

QUESTIONING THE NATURE OF GAPS IN THE LAW [(ORGANIC) GAPS IN THE LAW]*

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Abstract. The basic question is whether and in what sense it is possible to speak about gaps in the law. If we disagree with Kelsen's thesis that the nature of gaps in the law is that of an ideological formula, then we have to define them legally and to find the criteria regarding how they can be filled. It is also important that incompletenesses as regards contents – Hart treats them as “*open texture*” – are organic (natural, inevitable) parts of laws. The Slovene Courts Act is in accord with this thesis and for that very reason provides – the provision was written by the author of this paper – that “*the judge has to decide in such a way as if he had in front of him an indefinite number of equal cases*” (Art. 3/3).

Key words. Gap in the law, organic gap in the law, “*open texture*”, equality, generalization principle, abuse of law, analogy.

1. (Non)existence of gaps in the law

Perhaps it would be simpler to agree with Kelsen and accept his thesis that the legal order does not contain any gaps and that in the moment of legal decision-making in concrete cases this legal order can always be applied. It is logically unacceptable to say that the legal order does not contain an adequate solution. For example, the legal order determines at the very least that the defendant is not bound by certain obligations and therefore the judge must apply the negative rule and state that the claim is not well founded. Thus gaps in the law do not mean that “*the application of the actually valid law is logically impossible*”; rather, for an advocate of gaps in the law, the application of the valid law is “*legally-politically inadequate*”¹.

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¹ H. KELSEN, *General Theory of Law and State*, Cambridge-Massachusetts, 1945, pp. 146-149; Kelsen 1983, pp. 251-255.

If legal decision-making depended only on formal-logical conclusions, I would gladly agree with Kelsen and quickly find that the legally free space begins where the valid sources of law do not contain adequate legal rules on how to behave in concrete cases. I do not suggest that this conclusion is not in part true, but it can only be true when the legally relevant space is defined and when all those areas where it does not contain legal rules or is porous, ambiguous, indefinite, doubtful, unclear, etc. have been filled. For this reason I find it much more productive to accept the thesis of the existence of gaps in the law and to consider them in a positive way. Only then it is possible to reach a point that will enable us to differentiate legally allowed, required, and forbidden behaviour from legally empty, i.e. legally irrelevant (and thus free) behaviour, which does not fall within a gap in the law that the competent state authority (e.g. the judge) may legally fill.

One will only speak of a gap in the law when a legally unregulated case has *legally relevant characteristics* that should be legally regulated by law. This observation is all the more convincing insofar as the following three characteristics of a gap in the law can be established: (1) *it is an incompleteness in the law which is not left unregulated intentionally for reason of concerning an object of free human behaviour*; (2) *it is an incompleteness which fulfilment conforms with the principles of legal regulation in a certain country*; (3) *it is an incompleteness which reveals at the same time a void (lacuna) in a certain narrow area of the law (in a particular branch of the law and especially in its component parts).*

The answers to these three questions determine whether one can speak of a gap in the law in a certain case. It does not suffice that only one or two elements of incompleteness are present; a gap in the law (in the legal sense of the expression) requires all three elements. Otherwise the line between the legally relevant and legally irrelevant (free behaviour) would be blurred and – *volens nolens* – we would have a state of affairs in which only matters expressly defined as such would lie within the domain of free human behaviour.

2. Kinds of gaps in the law

Gaps in laws (e.g. in statutes) are *gaps in the narrow (real) sense of the word*. The German legal philosopher Canaris speaks of "*planwidrige Unvollständigkeit innerhalb des positiven Rechts*". They are "*gaps in the*

execution of the legal design"². Because such a gap is only an incompleteness in a structure that, as a whole, has been designed and realized, it is possible to act legally in every respect. The duty of the competent state authority (e.g. the judge) is (1) to proceed from the design of the legislature, (2) to establish, in accordance with the basic principles of this design where and to what extent it is incomplete, and (3) to fill this incompleteness on the basis of legal rules and principles as formulated by the legislature. If the competent state authority really acts in such a manner, it only executes in more detail what has already been designed by the legislature, and it remains faithful to the logic of the law as regards its content, and to the derivations thereof. A lawyer deciding in accordance with the starting points of the statute, with the established practice of the courts, with established legal doctrine, and with the principles of the legal culture, etc., acts in an essentially more legal manner than one leaning on uncertain legal terms and reserve clauses and interpreting them in a political way and in accordance with the pragmatic interests of the day.

In addition to gaps in laws (statutes), there are at least two further kinds of gaps. On the one hand, there are gaps that transcend the statute itself because legal regulation is lacking in certain legal areas. *These gaps could be called gaps in the law in the broad sense of the word.* Such gaps are typical of countries in the process of formation or of those where the type of legal system has essentially or completely changed. In the former Yugoslavia and in Slovenia we encountered gaps of this type in the years 1918, 1945, and 1991.

Of no lesser importance are gaps at the other end of the spectrum of meanings, which can be defined as *gaps in the law in the figurative sense of the word.* These gaps are an inevitable consequence of the fact that a statute can only foresee what is typical, average, and normal in a certain society, whereas it cannot foresee in a totally definite way what the legal decision in a unique and historically unrepeatable real-life case should be. The gap between these two levels is filled by the interpretation of the statute and the problems arising are reminiscent of the classical gaps in statutes and may even exceed the latter.

² C-W. CANARIS, *Die Feststellung von Lücken im Gesetz*, 2nd ed. Berlin, 1983, p. 198.

3. Gaps in the law in the figurative sense of the word

Gaps in the law in the *figurative* sense of the word are gaps in the statute that can only be called such at a symbolic level because such gaps cannot be avoided even in the most perfect statute. Such gaps are an inevitable companion of legal decision-making and are an intrinsic part of the nature of modern law. They have occurred, are occurring, and will occur because general and abstract legal rules can only foresee what is *typical, normal, and average*, and at the same time they are applied to real-life cases that are always unique, individual, and historically unrepeatable.

The normative starting point of decision-making is also a space open regarding its meaning [Hart speaks about "*open texture*"³. In this context the statute is not a synonym for the law that can be just repeated with regard to a concrete case. This has to do with legal valuation – which is situated in the relation between the normative starting point at one end and the factual (also imaginary) starting point at the other end. The opposed poles require a synthesis (a legal decision), yet they are not self-defining nor can they completely lean against each other because they are both, at least to a certain extent, open as regards their meanings.

Hart very aptly states that legal rules have "*a fringe of vagueness*" surrounding "*a core of certainty*". There are always "*clear central cases*", to which the legal rule certainly refers, and cases with "*a penumbra of doubt*", where one can also find reasons for an opposite statement⁴. There are especially two reasons for this openness. The first obstacle is »our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. "*If the situation were such, we could*" make rules, the application of which to particular cases never called for a further choice. "*This would be a world of 'mechanical' jurisprudence*"⁵.

Into this open space of the statute as regards its meaning and of life cases that are the subject of decision-making, the theory of interpretation and argumentation in law enters. These discussions are important for the debate about legal gaps because legal gaps in the figurative sense of the word may be much more demanding than

³ H.L.A. HART, *The Concept of Law*, 2nd ed. with a Postscript edited by P.A. BULLOCH and J. RAZ, Oxford, 1994, pp. 128 ss.

⁴ *Ivi*, p. 123.

⁵ *Ivi*, p. 128.

discovering and filling classic gaps in the law. What are especially sensitive are *uncertain terms and those that are very porous with regard to their meaning*.

This sensitivity is greater if legal institutions or even legal fields that should be relatively certainly regulated are involved. Uncertain terms and terms porous *with regard* to their meaning may even seem to *circumvent the prohibition that no classic legal gaps may exist* in certain legal fields (especially in criminal law). In such cases we are already beyond the looseness of legal regulation that may still be considered allowed. A classic example is the violation of the principle *Nullum crimen nulla poena sine lege certa*.

Legal gaps in the figurative sense of the word are only allowed on condition that they do not break the degree of certainty that is obligatory for particular legal fields. If one can say about classic legal gaps that they are incompletenesses in the execution of the legal design, legal gaps in the figurative sense of the word are "*intentional incompletenesses*". They are intentional uncertainties that are only allowed to the limit permitted by the constitutional and legal design. It is of essential importance whether the intentional uncertainty can be bridged by other foreseeable measures to which the statute refers (e.g. by referring to equity and good faith in civil law). If even this is not foreseen, *one cannot speak of foreseeable legal regulation* any more, which is *an essential element of a state governed by the rule of law*.

4. Instead of a conclusion

Kelsen's remark that legal gaps are an ideological construct does not correspond to legal reality, which cannot avoid incompletenesses in the execution of the legal design. In his own way, Kelsen is in conflict with himself. The theory of the hierarchical structure of the legal system⁶ realizes that the creator of a legal act (e.g. of a judgement) always moves within a certain normative framework that is neither completely certain nor completely uncertain. "*Creation of law is always application of law. These two concepts are by no means, as the traditional theory presumes, absolute opposites*"⁷.

The theory of the hierarchical structure of the legal system clearly confirms that the law contains passages that are empty with regard to

⁶ H. KELSEN, *Reine Rechtslehre*, Leipzig, Wien, 1934, pp. 74 ss., H. KELSEN, *Reine Rechtslehre*, 2nd ed. Wien, 1960, pp. 228 ss.

⁷ H. KELSEN, *Hans, General Theory of Law and State*, Cambridge-Massachusetts, 1945, p. 133.

their meaning. Kelsen would be more consistent if he theoretically acknowledged the existence of legal gaps and placed them in the system of the pure theory of law in an appropriate manner. The purity dictates that legal gaps are descriptively recognized and analyzed without explaining how they could be filled with regard to their contents (in a prescriptive way). It is not the responsibility of the pure theory of law to provide statements about the legal-political content of the law; it is within its nature to maintain the law as a scheme with meaning, including the gaps contained in this scheme.

Nevertheless, Kelsen has to be listened to carefully. Legal gaps – irrespective whether we reject or accept them – are always closely connected to human freedom. The knowledge that legal gaps are an organic (natural, unavoidable) part of the law dictates that they must be discovered and filled in a manner that best corresponds to the design of the law in a certain state community. It is necessary to discover the guiding principles of the legal system and then fill the gap in accordance with these guiding principles. If the guiding principles of the legal system do not provide a reliable support, one can no longer speak about incompletenesses in the legal design, but about novelties that change the design of law. Any deviation from the design, however, is the responsibility of the legislature and not of the judiciary or the administration, which are subordinate to statute.

This logic, i.e. that the design of the law has to be followed, is also accepted by modern civil codes that define how one should react to legal gaps.^{***} It is in the nature of things that also these instructions are

^{***} Compare with: § 6 ABGB (*“Einem Gesetze darf in der Anwendung kein anderer Verstand beigelegt werden, als welcher aus der eigentümlichen Bedeutung der Worte in ihrem Zusammenhange und aus klaren Absicht des Gesetzgebers hervorleuchtet”*) and § 7 ABGB (*“Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft, so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden”*); Art. 1 ZGB [*“(1) Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält./ (2) Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde./ (3) Er folgt dabei bewährter Lehre und Überlieferung”*]; Art. 12 Codice civile (*“Nell’applicare la legge non si può ad essa attribuire altro senso che quello fatto palese dal significato proprio delle parole secondo la connessione di esse, e dalla intenzione del legislatore (1362, 1363 c. c.)/ Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che*

subject to interpretation and are in a certain sense also an object of the continued development of law (Germ. "*Rechtsfortbildung*"). If the task of the statute is to foresee typical ways of behaviour, it is also the task of the interpreter (e.g. the judge) to standardise concrete cases.

If such standardisation did not take place, the decision-making in concrete cases would be arbitrary. The Slovenian Courts Act provides that "*the judge has to decide in such a way as if he had in front of him an indefinite number of equal cases*" (Art. 3/3). Another question is whether it is really necessary to write this down in such a special and explicit manner because the same result is achieved by applying the principle of generalisation that is incorporated in the principle of equality before law. It is certainly of essential importance that any deviation from the principle of equality before the law appears arbitrary and is not in accordance with the principle of equality or of difference, which is just the other side of the same coin.

Here a new story begins, which requires a new treatise. If it is ever written, it will be based on the fact that formal justice is always additionally charged with the question of *the equal treatment of legal subjects* and that *established court practice is a condition of lawfulness* in continental law as well. It is in the nature of the law that formal justice accompanies all kinds of justice. With all kinds of material justice there is the question of applying the appropriate standard of material law only to persons belonging to the same group of legal subjects. Judges, for example, who do not rise above the concrete case and

regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato.») See also Slovenian Courts Act, Art. 3/2 ("*Wenn eine Zivilrechtsangelegenheit nicht aufgrund geltender Vorschriften gelöst werden kann, berücksichtigt der Richter Vorschriften, die ähnliche Fälle regeln. Wenn die Lösung der Angelegenheit trotzdem rechtlich zweifelhaft ist, entscheidet er in Einklang mit den allgemeinen Prinzipien der Rechtsordnung im Staat. Dabei handelt er gemäß der Rechtstradition und den festen Erkenntnissen der Rechtswissenschaft*") and Art. 3/3 ("*Der Richter handelt immer so, als ob er eine unbestimmte Anzahl von gleichartigen Fällen vor sich hätte*"). – The precise reader certainly saw that the Swiss ZGB did not mention the statutory analogy ("*analogia legis*"). The reason is Huber's conception – Huber was the redactor of the Swiss Civil Code – that the statutory analogy is included in the notion of interpretation. See E. HUBER, *Eugen, Recht und Rechtsverwirklichung. Probleme der Gesetzgebung und der Rechtsphilosophie*, Basel, 1925, p. 354. See also E.A. KRAMER, *Juristische Methodenlehre*, 2nd ed., Bern, 2005, pp. 173 ss.; Ivi, 3rd ed., 2010.

generalise it to an indefinite number of cases of the same kind, would be acting against the design of law with respect to justice.

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