directives and Norms*, *supra* note 17 at 120.

norms are expressed, their purpose is to influence the conduct of citizens and judges.[40]

Since legal norms can be expressed in diverse formulas, all of them can be considered to be equivalent. Indeed, according to Ross, normative modalities exist in a relation of negation and correlation and are inter-definable. Any normative utterance which may be expressed by one of these modalities may be rewritten as any of the others.[41] It should be added to this that norms can also be formulated using adjectives like "obligatory", "prohibited" or "permitted" as predicates of factual or normative actions and adjectives like "valid" and "invalid" as predicates of normative actions.

C. *A Partially Reductionist Legal Ontology*

According to an extreme realist position, normative language is nonsensical and scientifically inadmissible because the qualifications of behaviour do not express anything objectively existent. There would be nothing objective in norms, except that people are under the false impression or the illusion that non-physical, and therefore, magical,[42] bondage is possible.

For legal positivism, an adequate response to the ontological problem of legal norms[43] is one that does not reduce them either to moral norms or to empirical facts. The strategy to avoid such reductionisms has been to distinguish the problem relative to the type of entity that norms are from the problem relative to their conditions of existence. Simplifying matters to the utmost, norms are considered abstract entities (meanings, signifying contents) whose existence is dependent on (although not reducible to) empirical facts.[44]

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[40] *Ibid* at 117, 124–125; Ross, *On Law and Justice*, *supra* note 27 at 159.

[41] Ross, *Directives and Norms*, *supra* note 17 at 120. It is not clear whether Ross refers simply to the fact that Hohfeldian expressions are replaceable by other Hohfeldian expressions without the statements that use them changing their meaning or if, alternatively, he refers to an equivalency of a logical nature, in which case it would only have value in relation to complete and coherent systems.

[42] Celano, "Fatti Istituzionali e Fatti Convenzionali", *supra* note 29 at 86, n 10.

[43] The questions typically guiding the discussions on the ontology of legal norms are: What kind of entity is a legal norm? and in the face of which conditions can we assert that a norm exists? *Eg*, Ricardo Caracciolo, "Existencia de Normas" (1997) 7 Isonomía 149 at 159; Riccardo Guastini, "Due Concezioni Delle Norme" (cited in the Spanish translation by Pedro Caballero, "Manifiesto de una Filosofía Analítica del Derecho" in Caballero, *Otras distinciones* (Bogotá: Universidad Externado de Colombia, 2014) at 77–92); Riccardo Guastini, "Dos Concepciones de las Normas" (2018) 35 Revus 97.

[44] Kelsen is, of course, a paradigmatic case. See at least Kelsen, *supra* note 18 at Chapter I. In the same vein, Maria Cristina Redondo, "Los Enunciados Jurídicos Internos: La Concepción de Eugenio Bulygin" 33(2) Análisis filosófico 170 at 172–177; Josep Maria Vilajosana, "Ontología y Normas Jurídica" in María Cristina Redondo & Pablo E. Navarro, *La Filosofía Desde el Derecho. Homenaje a Riccardo Caracciolo*, 2d ed (Mexico City: Fontamara, 2016) at 85–98; Josep Maria Vilajosana, *El Derecho en Acción: La Dimensión Social de las Normas Jurídicas* (Madrid: Marcial Pons, 2010) at Chapters I, II; Rodríguez, *Teoría Analítica del Derecho*, *supra* note 3 at 62–67, 93–97. Hart's case is less clear precisely because the *conditions of existence* of rules (the regular and uniform conduct and the critical reflective attitude of the members of the group) are also considered by Hart as *aspects* of rules. *Cf* Hart, *The Concept of Law*, *supra* note 17 at 8–12, 56–57, 82–91. I cannot here analyze this point in detail. I have done it in Arriagada, "Normas Jurídicas Regulativas", *supra* note 3. But it is at least important to note that the ontological thesis of legal positivism tries to refute the thesis affirming that

Ross must be considered as a representative of this second position.[45] Although, in his view, there are no entities in the world which we can call rights or duties, nor entities that we may call claims, liberties, powers, immunities, obligations, no-claims, liabilities and disabilities, legal norms do exist.[46]

In *On Law and Justice*, legal norms are defined as directives that are used as interpretation schemes for a corresponding group of social acts which Ross also calls "legal phenomena" or "law in action". As interpretation schemes, legal norms enable us to understand those acts as a coherent whole of meaning and motivation and even predict them within certain limits. Such aptitude of norms, or rather of the system, would be based on the fact that norms are effectively obeyed because they are experienced as socially binding. The law could be, by the same token, considered as something partially consisting of legal phenomena and partially of legal norms, in mutual correlation.[47]

This idea of mutual correlation is later developed in *Directive and Norms*, where a norm is defined as a directive corresponding to certain social facts such that the pattern of behaviour presented in the directive: (i) is generally followed by the members of society and (ii) is felt or internalized by them as mandatory (valid).[48] This definition confers meaning to two kinds of common and fundamental uses of the notion "norm": (i) defined as a directive, as in a *meaning content*, the common usage would make sense according to which a norm may be followed or complied with, felt as mandatory and be related with other norms with which they constitute a system; and (ii) as correspondence with certain social facts is required, the usage would make sense according to which norms can exist really (have validity) and that statements to that effect are part of the description of societies.[49]

According to Ross, the analysis of the elements determining the meaning content of the norm,[50] and therefore, of the norm itself, must be kept separate from the description of the norm's factual background, that is, the social conditions upon which its existence is predicated.[51] Ross develops the thesis that the law can be determined without ambiguity as the group of norms followed and maintained by state organs (legislative, judicial and administrative). These rules governing the

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any concept of a norm involves a commitment to one of the two exhaustive and exclusive ontological theses: either norms are abstract entities whose ideal existence does not depend on the occurrence of any fact, or they are empirical entities whose temporal and spatial existence depends on the occurrence of facts, Caracciolo, *supra* note 43. From this perspective, the problem relative to the type of entity that norms are would be no different than, or at least could not become independent from, the problem relative to their conditions of existence.

[45] *Eg*, Celano, "Fatti Istituzionali", *supra* note 29; Celano, "Fatti Istituzionali e Fatti Convenzionali", *supra* note 29 according to whom Ross advocates for a rigorously normativist thesis in legal theory and, therefore, very different from an extreme realist position.

[46] Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross", *supra* note 9 at 114.

[47] Ross, *On Law and Justice*, *supra* note 27 at 8–9, 17–18, 29, 34–35.

[48] Ross, *Directives and Norms*, *supra* note 17 at 82–83, 93.

[49] *Ibid* at 78–83.

[50] (i) those whose function is to describe the action-idea (the subject, the situation and the theme of the norm); and (ii) the directive operator whose function is to indicate that the action-idea is presented as a pattern of behaviour and that it is not thought of as real. Ross, *Directives and Norms*, *supra* note 17 at 107, 116–117.

[51] *Ibid* at 106.

structure and the functioning of the legal machinery would not be generally imposed by force, but followed voluntarily due to the *feeling of validity* conferring them binding force. Their source of effectiveness would be the loyalty of those organs to the Constitution and the institutions derived from it, along with the non-violent sanctions of disapproval and critique entailed by this attitude, none of which would exclude the application of organized sanctions that is the signature of the law as an institutional order.[52]

As these observations show, Ross's theory is committed to a partially reductionist ontology, according to which norms are constitutive elements of legal reality. The existence of legal norms depends on empirical facts, but the former are not reducible to the latter. The word "norm" has a semantic reference in legal reality.[53]

IV. The Reducibility of Legal Positions to Legal Norms

A. *Reduction and Types of Reduction*

In their technical use, the expression "reduction" refers to an asymmetrical relation between a relatum A and a relatum B. The assertion that A is reducible to B admits of many different interpretations depending on how the relatums of the relation are conceived and on the conditions that the relevant relatums must fulfil to instantiate the relation.[54]

It has been suggested that, depending on how the relatums are conceived (the type of entities making up the reduction relation), it is possible to distinguish between *representational reductions* and *ontological reductions*. While the conditions of an appropriate model of representational reduction would require the identification of a specific kind of intentional resemblance between the representational entities (*ie*, theories, models, concepts), the conditions of an appropriate model of ontological reduction would require the identification of a specific kind of intrinsic resemblance between the non-representational entities (*ie*, objects, properties, events).[55]

This distinction is of little use to the extent that it conceals that representational reductions can be representative of ontological reductions. In fact, I seriously doubt the convenience of speaking of representational *reduction* and, in principle, I think it is better to speak of *translating* one vocabulary into another.

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52 *Ibid* at 84–93.

53 It is of no interest to go into the discussion on whether the legal ontology assumed by Ross is of a naturalist kind, as, for *eg*, contended by Torben Spaak, "Alf Ross on the Concept of a Legal Right" (2014) 47(4) Ratio Juris 461 at 463; Bartosz Brożek, "Sobre tû-tû" (2015) 27 Revus 25 at 30, as that depends on how naturalism is understood. Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross", *supra* note 9 at 117–120.

54 John R. Searle, *The Rediscovery of the Mind* (Cambridge, MA: MIT Press, 1992) (cited in the Spanish translation by Luis M. Valdés Villanueva, *El Redescubrimiento de la Mente* (Barcelona: Crítica, 1996) at 45) [Searle, *The Rediscovery of the Mind*]; Jan G. Michel, "Reductionism" (2018) in SDA, Digital Humanities Project, Oxford University at 2; Raphael van Riel & Robert Van Gulick "Scientific reduction" (2019) in the *Stanford Encyclopedia of Philosophy Archive* <https://plato.stanford.edu/archives/spr2019/entries/scientific-reduction/>.

55 van Riel & Van Gulick, *supra* note 54 at 36–37.

However, if this terminology is to be kept, the translatability/translation of one vocabulary into another could take on the name of "*conceptual*" reducibility/ reduction and be defined in the following terms: a vocabulary A is reducible to a vocabulary B if, and only if, vocabulary A is *translatable* into vocabulary B (what is expressed by vocabulary A can be expressed in vocabulary B), without losing meaning.

Understood thusly, the translation or conceptual reduction of one vocabulary into another entails an *ontological* reduction. An entity A is *ontologically* reducible to an entity B if and only if A *is nothing but* B, and consequently A is dismissible and, therefore, replaceable by B. Thus, for example, and according to Searle, sunsets are but appearances generated by the Earth's rotation on its axis in relation to the Sun. The reduction of sunsets to the Earth's rotation is eliminative as it shows that the former are but simple appearances.[56]

We are facing a relation between words and sentences, where words and sentences referring to a type of entity can be translated without any residue into words and sentences referring to another type of entity. Given that words and sentences are definitionally reducible, the corresponding entities to which words and sentences refer are ontologically reducible.[57] When we consider that a vocabulary is reducible to another one, that is, that it is replaceable by another one without loss of meaning, we assume that what is denoted by the first vocabulary is the same as what is denoted by the second vocabulary. They are inter-translatable because they share the same reference.

Thus, for example, when from the perspective of logical behaviourism it obtains that a statement about a person's state of mind means the same as — and, in that sense, can be translated into — a group of statements about their real or possible behaviour, then an ontological thesis on the existence/inexistence of states of mind is espoused.[58]

Analogously, when Celano asserts that institutional discourse (the vocabulary of so-called "institutional facts") is reducible to the normative vocabulary,[59] in his assertion it is implied the proposition that (institutional) facts denoted by institutional vocabulary do not exist (they are apparent) and that, in their stead, there is a group of norms. Celano's thesis is that the vocabulary of institutional facts is reducible (translatable) to the normative vocabulary because institutional facts are ontologically reducible to groups of norms. I underscore this because the replaceability

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[56] John R. Searle, *Mind: A Brief Introduction* (Oxford: Oxford University Press, 2004) [Searle, *Mind: A Brief Introduction*] at 76–77, 85–86.

[57] In these terms, Searle defines what he calls the "logical or definitional" reduction. Searle, *The Rediscovery of the Mind*, *supra* note 54 at 45.

[58] Searle, *Mind: A Brief Introduction, supra* note 56 at 36–39. In its crudest version, behaviourism says the mind just is the behaviour of the body. There is nothing over and above the behaviour of the body that is constitutive of the mental. Behaviourism comes in two flavors: "methodological behaviourism" and "logical behaviourism". Searle, *Mind: A Brief Introduction, supra* note 56 at 35.

[59] Celano, "Fatti Istituzionali", *supra* note 29; Celano, "Fatti Istituzionali e Fatti Convenzionali", *supra* note 29.

of a vocabulary by another does not necessarily entail that what is denoted by the first vocabulary is eliminated, that is, ontologically reduced.[60]

Indeed, the substitution of a vocabulary for another may be representative of other types of reduction that could be grouped under the label of *methodological* or *explicative* reduction. Let us illustrate this with some examples.

Methodological behaviourism, unlike logical behaviourism, does not present a substantive proposition about the existence or inexistence of states of mind, but a method. Since scientific propositions must be verifiable in an objective manner and that the only propositions on the human mind that fulfil this condition are those referring to human behaviour, the appropriate method for psychology should be the study of that behaviour and not of internal and spiritual mental entities.[61]

Analogously, in Ross's assertion according to which norms of competence (and their modalities) are logically reducible to norms of conduct (and their modalities), the assertion is not implied that norms of competence (and their modalities) are ontologically reducible to norms of conduct (and their modalities).[62] The criteria for existence used by Ross are, as we have seen: (i) that directives are regularly followed and felt as obligatory (in *On Law and Justice*); and (ii) that the pattern of behaviour expressed in the norm is generally followed and felt or internalized as valid/obligatory (in *Directive and Norms*).[63]

As we have seen, Ross defends the logical reducibility of any normative modality to the modality of obligation that, therefore, is considered fundamental. But the specific purpose of this reduction is to achieve a stylization of normative language that makes more viable a logic of norms. The proposal consists of a *method* to *analyse* normative language in terms of obligations.

Recognizing that there are many appropriate expressions to reflect the feeling of validity and obligation that is the existential basis of norms, Ross contends that it is possible to stylize normative language by introducing the term "obligation" as the standard symbol of a norm's directive operator. That is, as a symbol of the element indicating that the action-idea is presented as a pattern of conduct.[64] In this context, Ross is clear that the logical reduction of the normative vocabulary to the fundamental category of an obligation does not entail an ontological reduction and that

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60 María Beatriz Arriagada, "El Apurado Filo de Una Navaja Reduccionista. Apuntes en Homenaje a Bruno Celano" (Forthcoming in the Milan Law Review) [Arriagada, "El Apurado Filo de Una Navaja Reduccionista"].

61 Searle, *Mind: A Brief Introduction, supra* note 56 at 35–36.

62 When Ross contends that every norm can be expressed, without a change of meaning, as a norm of conduct, the expression "without change of meaning" is not used in the same sense as it is used when a vocabulary is translatable into another and, consequently, the entity denoted by the first vocabulary is the same as the one denoted by the second.

63 It is especially important to keep in mind that rules as important as those determining the structure and functioning of the legal machinery, this is, the group of institutions through which *actes juridiques* and the factual actions we ascribe to the State are undertaken, are mainly norms of competence. According to Ross, to know these rules is to already know everything about the existence and content of the law. Ross, *Directives and Norms*, *supra* note 17 at 90–91.

64 *Ibid* at 117.

the objective of this reduction is to analyse all the formulas in which norms can be expressed in terms of obligations.[65]

Another example of explicative or methodological reduction is that of causal reduction.[66] According to Searle, we could say that solid objects (those possessing certain touch, that can withstand pressure and are impenetrable by other objects) are but clusters of molecules. What, however, differentiates this case from that of sunsets is that the reduction is not eliminative since it does not show that solid objects do not have a real existence (*ie* that they do not offer real resistance to other objects). Searle's conclusion is that solidity is not ontologically reducible to molecular behaviour, but causally reducible to molecular behaviour. In his view, phenomena of type A are *causally reducible* to phenomena of type B if and only if A's behaviour is completely *explicable* in *causal terms* by B's behaviour, and A does not have causal faculty outside of those of B. Thus, the features of solid objects are causally explained through molecular behaviour, and solidity has no additional causal powers outside of the faculties corresponding to molecules.[67]

What I am interested in illustrating with these examples is that, in all of them, one vocabulary is substituted by another, but this substitution is not a translation and, therefore, does not entail an ontological reduction. The substitution entails a change of meaning precisely because it is assumed that what is denoted by the first vocabulary is not the same as what is denoted by the second. Such vocabularies are not inter-translatable because they do not have the same reference.

B. *From the Vocabulary of Legal Positions to the Normative Vocabulary and from Legal Positions to Legal Norms*

We have seen that ontological *reductions* are represented through the *translation* of the vocabulary denoting the eliminated entity into the vocabulary denoting the entity that substitutes it. These two operations are perspicuously illustrated in the thesis, defended by Ross, according to which the legal expressions "right" and "duty" (and the Hohfeldian expressions implicit therein) are nothing but linguistic vehicles to

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[65] *Ibid* at 117–118. The unique position of the modality of obligation would result from the fact that, while it would be conceivable for a system to contain affirmative norms of obligation only, we could not say the same for norms of permission because these only have normative meaning as an exception to norms of obligation (*ibid* at 120). Keeping this argument as reference, which can be also found in Delia Teresa Echave, María Eugenia Urquijo & Ricardo A. Guibourg, *Lógica, Proposición y Norma*, 1st ed (Beunos Aires: Astrea, 1980) at 157–158, I have argued that, although from a logical point of view, all Hohfeldian concepts are on the same level (they are not reciprocally reducible, but they are inter-definable in terms of their correlatives and opposites), scholars studying Hohfeld implicitly accept that: (i) the concepts of privilege/no-right and of disability/immunity are derived in the sense that their legal meaning cannot be understood without respective reference to the concepts of duty/right and power/liability; and (ii) the latter are, in turn, primitive because their legal meaning can be understood without reference to the first four. This differentiation is not grounded in the Hohfeldian scheme of logical relations, but in the possibility that it is useful for those who wish to use it. It is a presupposition of the practical utility of Hohfeld's conceptual apparatus. Arriagada, "Fundamentality, Interdefinability and Circularity, *supra* note 15 at 36–42. I think that this distinction constitutes another example of an explicative or methodological reduction in the terms here delineated.

[66] I am aware that it is debated whether causal reductions must be considered ontological reductions. van Riel & Van Gulick, *supra* note 54 at 51; Searle, *The Rediscovery of the Mind*, *supra* note 54 at 45–46.

[67] Searle, *Mind: A Brief Introduction, supra* note 56 at 76–77, 83–86.

express legal norms. In this case, the vocabulary of legal positions is reducible to the normative vocabulary because so-called legal positions are ontologically reducible to norms.

Elsewhere[68] I have contended that the commitment of Ross's legal theory with a partially reductionist ontology (accepting the existence of norms, but not of rights and duties) admits of an interpretation in meta-theoretical terms. Specifically, it would be a challenge that, addressed at legal theorists, invites them to stop talking about the Law, in the sense of stop thinking about it, in terms of (the existence of) rights and duties, in order to conceive of it, in turn, in terms of (the existence of) norms guiding people's behaviour.

In this context, I argued that an ontological-legal thesis that affirms the existence of norms but rejects the existence of rights and duties could make sense within the framework of a prescriptive/evaluative discourse aimed at normative authorities. Olivecrona, for example, contends that, although the purpose of norms is always to influence people's actions, said purpose is obfuscated, in no small degree, by the legislative creation technique based on concepts such as rights, obligations and their complements.[69] I also underscored that this type of critique could become extended to jurists, since to describe the norms of specific legal systems in terms of rights and duties could contribute to obscuring the function of norms.

We know, however, that, after analysing the expressions "right" and "duty" both in the discourses of normative authorities and jurists, Ross's conclusion is not that said expressions must be eliminated. Taking this into account, I have suggested that, in line with a strict interpretation of Ross's contentions, a legal theory that talks about the Law and, therefore, thinks about it in terms of attributes, status or positions created, modified, extinguished and ascribed to subjects by legal norms, is a theory that has been captured by the magical thinking. A theory that embraces that thinking, instead of exposing it, would have ceased to fulfil its role.[70]

As an alternative to this interpretation of Ross's claims, I have suggested that, from a less strict perspective, a legal theory whose language seems to assume that legal positions are existing entities that are created, modified, extinguished and ascribed to individuals by norms would not cease to fulfil its role provided that it makes sure to show that the function of any norm is always to guide people's conduct.[71] However, in light of the different types of reductions that — as we have

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[68] Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross", *supra* note 9 at 120–121, 127–128.

[69] Karl Olivecrona, *Law as a Fact* (Oxford: Oxford University Press, 1939) at 27–30.

[70] Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross", *supra* note 9 at 128.

[71] This would be particularly relevant in a context dominated by the thesis that norms that are not regulative, among which we find important norms such as "norms of competence", do not guide conduct but contribute to guiding it in an indirect way. For *eg*, José Juan Moreso & Josep M. Vilajosana Rubio, *Introducción a la Teoría Del Derecho* (Madrid: Marcial Pons, 2004) at 72–74; Rodríguez, *Teoría Analítica del Derecho*, supra note 3 at 55; Orunesu & Rodríguez, *supra* note 17 at 97, all of them based on the thesis, defended in Alchourrón & Bulygin, *Normative Systems*, *supra* note 6 at 60–61, according to which the statements that usually appear in legal systems that correlate — not cases with normative solutions but — cases with cases are not norms but conceptual definitions. A criticism of that thesis thus justified can be seen in Arriagada, "The Closure of the Systems of Competence Legal Norms", *supra* note 15 at n 28; Arriagada, "Los Derechos y los Deberes Bajo la Lupa de Alf Ross", *supra* note 9 at 127 *et seq.*; María Beatriz Arriagada, "Las 'piezas' de Alchourrón y Bulygin" in José Juan Moreso *et al*, *Eugenio Bulygin en la Teoría del Derecho Ontemporánea* (Madrid: Marcial Pons, 2022) at 263–285; Arriagada, "Normas Jurídicas y Conceptos Jurídicos Básicos en la Teoría Analítica del Derecho de Jorge Luis Rodríguez" (forthcoming in *Isonomía*).

seen — can be represented through the substitution of one vocabulary for another, now I can propose a more plausible interpretation of the assumption of legal theorists precisely because of its evident compatibility with the thesis that the function of every norm is to guide conduct.

My proposal is that, just as it is possible to say that solidity can be explained in *causal terms*, that is, in a *causal vocabulary*, it would be possible to say that legal positions can be explained in *normative terms*, that is, in a *normative vocabulary*. Note that it is a reduction that, although not ontological, is also not causal, as we cannot say that norms (denoted by the normative vocabulary) *cause* legal positions.

The type of relationship we are looking for and that is analogous to the causal relation is a constitutive relation (of "grounding", "determination" or "dependence") established by a constitutive rule, between a certain type of constitutive conditions and a certain type of constituted results.[72] Under this view, we could say that sets of norms ground[73] or determine legal positions, that legal positions depend on sets of norms, or that legal positions are the constituted results arising from the existence of sets of norms.

At this point it is necessary to highlight that the linguistic statements identifying the constitutive relation that, established by constitutive norms, enables one to state that something is a constituted result produced when certain constitutive conditions are met, are, as argued by Redondo, pragmatically ambivalent. Said statements could be understood as: (i) the expression of the rule itself that, for that reason, has a direction of fit world-to-mind; or (ii) the expression of an informative thesis that allows one to explain why certain results take place that, for that reason, has a direction of fit mind-to-world. Thus, that constitutive relation could be considered as: (i) a productive relation based on which we can say that the verification of the conditions *produces* or *leads to* a constituted result, or (ii) an explicative relation based on which we can say that the verification of the constitutive conditions *explains* or *makes intelligible* the existence of certain results already produced or to be produced.[74]

From these considerations, we may say that a phenomenon of type A is constitutively reducible to a phenomenon of type B if and only if A is entirely explicable in terms of its grounding in B, its determination by B or its dependence on B, and A has no constituent faculties outside those of B. Or, in other words, we may say that a

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[72] A manageable and deflationary notion, as well as a brief characterization of this relation from the debates of contemporary analytical metaphysics may be found in Redondo, "Sobre el Carácter Constituido", *supra* note 17 at 224–229. In the field of analytical metaphysics, see, for *eg* Brian Epstein, *The Ant Trap: Rebuilding the Foundations of the Social Sciences* (Oxford: Oxford University Press, 2015); Jonathan Schaffer, "On What Grounds What" in David Chalmers, David Manley & Ryan Wasserman, eds, *Metametaphysics: New Essays on the Foundations on Ontology* (Oxford: Oxford University Press, 2009) at 347–383; Gideon Rosen, "Metaphysical Dependence: Grounding and Reduction" in Bob Hale & Aviv Hoffmann, eds, *Modality: Metaphysics, Logic, and Epistemology* (Oxford: Oxford University Press, 2010); Fabrice Correia & Benjamin Schnieder, eds, *Metaphysical Grounding: Understanding the Structure of Reality* (Cambridge: Cambridge University Press, 2012). I prefer to talk about a constitutive relation instead of a metaphysical-constitutive relation to avoid possible confusion.

[73] According to van Riel & Van Gulick, *supra* note 54 at 59, if the reduction is based on an explicative notion and the explicative vocabulary is interpreted in a non-causal manner, a notion of grounding may be introduced by reference to explicative connectors such as "because" or "in virtue of".

[74] Redondo, "Sobre el Carácter Constituido", *supra* note 17 at 228–229.

phenomenon of type A is constitutively reducible to a phenomenon of type B if and only if A is entirely explicable in terms of being the constituted result arising from the verification of the constitutive conditions B, and A has no constituent faculties outside those of B.

We could say that, just as the features of solid objects are *causally explained* through molecular behaviour, and solidity has no causal powers in addition to the faculties corresponding to molecules, the features of legal positions are constitutively *explained* through norms determining or constituting them, and that legal positions have no constituent powers in addition to those of said norms.

In summation, just as we can say that solid objects are causally reducible to clusters of molecules, we could say that legal positions are constitutively reducible to sets of norms. By the same token, just as it would be possible to say that the vocabulary used to denote solidity is reducible to the molecular vocabulary because solid objects are *causally explicable/fathomable in terms of* molecular behaviour, it is possible to say that the vocabulary of legal positions is reducible to the normative vocabulary because legal positions are constitutively *explicable/fathomable* in terms of sets of legal norms.

In either case, we are in the presence of a substitution of one vocabulary for another vocabulary. But it does not follow from this that what is denoted by the first vocabulary is *ontologically reducible* to (dismissible and replaceable by) that which is denoted by the second one. Substitution is not translation. Substitution entails a change of meaning precisely because what is denoted by the first vocabulary (legal positions) is not the same as what is denoted by the second vocabulary (norms).