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A revision of the theory of fundamental legal concepts

Although coming from different traditions, Hans Kelsen and W. N. Hohfeld have offered two essential contributions to the clarification of fundamental legal concepts. After a brief review of their proposals, certain problematic aspects of their reconstructions will be analyzed in the light of categories developed by Eugenio Bulygin, in particular his criticism of the reductionist conceptions of norms, the non-prescriptive character of power-conferring rules, and the distinction between norms and norm-propositions. On this basis, and starting from the concept of legal obligation, an outline of an alternative reconstruction of the theory of fundamental legal concepts will be presented. | *The Spanish original of this article was published in Revus (2018) 36: 81-110.*

Keywords: fundamental legal concepts, sanction, legal obligation, norms, norm-propositions, power conferring norms, Kelsen (Hans), Hohfeld (W. N.)

1 INTRODUCTION

Eugenio Bulygin had an important and well-deserved impact on legal philosophy over the last half century. He did so through a plurality of individual works as well as through his fruitful collaboration with Carlos Alchourrón. His influence is reflected not only in the repeated references to his ideas in subjects within which he is well recognized, such as legal systems, logical analysis applied to law, the problem of legal gaps, legal dynamics and legal positivism, but also in the possibilities his theoretical elaborations offer as a starting point to the analysis of various other topics, old and new, related to the law. In this paper, we use some of Bulygin's ideas to evaluate an issue that he did not comprehensively and systematically analyze: the theory of fundamental legal concepts.[1]

The strategy that legal theory has generally followed for the study of the fundamental legal concepts consists in offering a reconstruction of them by keep-

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1 Bulygin has, however, denounced the strong metaphysical assumptions in the traditional construction of many legal concepts by legal dogmatists and shown the viability of an alternative analysis in Bulygin 1961.

ing relatively close to current linguistic uses, preserving at least in part the diversity that underlies the abundant terminology used in legal practice. Their study requires more than merely introducing stipulative definitions. It also requires an attempt to grasp, with the necessary precisions, the core of meaning of the required expressions, showing their possible ambiguous uses, as well as the unnecessary multiplications of terms to refer to situations that only superficially present themselves as different.[2]

In philosophy of language, this task has been called the *rational reconstruction* of a concept, and consists in a method by which an inexact or vague concept (*explicandum*) is transformed into an exact one or, at least, into a more exact concept than the primitive one (the *explicatum*). The goal is to produce a new concept that can be used in the same situations in which the former was used, but with the advantage of diminishing the semantic problems the original concept suffered. This process of rational reconstruction has two stages. The first is the informal elucidation of the imprecise concept, which seeks to clarify it as accurately as possible, i.e., to make explicit its meaning by referring to the diversity of uses it possesses in different contexts. The second is the introduction of the new concept, which should be more precise than the previous one in order to make the formulation of the greatest number of universal statements possible. The new concept should be similar to the previous one in the sense of being useable in most situations in which the *explicandum* is used, while also being as simple as possible.[3]

Without ignoring the importance of many other contributions, the works of Hans Kelsen and Wesley Newcomb Hohfeld stand out in this task of developing a theoretical framework that accounts for the current uses of the fundamental legal concepts, and accomplish this task meeting the ideals of explanatory precision and methodological coherence. Within the Continental and the Anglo-Saxon traditions, respectively, they have laid the foundations of the theory of fundamental legal concepts. After a brief review of their theories, we will examine some deficient aspects of their reconstructions making use of Bulygin's categories of analysis. On this basis, we finally offer an outline of an alternative reconstruction.

2 TWO TRADITIONS

According to Kelsen, the law is a social technique of indirect motivation of conduct, essentially instrumented through legal norms that have a *general and conditional structure*. The antecedent of that conditional describes a certain class of actions and the consequent prescribes the application of a coercive sanction

2 See Carrió 1968: 11.

3 See Alchourrón & Bulygin 1975: 7-8.

when a certain individual case of the action described in the antecedent occurs. In Kelsen's reading, from a legal norm with such a structure, it would be possible to abstract or derive which behavior the norm-authority wishes to outlaw, and which behavior the norm-authority seeks to promote through this mechanism of indirect motivation. If a norm prescribes the application of a coercive sanction to a certain action *A* within a legal system, it can be concluded that action *A* is prohibited, or equivalently, that it is obligatory to refrain from performing action *A*. On the Kelsenian view, only norms with this structure would count as legal norms.

Based on this conception of legal norms, Kelsen offers a reconstruction of the elementary legal concepts used by legal dogmatists in any branch of law. He takes the concept of sanction as a basis to define the remaining fundamental legal concepts: within his theory, the terms "delict" or "illegal act", "legal obligation", "legal right", "liability", "capacity", "legal power", "imputability", etc., are defined by their (more or less direct) relations with the concept of sanction.

To provide a very brief review, Kelsen characterizes these different concepts as follow:

- A *legal sanction* is a coercive act established by a legal system that has as its purpose the forcible deprivation of a value, is imposed by a competent –judicial or administrative– authority, and is determined by the legal order as a reaction against an action.[4]
- An *illegal act* or *delict* is the behavior of the individual against whom, or against whose relatives (understood as a reference to the subjects that, according to other norms of the same legal system, have the duty to respond for the acts of the person who commits the wrong), a sanction is directed as a consequence in a legal norm.[5]
- A *legal obligation* or *legal duty* is the behavior opposite to that regarding which a legal norm attaches a coercive act as a sanction.[6]
- An individual is said to be *liable* if a sanction must be applied to her in accordance with the norms of a legal system. Liable is the person against whom the sanction is directed as a consequence of a delict, i.e., the agent susceptible of being sanctioned.[7]

4 See Kelsen 1960: 108-109.

5 See Kelsen 1960: 114.

6 See Kelsen 1960: 115. As we shall see, Kelsen rightly distinguishes between the agent who is liable, i.e., the passive subject of the sanction for the commission of an illegal act, and the agent who has capacity to commit crimes, i.e., the active subject of the illegal act, given that in the cases of indirect responsibility those two qualities may not concur in the same agent.

7 See Kelsen 1960: 121.

– The term "right" has for Kelsen multiple uses.[8] First, it is sometimes used to refer to an action that is simply not legally forbidden, i.e., an action that is permitted in a negative sense.[9] Second, the term is also used to refer to the fact that the legal order conditions the performance of a certain activity to the existence of an express authorization to an individual, granted by a certain organ of the community, i.e., an action permitted in a positive sense.[10] Third, the term "right" can refer to the correlate of the (active or passive) obligation of another agent.[11] Fourth, at times it is used to designate a private right in a technical sense, i.e., the power granted to an individual to enforce the failure to comply with the pending legal obligation through a motion aimed at the execution of the sanction before the law-applying organ.[12] Fifth, it is also used to refer to political rights, i.e., authorizations to influence the formation of the will of the state, to participate directly or indirectly in the production of legal norms.[13] Finally, it may also refer to the so-called fundamental rights or liberties, generally stipulated by the constitutions of modern States, which determine the content of the laws in a negative way, establishing the procedure by which the norms not conforming to such limitations may be repealed as unconstitutional.[14]
– "Capacity" to act, "competence", and "imputability" are for Kelsen essentially equivalent notions. According to him, they are three ways of naming the same phenomenon occurring in different branches of law: private law uses the expression "capacity" to refer to the aptitude of persons in general, recognized by the legal order, to produce legal effects; in public law the expression "competence" is used to refer to the aptitude of certain individuals qualified for the creation of norms,[15] while "imputability" is the expression used in criminal law to refer to the aptitude of a person to be the subject of an illegal act.[16]

8 See Kelsen 1960: 125.

9 See Kelsen 1960: 126.

10 See Kelsen 1960: 138. The distinction between positive and negative permission will be explored further in section 5.

11 See Kelsen 1960: 126.

12 See Kelsen 1960: 134.

13 See Kelsen 1960: 138-139.

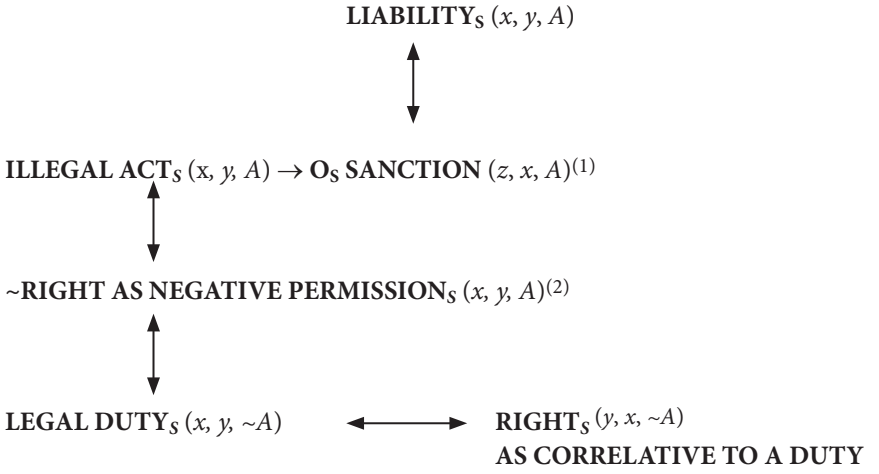
14 See Kelsen 1960: 140-141.

15 See Kelsen 1960: 159.

16 See Kelsen 1960: 146. This notion of imputation ("central imputation") should not be confused with the use of the expression "imputation" when it refers to the correlation of a sanction to a certain act ("peripheral imputation"), and in the strict sense is not predicated of natural persons, but of legal subsystems of legal positions. For a more detailed analysis of the concept, see Paulson 2001.

– "Person", for both physical persons and juristic persons, is used to refer to the unity of a set of legal obligations and legal rights, a *"totality of rights and obligations",* in the head of a subject. Since these legal obligations and rights are established by legal norms, it is also said that the legal person *"…is a legal construction created by the science of law…"*,[17] a center of the imputation of norms.[18]

From the existence in a legal system of a norm that correlates action *A* with the duty to apply a coercive sanction, the relations between the main basic concepts of the Kelsenian theory can be schematized as follows:



(1) Though it is not represented in this sketch, as has already been mentioned, Kelsen derives all the other basic concepts from the concept of legal sanction. However, in the Kelsenian theory an organ does not always have a duty to apply coercive sanctions against the illegal act. Kelsen argues that when the term "ought" appears as a link between the wrongful act and the legal sanction, it can mean either an obligation or a positive permission or authorization. Only when another norm correlates to the action opposed to it, i.e., to the omission to apply the sanction, another coercive act as a consequence, that action would also constitute the content of a legal obligation (see Kelsen 1960: 118-119). For a critique of this point, see Ross 1946: 76ff.

(2) To preserve uniformity (and for its subsequent connection with the Hohfeldian fundamental legal concepts), we introduce a relational notion of right as negative permission. Of course, nothing prevents one from speaking of a right as negative permission in a non-relational sense.

In this simplified reconstruction, *x*, *y,* and *z* are variables representing subjects, while *A* is an action, and the subscript $_S$ is used to refer to a certain normative system S.

17 Kelsen 1960: 174.

18 See Kelsen 1960: 173-174.

Although we will point out certain difficulties in this reconstruction in subsequent sections, it is undeniable that Kelsen's theory of basic legal concepts possesses very significant virtues: it is simple, systematic, and clearly departs from traditional natural law theory. The simplicity of this system lies on its reduction of fundamental legal concepts to just a few, as compared to the multitude that jurists use in their practice to refer to the law. Despite this important quantitative reduction, the system preserves much of its qualitative richness, since it can be used to explain a great diversity of statements describing the same situations for which legal theorists use a much more complex conceptual background. The systematization is reflected in the fact that all of the basic concepts are interrelated since, as mentioned, they are directly or indirectly defined in terms of the notion of legal sanction. Moreover, Kelsen's ideas are part of a persistent attempt to reject natural law theories,[19] which ultimately reduce law to morality. This explains why it is so important for Kelsen to maintain, in the development of his theory of basic legal concepts, the foundations for the construction of a positivist theory of law: the distinction between description and valuation, and the conceptual separation between law and morality.

Notwithstanding its significant merits, the Kelsenian theory of basic concepts did not have much of an impact in English-speaking countries, mainly because of the existence of a parallel tradition based on the work of W.N. Hohfeld.[20] In a famous essay from 1913, Hohfeld presented a very attractive reconstruction of some basic legal concepts. As Schlag points out, his fundamental concern was avoiding fallacies in legal discourse deriving from the ambiguities and inaccuracies in the use of language. In particular, Hohfeld remarked on the problems arising from the assumption that all legal relations can be reduced to the categories of rights and duties, and that those categories are adequate for analyzing any complex legal concept.[21] Hohfeld argued that the formal definitions of fundamental legal relationships were unsatisfactory and useless, so he gave up offering them, exhibiting instead their reciprocal relations in order to clarify their meaning, and providing examples of their scope and applications.[22] The relations are presented by the following schemes of opposites and correlatives:

19 Kelsen's theory not only seeks a purification of legal theory from naturalist doctrines, but also of legal sociology. On the interpretation of Kelsen's theory as a "third way" between such alternatives, see Paulson 2012.

20 We do not mean to deny the importance in this tradition of the contributions of Bentham (1789, 1872), Austin (1832, 1863), Hart (1961, 1982), Ross (1957, 1958), and most recently Kanger (1957, 1972), and Lindahl (1977).

21 See Schlag 2015.

22 See Hohfeld 1913: 30.

Opposites:	Right No-right	Privilege Duty	Power Disability	Immunity Liability
Correlatives:	Right Duty	Privilege No-right	Power Liability	Immunity Disability

This presentation shows that what Hohfeld calls "opposites", are contradictory notions, i.e., one is the negation of the other. For example, to claim that *x* has a right against *y* regarding some action, is tantamount to denying that *x* has a no-right with respect to *y* in relation to that action. Similarly, to claim that *x* has a legal power against *y* in relation to some normative action, is tantamount to denying that *x* has a disability against *y* in relation to that normative action, etc. Moreover, what Hohfeld calls "correlatives" are equivalent notions when the order of the subjects is inverted. Therefore, to claim that *x* has a right against *y* in relation to a certain action is equivalent to saying that *y* has a duty with respect to *x* in relation to that action; to claim that *x* has legal power over *y* in relation to some normative action is equivalent to saying that *y* is liable to *x* in relation to such normative action, etc.

Hohfeld argues that while the term "right" is used in a broad sense to refer to any type of legal advantage, it is strictly used with a scope that also seems to be captured by the expression "claim", and that is identified with the correlate of the duty of another.[23] The opposite of a duty in Hohfeld's scheme is a *privilege*, an expression he uses with a scope similar to the one Bentham assigns to the expression "liberty".[24] Strictly speaking, however, the "opposite" of a duty of *x* with respect to *y* regarding action *A* is not a privilege of *x* with respect to *y* regarding action *A*, but a privilege of *x* against *y* with respect to the abstention to perform action *A*.[25] The concept of privilege is equivalent to a permission to act, but in this case it is clearly a *unilateral* notion, not a permission to perform and to abstain from performing a certain action. Hence, a duty to perform action *A* is equivalent to the absence of a privilege (liberty, permission) to refrain from *A*.[26]

23 See Hohfeld 1913: 32.

24 See Hohfeld 1913: 36; Bentham 1789: 212. In general, we will use the expression "liberty" to refer to this notion.

25 See Hohfeld 1913: 32-33.

26 Hohfeld does not offer a reduction of his basic concepts to deontic operators. However, that reduction was proposed by Corbin, identifying duty with the operator *O* and liberty with the

The "correlative" concept of the privilege *x* has against *y* of, for example entering her own property, is a *no-right* of *y* against *x* not to enter, an expression Hohfeld uses since there is no single ordinary term available to express this latter concept. In other words, if *x* has a privilege against *y* in relation to action *A*, that means that *x* has no duty to refrain from doing so, which is tantamount to saying that *y* has no right (she has a no-right) against *x* to refrain from doing *A*. Hohfeld stresses that the privilege (liberty, permission) to perform a certain action must be distinguished from the claim-right of others not to interfere with the exercise of that privilege. Carrió, in the preliminary note to the Spanish translation of Hohfeld's essay, exemplifies this with the situation of two boxers in the ring: each of them has the privilege (liberty, permission) to hit the other, but he definitely does not have the right that the other does not interfere with his attempt to hit him.[27]

Examining the notion of *legal power*, Hohfeld claims that it must be distinguished from a mere physical or psychic power, and explains that a change in a given legal relation may result either from a superadded fact that is not under the volitional control of a human being, or from a fact that is under the volitional control of a human being. In this second hypothesis it can be said that the agent in question has *legal power* to make the change in the legal situation in question.[28] Consequently, for Hohfeld, while the group formed by the first four concepts (*right, duty, privilege, no-right*) refers to actions in general, the group formed by the second four concepts (*power, liability, immunity, disability*) refers to *normative actions*, i.e., actions that, according to a given legal norm, are a sufficient condition for the production of certain normative effects.

When providing an example of a legal power, Hohfeld explains that an agent *x*, as owner of a chattel, has the power to extinguish her legal interest in it, i.e., the set of rights, powers, immunities, etc., that this entails, abandoning it. The contradictory concept of legal power is *disability*, and the "correlative" is *liability*, i.e., if *x* has legal power over *y* in relation to a certain modification of a legal situation through a normative action, this is tantamount to saying that *y* is liable to the normative action of *x*. On the other hand, if *x* has a disability over *y* in relation to some normative action, then it can be said that *y* has an *immunity* from *x* as regards that normative action.

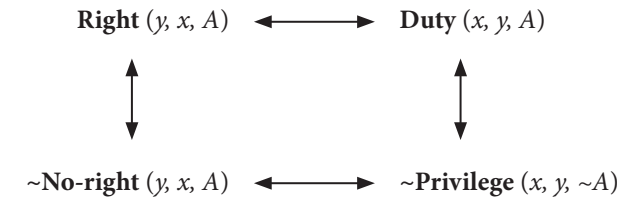
With these precisions and clarifications, following Lindahl, the relations of interdefinition between these eight notions can be more clearly represented by the following scheme, where all double arrows represent equivalence relations:[29]

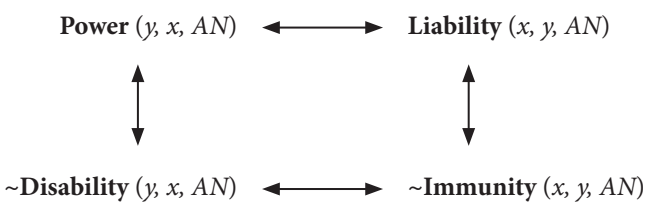
operator *P* (see Corbin 1919: 165).

27 See Carrió 1968: 16.

28 See Hohfeld 1913: 46.

29 See Lindahl 1977: 26.





It is important to note that Hohfeld does not assume that the duty of *x* with respect to *y* regarding action *A* is logically incompatible with the duty of *x* with respect to *y* regarding the abstention to perform *A*. In other words, Hohfeld does not assume the validity of:

$$\sim(\text{Duty}\ (x, y, A) \wedge \text{Duty}\ (x, y, \sim A))$$

This means that his analysis does not assume that existing legal systems are necessarily complete and consistent. As we shall see, this implies a very significant improvement regarding Kelsen's position in his reconstruction of the fundamental legal concepts.[30]

3 REDUCTIONISM AND ITS SHORTCOMINGS

As we pointed out above, Kelsen argues that *all* legal norms are characterized by attaching a sanction to a certain act, and based on that idea, he builds his model for reconstructing basic legal concepts. The program drawn up by Kelsen always seems aimed at giving an account of the distinctive features of legal norms in order to analyze the functioning of legal systems, conceived as sets of norms having such characteristics.[31] Regarding this issue, Eugenio Bulygin and Carlos Alchourrón have highlighted that beyond statements in legal sys-

30 Against this idea, see Lindahl 1977: 28-29; Halpin 2014. For a critique of the latter, see Duarte D'Almeida 2016.

31 As we will see shortly, from Kelsen 1960 the author seems to have subtly dismissed this view.

tems that do not seem to impute coercive sanctions to certain actions, others do not even seem to impose obligations, prohibitions, or grant permissions. Many norm-formulations in legal systems express definitions, conceptual rules, political declarations, etc. Were all those categories included under the scope of the expression "norm", they would end up enlarging its field of reference excessively, thereby also blurring it.[32] Kelsen tried to deal with this problem in the first edition of his *Pure Theory of Law* arguing that those norm-formulations that do not seem to attach a sanction to a certain act express *fragments* of legal norms: they would not be legal norms in themselves, but *parts* of legal norms. They would integrate the antecedent of a "complete norm", whose consequent would always assign a coercive sanction to a certain act.[33] According to this view, a considerable amount of legal material would be but fragments of a huge and complex antecedent in a conditional structure whose consequent would impose on certain organs the duty, or at least the authorization, to apply a coercive sanction. And the compound of such an immense antecedent plus the attachment of a sanction as a consequent would constitute a "complete legal norm".

Alchourrón and Bulygin argue that this explanation fails for two reasons. First, not all statements in legal systems are normative (and not all normative statements impose the duty to apply sanctions). Second, it obscures and blurs the notion that it is supposed to define, i.e., "legal norm", since it does not offer a clear and unambiguous criterion to identify what would count as a "complete legal norm".[34] The unsatisfactory results of this solution motivated Kelson to postulate a new hypothesis in the second edition of the *Pure Theory of Law*, calling those norms that lack a coercive sanction *non-independent legal norms*. In this reading, because of their "essential connection" with other norms that do have the latter structure, those formulations would count as legal norms even though they do not assign a coercive sanction to a certain act. Thus, a norm prohibiting a certain action without establishing itself a sanction, and another that imposes a sanction for the case of violation of the previous one, would be "essentially" interrelated, and only because of its connection with the latter is that the former would count as legal. Kelsen classifies those prescriptive norms that do not establish sanctions, permissive norms, power-conferring norms, derogatory norms, and those aimed at clarifying the meaning of other norms as *non-independent legal norms*.[35]

Alchourrón and Bulygin concede that this solution seems somewhat better than the previous one. Nevertheless, they remark that it means abandoning Kelsen's primitive idea of defining the law on the basis of a previous character-

32 See Alchourrón & Bulygin 1975: 59.

33 See Kelsen 1934: 29-30.

34 See Alchourron & Bulygin 1975: 59-60.

35 See Kelsen 1960: 54-58.

ization of the notion of legal norm. This is so because if norms categorized as a non-independent legal norms become legal only on account of their relation to sanction-imposing norms, then there is no unique common property to all legal norms, and a proper characterization of the law requires taking the relations between norms into account, i.e., it has to be given at the level of legal systems.[36]

This difficulty pointed out by Alchourrón and Bulygin regarding the reductionist conception of legal norms proposed by Kelsen has a logical impact on his theory of the basic legal concepts. There is a fundamental problem in Kelsen's general program, namely, the idea of taking the concept of sanction as a basis for defining the remaining basic concepts, which can be better appreciated when we examine the notions of delict or illegal act and legal duty.[37] As stated, Kelsen's final characterization of delict or illegal act consisted in claiming that it is that action against whom, or against whose relatives, a sanction in a legal norm is directed as a consequence. With the precisions Kelsen introduces in his successive rectifications of this definition, he adequately solves the problem of those actions that come from third parties and that nobody would ordinarily call illegal.[38] But in any case, there may be more than one action by the perpetrator of the offense that count as conditions for the application of a sanction, and not all of them qualify as illegal acts.[39] For example, the crime or bouncing a check, regulated in Article 302 of the Argentine Penal Code, requires two conditioning facts: one action (give in payment or deliver a check without funds provision or without express authorization to overdraw), and one omission (not paying the amount established by the check within twenty-four hours of being informed of the deficiency). The Kelsenian definition of illegal act or delict does not provide a criterion for distinguishing, in an example like this, whether the offense consists of the action, the omission, or both. And this is a serious question since no additional stipulation on the definition can overcome this difficulty, other than acknowledging that among the many conditions for the application of a sanction, the illegal act is the one that constitutes the *transgression of a duty*. This has led Hugo Zuleta to conclude that:

> The problems Kelsen has in isolating the notion of illegal act without resorting to norms of a prohibitive nature show us that, after all, such norms may not be as superfluous as he thought. However, in that case the general theory of law should admit norms of various kinds, rather than trying to reduce them all to a single canonical structure. If this is so, the distinctive features of legal systems, as different from other normative systems, should not be sought in the structure or content of their norms, but in other attributes.[40]

36 See Alchourrón & Bulygin 1975: 104-106.

37 See also Betegón 1996: 359.

38 See Kelsen 1960: 111

39 See Nino 1980: 176.

40 Zuleta 1996: 340.

Alchourrón and Bulygin argue that in the face of the difficulties posed by the reductionist conceptions of legal norms like Kelsen´s, the advantages of defining legal systems while leaving open the question of what type of statements they contain would be evident.[41] Starting from Tarski's conception of deductive systems as sets of statements that comprise all their logical consequences, Alchourrón and Bulygin propose characterizing legal systems as deductive systems among whose consequences there is at least one norm, understood as a sentence that correlates a case with a normative consequence, and where the content of at least one norm consists of a coercive act.[42] This definition does not require a common characteristic in every statement of the system, but rather allows explaining how, along with statements that prescribe coercive acts, there are legal statements that impose obligations, prohibitions, or grant permissions but are not correlated with sanctions, and others that have normative relevance on account of their connection with other legal norms, as in the case of the many definitions that appear in legal texts. The last two kinds of statements would be legal, not because of their "essential relation" with other statements that impose sanctions, but only because they belong to a system among whose consequences there is at least one statement that correlates a case with a solution that is a sanction.[43]

One of the fundamental reasons why Kelsen assumes a reductionist conception of legal norms, and relies on the concept of sanction to characterize the remaining basic legal concepts, lies in the goal of offering a reconstruction that distinguishes law from morality, and more specifically, legal duties from moral duties. As suggested by Alchourrón and Bulygin, the thesis that a legal norm requires one to perform action *A* if and only if it correlates a sanction to the nonperformance of *A*, can be abandoned, since it is not necessary to resort to the imposition of sanctions as a characteristic shared by all legal norms. According to this idea, the existence of a legal duty depends solely on the membership of a norm of obligation in the legal system, and the way to distinguish the law from other normative systems like morality will be a function of the criteria of membership of norms in a legal system.

41 See Alchourrón & Bulygin 1975: 58-59.

42 See Alchourrón & Bulygin 1975: 54-58. This definition is not found in the English version of 1971.

43 Despite their improvement compared to Kelsenian reductionism, Alchourrón and Bulygin's definitions of legal norm and legal system are not free from shortcomings. See Caffera & Mariño 1996; Ratti 2011; and Rodríguez 2011.

4 THE NATURE OF POWER-CONFERRING RULES[44]

Recall that Kelsen takes the notions of capacity, competence, and imputation as three different names for the same concept, with the only difference being that they are used in different areas of law.[45] This idea has been challenged by Carlos Nino, who argues that in the common usage it is contradictory to say that a prohibited behavior is "authorized" or "allowed". In his view, Kelsen is right in interpreting power-conferring rules as permissions or authorizations, but wrong in identifying the notion of imputability with those of capacity and competence, since it would not make sense to speak of an authorization of the legal order to perform a prohibited act.[46] It goes without saying that the assertion that the legal order "authorizes" one to perform illegal acts, or equally, that it "allows" one to commit crimes, is counterintuitive. But this only shows that we cannot accept both that power-conferring rules are a kind of authorization or permission, and that the concept of imputability is analogous to the concepts of capacity and competence, leaving open the question of which of these two ideas should be abandoned, i.e., whether Nino is right and the inadequacy rests on the assimilation of the three notions, or whether the inadequacy rests on explaining power-conferring rules in terms of simple permissions.

There is a persistent controversy regarding the nature of power-conferring rules. Some theorists interpret them as reducible to norms that impose duties or obligations, particularly as indirect norms addressed to judges.[47] However, this characterization suffers the inconveniencies of all reductionist conceptions of norms that we have already mentioned. In particular, as is well known, one of the arguments used by Hart to reject the reductionist conceptions of norms is that it is impossible to account for the differences between sanction and nullity, given that the latter could only be adequately explained in terms of power-conferring rules.[48] The important question here is if this is compatible with considering power-conferring rules as permissive norms. According to Alchourrón and Bulygin, we cannot speak of sanctions when we refer to permissive norms, since someone who is allowed to perform an act cannot be sanctioned for not making use of such authorization. But it would not make sense either to speak of nullity when we refer to permissive norms, since the idea of nullity is only in place regarding constitutive or determinative rules. If, for example, one of the

44 Unless otherwise indicated, we will use the terms "power-conferring rules" and "norms of competence" as equivalents.

45 The notion of legal right, in those cases in which it is used to refer to the legal power to create particular norms (in a technical sense) or general norms (political rights), would also be analyzable in this line (see Bulygin 1992: 272-273).

46 See Nino 1980: 221-222.

47 See Kelsen 1945: 90-91; Ross 1958: 32.

48 See Hart 1961: 33-38.

conditions for the existence of a valid will is the signature of two witnesses, the absence of such a requirement determines the nullity of the will. Consequently, according to Alchourrón and Bulygin, Hart's argument makes it clear that power-conferring rules cannot be reduced to prescriptions of any kind.

Bulygin developed an additional argument to reject the conception of power-conferring rules as permissive norms: under that conception, a prohibition to make use of the legal power granted by another norm would give rise to a contradiction. However, in Bulygin's opinion, jurists would not admit this consequence. Cases in which a person has the legal power to perform a certain action and, at the same time, is forbidden to make use of that power, are frequent in modern legal systems. Consider a judge who signs a petition directed to a court in a legal system in which there are norms that prohibit her from doing so. Only lawyers have the legal power to sign a petition directed to a court, and though judges are lawyers, they are prohibited from acting as practicing lawyers. Therefore, in a case in which a judge signed a petition directed to a court, were power-conferring rules conceived of as permissive norms, the action would be both prohibited and permitted. However, situations like this would not be treated as antinomies in legal practice: it would be perfectly normal to have a legal power without the corresponding permission to exercise it. It seems more reasonable to say here that although the judge may deserve a sanction for what she did due to the existing prohibition, the petition should be accepted as valid.[49]

Consequently, Bulygin argues that:

> the rules that establish the competence of the legislator (in its personal, material and procedural aspect) define the concept of legislator and make the activity of legislating possible ... legislating is not a natural activity, independent of preexisting rules, but it is a pattern of behavior that is only possible because there are rules establishing which kind of conduct count as legislation and who can perform these actions.[50]

Based on these ideas, it is possible to account for the legal power to produce normative changes, and to reconstruct the structure of the statements related to such powers. We have already seen that Hohfeld clearly stated that a normative change in law can be the product of a fact that does not require the intervention of any agent, or of a fact that requires the intervention of one or more agents, and in this latter case we may say that such agent has a legal power to produce that normative change.[51] This is tantamount to saying that an agent has a legal power when her behavior is a condition, stated in a legal rule, for the production of certain normative effect. A contract, a marriage, a will, or the enactment of a legal norm are not brute facts, but *institutional facts*, to use Searle's terminology, i.e., they are interpretations of certain facts or set of facts in a given con-

49 See Bulygin 1992: 275.

50 Bulygin 1992: 283.

51 See Hohfeld 1913: 44-45.

text and according to certain rules.[52] Hence, the power of an agent to conclude a contract, to get married, to sign a will, or to enact a legal norm consists in the fact that an action or set of actions of that agent are taken by a constitutive or determinative rule in a legal system as a condition for the emergence of a valid instance of such institutions. Following Kelsen, within this generic notion of legal power it is possible to differentiate between the notion of competence in its strict sense, as the power to enact legal norms in public law, the notion of legal capacity as the power to produce legal effects in private law, and the notion of imputability as the power (not authorization) to perform an illegal act.

The reconstruction of power-conferring rules as constitutive or determinative rules is not meant to deny that such rules acquire genuine relevance due to their relation with prescriptive norms. In Hart's words:

> rules of the power conferring sort, though different from rules which impose duties and so have some analogy to orders backed by threats, are always related to such rules: for the powers which they confer are powers to make general rules of the latter sort or to impose duties on particular persons who would otherwise not be subject to them.[53]

Along the same lines, Alf Ross in his analysis of legal concepts such as "right", observed that such expressions only serve as a link between certain conditioning facts and certain legal consequences.[54] Similarly, it could be said that the legal power of an agent for the enactment of legal norms, the production of legal effects, or the modification of one's own legal positions or those of others, does not result from a single norm, but from a system of norms, sometimes simpler, sometimes more complex. Schematically, to attribute power to an agent for the production of certain legal effects requires at least two rules. On the one hand, we need a constitutive rule that determines the set of necessary and sufficient conditions for the emergence of a valid instance of a certain legal predicate P (contract, marriage, will, legal rule, etc.), a set the elements of which include a certain action A of x:

$$(C_1 \wedge C_1 \ldots \wedge C_{Ax}) \Leftrightarrow P$$

On the other hand, we need a prescriptive norm that correlates legal consequences to every valid instance of the legal predicate in question. For example:

$$P \Rightarrow OAx$$[55]

52 See Searle 1969: 52; Searle 1995: 43-45. On institutional facts, see also MacCormick & Weinberger 1986.

53 See Hart 1961: 33.

54 See Ross 1957; also Bulygin 1961.

55 For a formal analysis of constitutive rules, see Grossi & Jones 2013.

In other words, a valid instance of a certain legal predicate is a sufficient condition for the qualification of certain actions of an agent as obligatory, prohibited, or permitted, whether that agent is the same holder of the power or a different one. In practice the production of a valid instance of a certain legal predicate will not generate one, but a set of obligations, prohibitions, or permissions. There must, however, be at least one deontically qualified action correlated in a certain way to the emergence of a valid instance of a legal predicate to call the latter as such. Hansson and Makinson consider that:

> Legal codes contain predicates ... which are ostensibly descriptive, but whose content is partly or wholly determined by articles of the code itself, in a way that may be at variance with ordinary usage outside the code. Such predicates may occur on the right of one rule, and also on the left of another, in each case unmodalized by any deontic operator…They are sometimes referred to as "legal predicates". When such a predicate occurs on the right, it is usually in the form of a simple assertion or denial, and the rule is often thought of as fixing its descriptive content, whilst the rules in which such a predicate occurs on the left fix its normative implications.[56]

Hence, legal predicates appear both in constitutive or determinative rules defining the conditions to enact other norms or to produce certain legal effects, as well as in norms of conduct that prescribe their deontic consequences for the law. Although it seems wise to reserve the expression "power-conferring rules" for the former, this should not lead us to forget their connection with the latter. That is the grain of truth in those theories that propose the reduction of power-conferring rules to prescriptions.

5 NORMS AND NORM-PROPOSITIONS

In his own works, and in those in collaboration with Carlos Alchourrón,[57] Bulygin always drew attention to the ambiguity of deontic expressions, pointing out that deontic terms may be used to express genuine norms, or to express that something is obligatory, prohibited, or permitted according to a certain set of norms. Suppose someone says: "Smoking is prohibited here". This sentence may be formulated by someone in a position of authority, in which case it expresses the prescription not to smoke, but it may also be formulated by someone with no authority whatsoever, in which case it simply states that a certain authority has enacted a prescription not to smoke. In the first case, the deontic sentence expresses a norm, while in the second it expresses a *norm-proposition*.[58] According to Bulygin, norms lack truth values, while norm-propositions are

56 Hansson & Makinson 1997: 327.

57 See Alchurrón & Bulygin 1975, Alchurrón & Bulygin 1983, Alchurrón & Bulygin 1988, Bulygin 1982, Bulygin 1985, Bulygin 1995, Bulygin 2010.

58 See Bulygin 1982: 169-170.

true or false metalinguistic statements referring to norms and predicating certain characteristics of them.[59]

In *Normative Systems* Alchourrón and Bulygin emphasize this ambiguity of deontic terms in general, and of the expression "permission" in particular.[60] Like the other deontic operators, "permitted" is an expression that can appear in a genuine norm or in a norm-proposition. In the first case, i.e., under a prescriptive interpretation, permitting an action is equivalent to not prohibiting it. Hence, a permissive norm may be equivalently expressed as *PA* ("It is permitted to A"), as *~PhA* ("It is not prohibited to A"), or as *~O~A* ("It is not obligatory to refrain from A"). In the second case, when "permitted" appears in a norm-proposition, it becomes ambiguous since there are two alternative senses in which an action can be said to be permitted according to a certain normative system. An action can be qualified as permitted simply because it has not been prohibited, but it can also be qualified as permitted because a normative authority has expressly authorized its performance. Therefore, it is necessary to distinguish two descriptive notions of permission, one negative and one positive, which Bulygin defines as follows:

> Definition of *negative permission*: *p* is permitted in the negative or weak sense in α = df. α does not contain any rule prohibiting *p*.
>
> Definition of *positive permission*: *p* is permitted in the positive or strong sense in α = df. α contains a rule that permits *p*.[61]

Alchourrón and Bulygin have shown that this ambiguity is due to the existence of two types of negation of norm-propositions: internal negation and external negation. Suppose action *A* is prohibited in a certain normative system S. The internal negation of such a statement means that a norm that is the negation of the original one, i.e., *~PhA*, belongs to *S*, what results in a positive permission. On the other hand, the external negation of the statement in question affects the entire norm-proposition, which is tantamount to saying that the norm *PhA* does not belong to *S*, what results in a negative permission.[62] Formally:

Negative permission: $P^{-}{}_{S}A \Leftrightarrow PhA \notin S$

Positive permission:: $P^{+}{}_{S}A \Leftrightarrow {\sim}PhA \in S \Leftrightarrow PA \in S$

59 See Bulygin 1995: 132-134.

60 See Alchourrón & Bulygin 1975: 119-134, 191 ff.

61 Bulygin 2010: 284.

62 See Alchourrón & Bulygin 1975: 124; Bulygin 2010: 284-285.

It is important to note that Kelsen saw the difference between these two notions of permission when examining the different senses of the expression "legal right". As mentioned, Kelsen makes a valuable contribution by distinguishing different senses this expression assumes. In fact, if we compare Kelsen's and Hohfeld's reconstructions, Kelsen only omits taking into account the Hohfeldian categories of no-right, immunity, and liability. The notions of right as a correlate of a duty, as liberty, and as power, are clearly differentiated in the *Pure Theory of Law*. But Kelsen adds to these notions what he calls as a *technical* meaning of the expression "legal right", as synonymous with a procedural action, as well as political rights and constitutionally protected liberties. On the other hand, Kelsen clearly distinguishes a merely negative permission in case of the absence of a prohibition, from an explicit authorization to perform a given act. However, this important remark is overshadowed by the fact that Kelsen seems to forget this latter difference when he claims that legal systems are necessarily closed by virtue of the principle according to which everything that is not legally prohibited is legally permitted.

Alchourrón and Bulygin highlight that when the distinction between norms and norm-propositions is considered, the principle "everything that is not legally prohibited is legally permitted" admits different readings. If the principle is understood as a genuine norm that authorizes those actions that have not been prohibited, it does not make sense to claim that it expresses an analytical truth, since norms lack truth values. Moreover, there is no reason to think that such a norm should be part of any conceivable legal system. If the principle is not interpreted as a norm but as a norm-proposition, the expression "permitted" contained in it can be understood as referring to a positive permission or to a negative permission, and consequently in this case there would still be two versions of the principle. In a merely negative version, the principle would express that if a normative system does not contain a norm prohibiting action *A*, then *A* is permitted in a negative sense in the system. On this reading the principle expresses an analytical truth, a particular case of the principle of identity. However, on this reading the principle does not preclude the possibility of legal gaps, since it only expresses the trivial truth that if the normative authority has not regulated a given action, it has been left unregulated. In a positive version, by contrast, the principle expresses that, for any normative system, if it does not contain a norm prohibiting action *A*, then *A* is permitted in a positive sense in the system. In this version the principle would guarantee the absence of legal gaps, but far from being an analytical truth, it would express a merely contingent one. Only regarding those legal systems that contain a norm to that effect, i.e., a norm expressly and residually authorizing all actions that have not been prohibited, would it be true that what is not legally forbidden is legally permitted in a positive sense.

Unlike Kelsen, as we pointed out, Hohfeld does not assume that existing legal systems are necessarily complete and consistent.[63] This is undoubtedly a great merit of his theory, and it allows him to avoid some serious confusions.

The distinction between norms and norm-propositions is central for the subject we are dealing with, since it shows that the use of the same normative expressions, such as "obligatory", "prohibited", "permitted", "right", "duty", etc., does not necessarily imply identity in meaning. In particular, it shows their different scopes when they are used to formulate norms, and when they are used to express propositions about norms, and that even in the latter case their use may lead to ambiguities.[64]

6 AN ALTERNATIVE RECONSTRUCTION: A SKETCH

The rudiments of an alternative reconstruction of the fundamental legal concepts can be outlined with the help of the clarifications arising from the analysis made so far. Starting from the concept of legal duty instead of legal sanction, rejecting the assimilation of power-conferring rules to prescriptions, and acknowledging the distinction between norms and the propositions referred to them, it is possible to harmonize in their salient features the contributions of Kelsen and Hohfeld.

First, although expressions such as "obligation" and "duty", when they appear in norm- formulations, are used to ascribe duties to certain subjects,[65] the concept of "legal duty" as used by legal theorists and legal dogmatists to formulate norm-propositions should be characterized by reference to the membership in a legal system of norms of obligation.

The most elementary idea of a legal duty (or delict) in this latter sense is to claim that agent *x* has the legal duty to perform action *A*[66] (or commits a delict or illegal act if she performs action *A*) in accordance with the norms of a legal

63 For a critical view on Hohfeld's ideas on this point, see Lindahl 1977: 28-29.

64 To argue that the theory of basic legal concepts is located, as stated in the text, at the level of norm-propositions and not at the level of the norms themselves, does not mean to deny either that references to rights, duties, and other legal concepts can also appear in norms, or that there are no adscriptive (cf. Hart 1948) or performative (Olivecrona 1971) uses of them.

65 See also Guastini 2014: 89-91.

66 In this outline of a reconstruction of basic legal concepts, they will be presented as relative to actions and not to the results of actions or states of affairs. Distinguishing actions from their results may be necessary in this domain to account for many subtleties of the language of law, and in order to do so a possible tool is the one introduced by Kanger and Lindhal, i.e., an action operator of the *stit* ('see to it that') type. For simplicity, we will disregard this complication here. On the distinction between a logic of what must be done, i.e., a deontic logic relative to actions, and a logic of what should be the case, i.e., a deontic logic relative to results of actions, see von Wright 1983, Forrester 1996, and Horty 2001, among others.

system S if and only if a norm imposing on *x* the obligation (prohibition) to do *A* is derivable from *S*. However, in order to present its relations with the other basic concepts, it is preferable to offer a characterization of the notion of legal duty (and of delict) *relative to another agent*:[67]

$$LD_S(x, y, A) \Leftrightarrow O(x, y, A) \in \mathrm{Cn}(S)$$
$$IA_S(x, y, A) \Leftrightarrow O(x, y, \sim A) \in \mathrm{Cn}(S) \Leftrightarrow Ph(x, y, A) \in \mathrm{Cn}(S)$$

On this view, to claim that agent *x* has the *legal duty* (*LD*) to perform action *A* regarding another agent *y* in accordance with the norms of a legal system *S* is equivalent to saying that a norm that imposes on *x* the obligation to do *A* with respect to *y* is a consequence (is logically derivable) in legal system *S*, and to claim that agent *x* commits a *delict* or *illegal act* (*IA*) when performing action *A* regarding another agent *y* in accordance with the norms of a legal system *S* is equivalent to saying that a norm that imposes on *x* the obligation to refrain from (the prohibition of) doing *A* with respect to *y* is a consequence (is logically derivable) in legal system *S*. Therefore, the notions of illegal act and legal duty are interdefinable as follows:

$$IA_S(x, y, A) \Leftrightarrow LD_S(x, y, \sim A)$$

Second, when it comes to the notion of legal right, though the expression is often used to refer to complex combinations of different legal situations, it is necessary to differentiate at least the following three groups of concepts: *liberties* (privileges, permissions), *rights correlated to duties* (claim-rights, rights in the strict sense), and *rights as procedural actions* (rights in a technical sense).

Within the category of liberties (privileges, permissions), a simple notion must be distinguished from a double or *full* notion of liberty,[68] on the one hand, and a positive and a negative notion of each of them, on the other. Here, again, the most basic notion of liberty is to claim that agent *x* has the liberty to perform action *A* in accordance with the norms of a legal system *S* if and only if such action is permitted according to *S*, and then to distinguish the positive and negative notions, and the simple and full notions of permission. However, for

67 This idea does not involve the adoption of any substantive position as to whether, in each case, non-relational notions of the concepts reconstructed here are more basic or appropriate. For example, while the notion of claim-right seems paradigmatically relational, in the case of liberties, at least at first sight, the most basic notions seem to be non-relational.

68 See Guastini 2014: 93.

the reasons already indicated, we will offer here a characterization of these different notions of liberty *relative to another agent*:

Simple liberties:

$$P^{+}{}_{S}(x, y, A) \quad \Leftrightarrow \quad \sim O(x, y, \sim A) \in \mathrm{Cn}(S) \quad \Leftrightarrow \quad P(x, y, A) \in \mathrm{Cn}(S)$$
$$P^{-}{}_{S}(x, y, A) \quad \Leftrightarrow \quad O(x, y, \sim A) \notin \mathrm{Cn}(S) \quad \Leftrightarrow \quad \sim P(x, y, A) \notin \mathrm{Cn}(S)$$

Full liberties:

$$F^{+}{}_{S}(x, y, A) \quad \Leftrightarrow \quad \sim O(x, y, A) \in \mathrm{Cn}(S) \wedge \sim O(x, y, \sim A) \in \mathrm{Cn}(S)$$
$$F^{-}{}_{S}(x, y, A) \quad \Leftrightarrow \quad O(x, y, A) \notin \mathrm{Cn}(S) \wedge O(x, y, \sim A) \notin \mathrm{Cn}(S)$$

According to this, while a simple liberty consists in the qualification of a certain action as permitted but without any qualification of the abstention of such an action, a full liberty consists in the qualification as permitted of both an action and its abstention. Still, to claim that a certain action is qualified as permitted according to a certain normative system is, as Alchourrón and Bulygin pointed out, an ambiguous statement that can mean either the absence in the system of a prohibitive norm (negative permission), or the presence in the system of a permissive norm (positive permission).

The four concepts of liberty resulting from these distinctions can be defined as follows:

(1) To claim that agent *x* has a *simple positive liberty* to perform action *A* regarding another agent *y* in accordance with the norms of legal system *S* is equivalent to saying that a norm to the effect that it is not obligatory for *x* to refrain from doing *A* regarding agent *y* (or, equivalently, a norm that permits *x* to do *A* with respect to *y*) is a consequence (is logically derivable) in legal system *S*.

(2) To claim that agent *x* has a *simple negative liberty* to perform action *A* regarding another agent *y* in accordance with the norms of legal system *S* is equivalent to saying that a norm that imposes on *x* the obligation to refrain from doing *A* regarding *y* (or, equivalently, a norm that does not permit *x* to perform *A* with respect to *y*) is not a consequence (is not logically derivable) in legal system *S*.

(3) To claim that agent *x* has a *full positive liberty* to perform action *A* regarding another agent *y* in accordance with the norms of legal system *S* is equivalent to saying that a norm to the effect that it is not obligatory for *x* to perform *A* with respect to *y*, as well as a norm to the effect that it is not

obligatory for *x* to refrain from doing *A* regarding *y*, are consequences (are logically derivable) in legal system *S*.

(4) To claim that an agent *x* has a *full negative liberty* to perform action *A* regarding another agent *y* in accordance with the norms of legal system *S* is equivalent to saying that a norm that imposes on *x* the obligation to perform action *A* regarding *y*, as well as a norm that imposes on *x* the obligation to refrain from *A* with respect to *y*, are not consequences (are not logically derivable) in legal system *S*.

These four categories of liberties might be called *naked liberties*, to differentiate them from *protected liberties*. A liberty can be protected in at least two different ways. On the one hand, the enactment of a permissive norm at a certain normative level can entail (and is usually interpreted to entail) the incompetence or disability on the part of lower authorities to *normatively interfere* with its exercise, i.e., to enact incompatible rules.[69] On the other hand, both positive and negative liberties (simple and full) can be accompanied by prohibitions, either with respect to State organs or to individuals, to *factually interfere* with their exercise, i.e., to perform actions that disturb or prevent their exercise. Of course, these protective mechanisms are merely contingent.[70]

The idea of legal rights as correlative to legal duties, i.e., claim-rights, for which we will strictly reserve the expression "legal right", can be defined as follows:

$$LR_S(x, y, A) \quad \Leftrightarrow \quad O(y, x, A) \in \mathrm{Cn}(S)$$

Consequently, to claim that agent *x* has a *legal right* (*LR*) regarding another agent *y* to perform action *A* in accordance with the norms of a legal system *S* is equivalent to saying that a norm that imposes on *y* the obligation to perform *A* with respect to *x* is a consequence (is logically derivable) in legal system *S*. Thus, the notions of legal right and legal duty are interdefinable:

$$LR_S(x, y, A) \quad \Leftrightarrow \quad LD_S(y, x, A)$$

It is important to note that there are no legal rights as correlatives of duties that are not relative to another agent. On the other hand, the Hohfeldian notion of no-right can be characterized as the negation of a legal right as a correlate of a legal duty:

69 In other words, (simple or full) positive liberties can be protected in this way. By contrast, it does not seem possible to associate negative liberties with this kind of protection.

70 See Guastini 2014: 93.

$$\sim LR_S(x, y, A) \quad \Leftrightarrow \quad O(y, x, A) \quad \notin \quad \mathrm{Cn}(S)$$

This means that to claim that agent *x* has a *no-right* (does not have a legal right) regarding *y* to perform action *A* in accordance with the norms of legal system *S* is equivalent to saying that a norm that imposes on *y* the obligation to perform *A* with respect to *x* is not a consequence (is not logically derivable) in legal system *S*.

Guastini has remarked that since the notion of no-right is defined as the negation of the notion of claim-right, in the same way as the notion of liberty is defined as the negation of the notion of legal duty or obligation, two different senses of no-right should be distinguished: a merely negative one, when no norm in the system grants an agent a claim-right, and a positive one, when there is a norm in the system that *"…explicitly denies or substracts a (previously granted) claim-right…"*[71] This idea is unquestionable from a formal point of view, but since the notion of no-right has no use in ordinary language, those two notions introduced by Guastini have even fewer correlates.

Rights as correlative to duties can also be protected through different techniques, generally referred to as *guarantees*.[72] These guarantees include the notion of right as a procedural action, which as Kelsen suggests, can be characterized as a kind of the genre of legal powers. Consequently, we should first examine how to reconstruct legal powers. If we accept, following Bulygin, that legal powers cannot be satisfactorily explained in terms of norms of conduct or prescriptions, but require appeal to constitutive rules, then neither the notion of legal power nor any of the other Hohfeldian concepts associated with it, i.e., liability, disability and immunity, would be directly reducible to the membership of norms of obligation in the legal system of reference.

Without ruling out here either the possibility of a more basic notion of legal power (and its associated concepts) of a non-relational kind, we may say that to claim that agent *x* has, according to the norms of a legal system *S*, the *legal power* (*LP*) regarding another agent *y* to perform a certain normative action *AN*, i.e., an action whose result is the modification of certain normative consequences derivable from *S*, is equivalent to saying that a constitutive rule that is a consequence of *S* determines the performance of *AN* by *x* as one of the conditions for the production of a valid instance of a certain legal predicate *P*, to which at least another derivable norm of *S* links a certain normative consequence with respect to *y*. In a rough formal presentation:

71 See Guastini 2014: 85.

72 See, for example, Ferrajoli 2001.

$$LP_S\,(x, y, AN) \quad \Leftrightarrow \quad ((ANx \wedge ...) \Leftrightarrow P) \in \mathrm{Cn}(S) \wedge (P \Rightarrow OAy) \in \mathrm{Cn}(S)$$

This generic notion of legal power encompasses the *competence* to produce other legal norms, the *capacity* to conduct legal business or to be the holder of rights and obligations, as well as the *imputability* to be the author of an illegal act.[73] The notion of *responsibility* is also subsumable within this basic type of legal power, as the aptitude to be the subject of a sanction, as well as that of right as procedural action, as already mentioned. In this sense, we may say that agent *x* having a *right as a procedural action* regarding another agent *y* in accordance with the norms of a legal system *S* is equivalent to saying that an action of *x*, consisting of filing a civil or criminal lawsuit, is determined by a constitutive rule derivable from *S* as a condition for the production of certain normative effects with respect to *y*, in particular for the imposition of a sanction on *y* for having failed to comply with her legal duty.

To claim that agent *x* is *liable* to the legal power of another agent *y* regarding a certain normative action *AN* in accordance with the norms of a legal system *S* is equivalent to saying that *y* has a legal power with respect to *x* to perform *AN* in accordance with the norms of legal system *S*. To claim that agent *x* has a *disability* with respect to another agent *y* regarding a certain normative action *AN* in accordance with the norms of a legal system *S* is equivalent to saying that regarding *y, x* does not have the legal power to do *AN*, i.e., that the constitutive rules derivable from *S* do not determine the performance of *AN* by *x a*s one the conditions for the production of a valid instance of certain legal predicate *P*, to which another derivable norm of *S* links certain normative consequences with respect to *y.* Finally, to claim that agent *x* has an *immunity* with respect to another agent *y* regarding a certain normative action *AN* in accordance to the norms of a legal system *S* is equivalent to saying that *y* has a disability with respect to *x* regarding *AN* in accordance with the norms of *S*.

Regarding these latter two notions, it could be claimed that just like the notions of liberty and no-right derive from the negations of the concepts of legal duty and right and, consequently, each of them may lead to two different versions, one positive and one negative, the same could be the case with the concepts of disability and immunity. Thus, Guastini remarks that the disability of an agent may derive from the simple absence in the system of a power-conferring rule (negative disability) or from the existence in the system of a rule depriving her of a previously granted power (positive disability). Analogously, the immunity of an agent may derive from the absence of a rule imposing on her a liability (negative immunity) of from the existence in the system of a rule liber-

73 The prevailing legal use seems to privilege non-relational notions of capacity and imputation.

ating her from a previously imposed liability (positive immunity).[74] Similarly, María Beatriz Arriagada distinguishes strong and weak immunities/disabilities following these criteria: an agent *y* has a strong immunity with respect to another agent *x* regarding the normative status of action *A* if and only if there is a norm in the legal system enacted by a hierarchically higher authority with respect to *x* that imposes on x a disability to alter the normative status of *A*, and an agent *y* has a weak immunity with respect to another agent *x* regarding the normative status of action *A* if and only if there is no norm in the legal system assigning *x* the legal power to alter the normative status of *A*.[75]

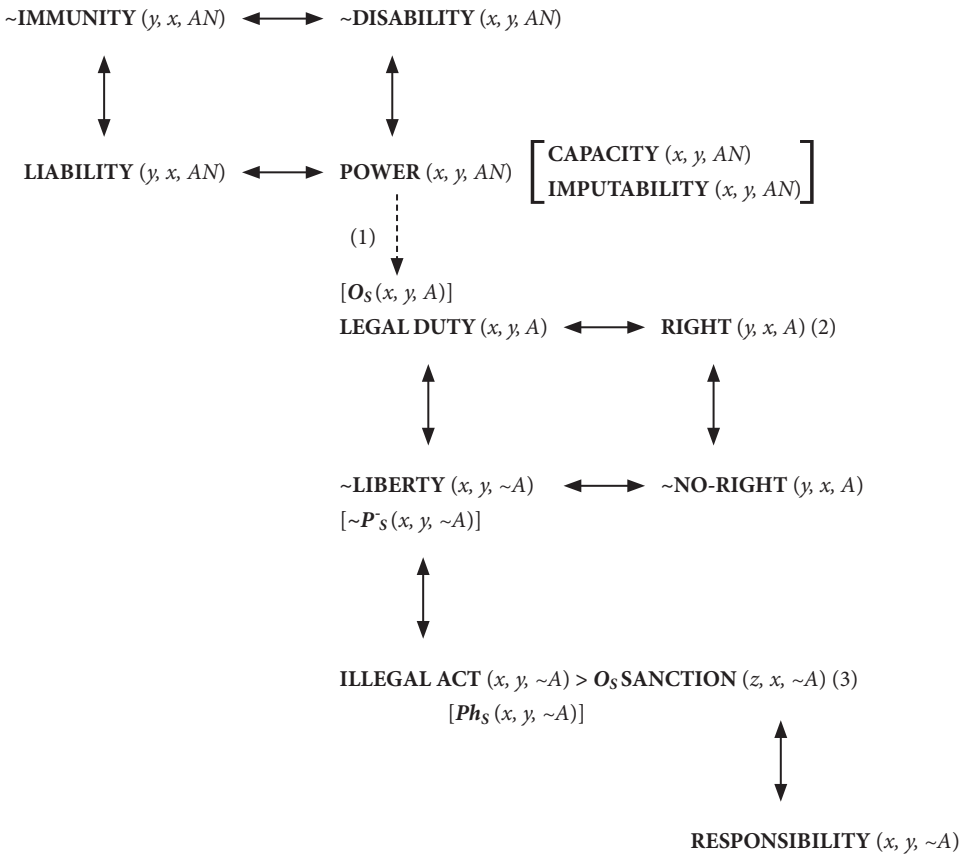
The conclusions of these brief remarks are outlined in the table on the next page.

Double arrows indicate equivalence or biconditional relations, while the simple arrow indicates a relation of material or conditional implication. The dotted arrow indicates that the implication relation depends on the satisfaction of the condition expressed in (1). The symbol > represents a defeasible conditional, i.e., a conditional whose antecedent only expresses conditions that are normally (but not always) sufficient for the derivation of its consequent.

Hohfeld's and Kelsen's reconstructions are combined here, albeit with various modifications. Contrary to Hohfeld, we clearly express that the legal duty of *x* with respect to *y* to perform action *A* is not equivalent, as Hohfeld seems at times to claim, to the absence of a liberty of *x* with respect to *y* to perform action *A*, but to refrain from *A*.

74 Cf. Guastini 2014: 86.

75 Cf. Arriagada 2018. These two notions of immunity/disability would make perfect sense if power-conferring rules were understood as permissions, since positive and negative disability would then be perfect correlates of the notions of positive and negative permission. But if such a view is rejected, as we have tried to justify here, the distinction is less clear. It seems undeniable that *x* has an immunity with respect to *y* regarding certain normative action *AN* if there is no norm in the system enacted by a hierarchically higher authority granting *y* the power to perform *AN* regarding *x*, i.e., what Arriagada calls weak immunity. But how could a hierarchically higher authority "impose a disability" on *y* to alter the normative status of *x* through a certain normative action? Either that authority enacts a norm imposing a prohibition on *y* to exercise such a power, something that, as we saw, is compatible with –and even presupposes– the existence of the rule granting that power to *y*, or the disability of *y* is imposed by the higher order authority simply by not enacting a norm conferring such power on *y*, in which case positive disability collapses with negative disability.



(1) Only if *x* in fact exercises her legal power to perform *AN*.
(2) No deontic operator corresponds to the concept of legal right as a correlate of a legal duty, save in the sense that, if *y* has, according to the S system, a legal right regarding *x* to ~*A*, this is equivalent to saying $\boldsymbol{O_S}$ (*x*, *y*, ~*A*).
(3) It is assumed that *z* has the legal power to impose a sanction on *x*.

On the other hand, and here in accordance with Hohfeld, it is not assumed that the legal duty of *x* with respect to *y* to perform *A* implies the liberty of *x* with respect to *y* to perform *A*. The liberty in question is a simple negative liberty, i.e., the absence of prohibition to perform action *A*, and thus if this duty implied liberty, this would involve that the duty to perform *A* would imply the absence of a prohibition to perform *A*. However, that would only be the case if the normative system under consideration were consistent, which constitutes a merely contingent characteristic of legal systems. We also claim that the valid exercise of a legal power produces a modification in the normative solutions

derivable from the legal system, linking the first group of Hohfeldian concepts with the second.

Contrary to Kelsen, the basic legal concept here is legal duty, and the concept of illegal act or delict is defined as the legal duty to refrain from an action. Sanctions are a typical but not necessary consequence of the commission of an illegal act, and must be defined in terms of this latter notion, not the other way around, as Kelsen did. In accordance with Kelsen, however, the notions of capacity and imputability can be assimilated to that of competence, and the notion of responsibility can be characterized as the aptitude to being sanctioned.

The rejection of a reductionist view of legal norms, the advantages of considering power-conferring rules, not as prescriptions, but as constitutive rules, as well as the distinction between norms and norm-propositions, are key elements of this alternative reconstruction of the basic legal concepts, which preserves the systematic character of classical theories, but offers greater explanatory power since it not only accounts for the internal and relational functioning of them, but is articulated with a more plausible conception of legal systems and norms, in accordance with the characteristics of contemporary law.

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