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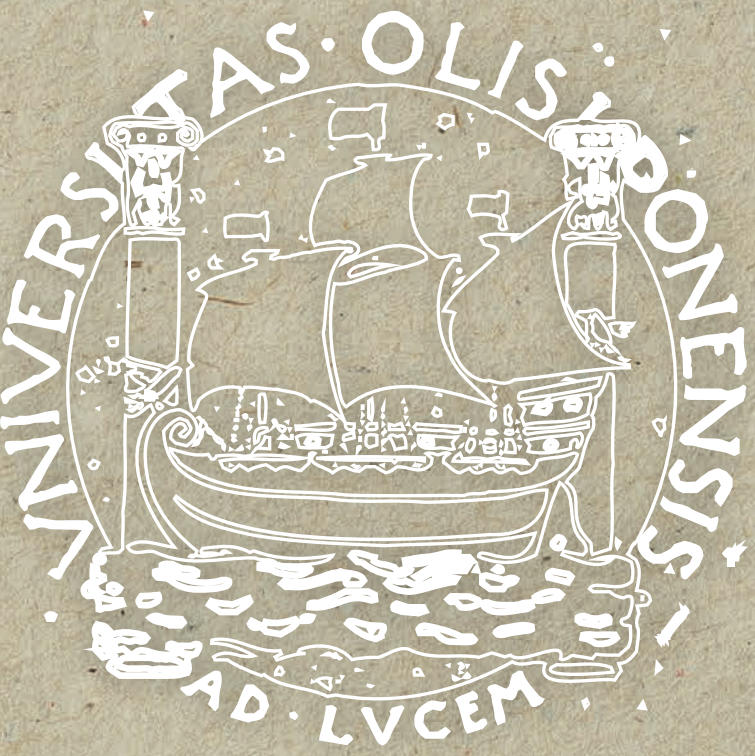

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Legal Gaps

Lacunas jurídicas

Pierluigi Chiassoni*

Abstract: The paper purports to provide a bird-eye account of legal gaps from the standpoint of contemporary Civil Law jurisprudence and legal practice. After pointing out the several problems gaps pose to legal philosophy and legal methodology, it focuses on three of them: the conceptual problem, the identification problem, and the repair problem. Dealing with the conceptual problem, a few ongoing concepts of legal gap are analyzed, and a few proposals for conceptual improvement set forth. An interpretation-transparent perspective complements the strictly normativist and interpretation-opaque mainstream approach.

Key words: legal gaps; normative gaps; normative gaps proper; technical gaps; axiological gaps; textual gaps; meta-textual gaps.

Resumo: Este estudo analisa de forma geral as lacunas jurídicas da perspectiva da jurisprudência e prática jurídica contemporânea de *Civil Law*. Após realçar vários problemas que as lacunas colocam à filosofia e à metodologia jurídicas, concentramo-nos em três deles: o problema conceptual, o de identificação e o de preenchimento. Ao lidar com o problema conceptual, alguns conceitos existentes de lacuna jurídica são analisados e feitas propostas para um seu aperfeiçoamento conceptual. Uma perspectiva transparente a nível da interpretação complementa a abordagem mainstream estritamente normativística e interpretativamente opaca.

Palavras-chave: lacunas jurídicas; lacunas normativas; lacunas normativas próprias; lacunas técnicas; lacunas axiológicas; lacunas textual e meta-textuais.

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1. A Troublesome Matter

Jurisprudents sometimes refer to "the problem of gaps"[1]. However, gaps pose to legal professionals and philosophers of law not just one, but, rather, a variety of problems. Among these, the conceptual, the ontological, the identification, and the repair problems are worthwhile considering.

First, gaps pose a *conceptual* problem. The problem concerns the meaning of phrases like "legal gap", "gaps in the law", "gaps of the law", etc. Its solution requires devising a terminological and conceptual apparatus capable of capturing all (or most of) the different situations legal professionals and legal philosophers refer to when they speak of "gaps", by means of an articulated set of precise notions univocally connected to corresponding terms.

Secondly, gaps pose an *ontological* problem. The problem is about establishing whether gaps are to be counted as a *necessary*, or rather, a *contingent*, or else, an *impossible* feature of positive legal orders. At a cursory look, all the three positions have been argued for in Civil Law jurisprudence since the beginning of the XX century. Some philosophers (e.g., Hermann Kantorowicz) claimed gaps to be a *necessary* feature of positive legal orders[2]. Others (e.g., Ernst Zitelmann, Donato Donati, Santi Romano, and Hans Kelsen) claimed, contrariwise, the presence of ("genuine") gaps in legal orders to be altogether *impossible*[3]. Others still (e.g., Norberto Bobbio, Carlos Alchourrón and Eugenio Bulygin), finally, claimed the presence of gaps in legal orders to be altogether *contingent*: a possibility that may, as well as may not, materialize[4]. It must be noticed, however, that the three positions are not necessarily at odds. Indeed, in order for that to be the case, they must refer to the same type of gaps. But this is not always the case. For instance, when

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[1] Donato Donati, *Il problema delle lacune nell'ordinamento giuridico* (SEI 1910) (hereafter Donati, *Il problema*); Santi Romano, 'Osservazioni sulla completezza degli ordinamenti giuridici' (1925) in Id., *Lo stato moderno e la sua crisi. Saggi di diritto costituzionale* (Giuffrè 1969) 173-174 (hereafter Romano, 'Osservazioni'); Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Deuticke 1934), § 40 (hereafter Kelsen, *Reine Rechtslehre. Einleitung*).

[2] Hermann U. Kantorowicz, 'Der Kampf um die Rechtswissenschaft' (1906) in Id., *Rechtswissenschaft und Soziologie. Ausgewählte Schriften zur Wissenschaftslehre* (Müller 1962) 13-39.

[3] Ernst Zitelmann, 'Lücken im Recht' (1902), Sp. Tr., 'Las lagunas del derecho', in AAVV, *La ciencia del derecho* (Losada 1949) 287-322; Donati, *Il problema*; Romano, 'Osservazioni'; Kelsen, *Reine Rechtslehre. Einleitung*.

[4] Norberto Bobbio, 'Lacune del diritto' (1963) in Id., *Contributi ad un dizionario giuridico* (Giappichelli 1994) 89-109 (hereafter Bobbio, 'Lacune'); Carlos Eduardo Alchourrón / Eugenio Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales* (Editorial Astrea 1975) (hereafter Alchourrón and Bulygin, *Introducción*).

Kantorowicz claims gaps to be a necessary feature of positive legal orders, he is talking of gaps as *situations of semantic indeterminacy* of existing legal norms; roughly, of what Alchourrón and Bulygin propose to call "gaps of recognition", as we shall see in a moment. Therefore, he is not advancing a thesis that is contradictory to the claims made by Donati or by Alchourrón and Bulygin, who, instead, are talking of *normative gaps*; roughly, of the absence of a norm for a case at hand. Contrariwise, Zitelmann, Donati and Kelsen[5], while upholding the impossibility of (genuine) normative gaps in extant legal orders, do make a claim that is indeed at odds with the contingency claim advanced by Bobbio and Alchourrón and Bulygin, since they are all referring roughly to the same sort of (normative) gaps.

Thirdly, gaps pose an *identification* problem. The problem concerns the "ascertainment" (*Feststellung*), "finding", or "recognition" of gaps: namely, the activity by means of which legal professionals come to affirm the existence of a gap in a certain area of a positive legal order. The identification problem comes in a descriptive and a prescriptive variety. In its *descriptive* variety, it asks for true accounts about *how* (by which tools, through which sorts of operations), in a given legal experience at a certain time, legal professionals (judges, jurists, attorneys, etc.) *do in fact* proceed when they identify ("ascertain", "find", "recognize the existence of") some gap in their law. In its *prescriptive* variety, contrariwise, it asks for providing legal professionals with the "proper" or "correct" instructions about *how* they *ought to* proceed to identifying gaps in a legal order.

Finally, gaps pose a *repair* problem. The problem concerns the filling of gaps once they have been identified. The repair problem too comes in a descriptive and a prescriptive variety. In its *descriptive* variety, it asks for true accounts about how (by which tools, through which sorts of operations), in a given legal experience at a certain time, legal professionals *do in fact* proceed when they remedy to (when they "fill") some gap in their law. In its *prescriptive* variety, contrariwise, it asks for the "proper" or "correct" instructions about how legal professionals *ought to* proceed in filling gaps in a legal order.

In the following, leaving the ontological problem aside, I will focus on the three remaining ones, taking into account Civil Law jurisprudence and legal methodology.

[5] On Kelsen's necessary ("logical") completeness claim, see also § 3.3, below.

2. Non-Normative Gaps

Different concepts of legal gap are afoot. They make up a set where it seems useful, for clarity's sake, telling *normative* gaps from *non-normative* ones. Both sub-sets are in turn quite varied bunches. I will deal with non-normative gaps in the present section, leaving normative ones, but for a swift remark, to the next one (*infra*, § 3).

In a broad and tentative sense, a *normative gap* occurs whenever, from the standpoint of some legal professional, a positive legal order contains no norm concerning a (generic) case at hand[6]. Contrariwise, a *non-normative gap* can be characterized, broadly, as any situation where "the missing something" is *not* a norm for a case at hand.

In contemporary jurisprudence, not fewer than four different notions of non-normative gaps have been singled out. These are institutional gaps, personality gaps, gaps of knowledge, and gaps of recognition.

1. *Institutional gaps* consist in situations of crisis in the working of a legal order, which are the effect of the impairment or malfunctioning of an organ playing a key constitutional role. Suppose no member of the electoral body shows up at polling stations, so that no new representative is being elected to be part of the legislative body. Suppose the whole royal family of a country perishes at once by an unfortunate combination of accidents. The legal orders may (and do usually in fact) contain norms coping with such events. Nonetheless, even if that were the case, the orderly working of the law would be impaired, until new elections bring about a new legislature, or a new royal family is finally called to the throne[7].

2. *Personality gaps* consist in situations of crisis in the working of a legal order, which are the effect of the disappearance of a charismatic leader. Suppose the "Great Mather of the Freedonian Nation" suddenly passes away. The Freedonian law may contain rules for such an event. Nonetheless, even if that were the case, the working of the Freedonian order would be impaired, at least until a new charismatic leader appears and gets popular recognition[8].

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[6] There is, in other terms, no norm that connects some legal qualification or legal consequence to a class of persons, events, conducts, or states-of-affairs, exhibiting a certain property named by a certain predicative term (like, e.g., "citizen", "murder", "negligent behaviour", etc.).

[7] Romano, 'Osservazioni', 181-185; Santi Romano, *Frammenti di un dizionario giuridico* (Giuffrè 1946), 99.

[8] Romano, 'Osservazioni', 181-185.

3. *Gaps of knowledge* consist in situations where the pieces of information available about the relevant facts of a trial are so poor or uncertain, that it is not possible to establish the truth or falsity of the corresponding statements. As it is well known, in legal orders where judges ought always to decide cases one way or the other, where they are not allowed to pronounce *non liquet* judgments upon the facts of the case, gaps of knowledge are usually cured by legal presumptions and default rules (like, e.g., the well known principle *Actore non probante, reus absolvitur*)[9].

4. *Gaps of recognition*, finally, are situations where there is *prima facie* a norm for a case at hand, but it proves to be semantically indeterminate in relation to the facts on trial. This happens, in particular, because existing norms contain expressions (say, "sacrilegious contract"), the current meaning of which, as determined by linguistic conventions, is such that the individual fact at stake (say, Tim and Tom made a deal on Sunday) *neither* is clearly included in the reference of the expression, *nor* is clearly excluded from it, dwelling rather in the so-called area of penumbra[10].

It must be noticed, in passing, that gaps of recognition might be considered to be the effect, ultimately, of a second-order methodological *normative* gap. To wit, they can be considered as depending, ultimately, on the absence of a *methodological default rule* establishing which, between the inclusive or exclusive interpretation of a vague expression ("sacrilegious contract", "vehicle", "wood", "edifice", "due care", etc.), should be preferred. This connection between gaps of recognition and normative gaps proper, however, is usually overlooked[11].

Non-normative gaps cast light on momentous blind spots in the working of legal orders. They provide a healthy counter to naïf normativism, which views legal orders as smoothly operating sets of norms. Nevertheless, but for gaps of knowledge and gaps of recognition, the focus of legal methodology has traditionally been on normative gaps. It is indeed normative gaps that have proved to be a more difficult bullet to bite.

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[9] Alchourrón and Bulygin, *Introducción*, 63.
[10] Alchourrón and Bulygin, *Introducción*, 61-62.
[11] Pierluigi Chiassoni, *Técnica da interpretação jurídica. Breviário para juristas* (Revista dos Tribunais 2020) ch.3, § 3.5.1.2 (hereafter Chiassoni, *Técnica*).

3. Normative Gaps

In contemporary jurisprudence, three main notions of normative gap are usually singled-out, namely:

(1) normative gaps "proper" or "properly so-called";

(2) "technical" gaps;

(3) "ideological", "political", or "axiological" gaps, or "normative gaps improper" or "improperly so-called".

3.1. Normative Gaps Proper

There is not a single notion of normative gap proper, not a uniform way of understanding normative gaps proper. A fair account requires, therefore, considering different notions. Three are in my view to be regarded as the most worthwhile knowing: the (juristic) common sense notion, the Bobbian notion, and the Bulyrronian notion.

1. The (juristic) *common sense notion* is the notion that, apparently, every ordinary Civil Law professional has in mind whenever s/he talks or writes about normative "gaps". We have already met it at the outset of the previous section (see § 2 above). As you may recall, it is tantamount to viewing (normative) gaps as situations where the law provides apparently *no norm at all* for coping with a case at hand. The norm that would be necessary to decide a case appears, unfortunately, to be missing (lacking, un-existent)[12].

2. The *Bobbian notion* is the output of a rational reconstruction (precisification), by Norberto Bobbio, of the common sense notion of normative gap[13]. From Bobbio's standpoint, a normative gap proper is *not* just the absence of a *norm whatsoever* necessary for coping with a case at hand, as jurists are used to think. It is, rather, the absence of a *hard-and-fast norm* ("norma certa") for a case at hand. This is so, Bobbio claims, because whenever a normative gap is at stake, two alternative ways of filling the gap are usually available, leading to opposite results. Suppose there is a gap concerning the right of *fathers* to get social-welfare-paid parental leave, and the only norm we do have already states that *mothers* have a right to social-welfare-paid parental leave. From a strictly

[12] Kelsen, *Reine Rechtslehre. Einleitung*, § 40; Bobbio, 'Lacune', 89.

[13] Bobbio, 'Lacune', 95-96. Bobbio also calls these gaps "*extra legem* gaps", meaning they are "voids" occurring "outside" of existing norms. There are also "*intra legem* gaps" though, occurring "inside" of an existing norm, which are also known as *technical gaps* (see § 3.2 below).

methodological standpoint, such gap can be filled in two opposite ways: *either* by an analogical reasoning, and in such event, fathers *too* end up with having the right to social-welfare-paid parental leave; *or*, alternatively, by an *a contrario* or *e silentio* reasoning, and in such event, fathers end up with having *no right* to social-welfare-paid parental leave. That uncertainty concerning the gapfilling norm, that embarrassment of riches of alternative (implicit) norms for filling one and the same gap, is what, in Bobbio's view, should be regarded as making part of a theoretically adequate concept of a normative gap proper. It is worthwhile noticing that the Bobbian notion of *normative gap proper* refers to a *complex situation* where three conditions obtain:

(i) *there is* a gap, roughly in the juristic common sense meaning of the term;

(ii) alternative, and opposite, ways of filling that gaps are available[14];

(iii) the law does not provide any methodological meta-rule of preference establishing *which* way of filling the gap, among the ones available, should be adopted, leaving rather the choice to the discretion of law-applying organs.

In other words, a gap as the absence of a hard-and-fast rule obtains whenever a legal order proves to be gappy on *two* counts. On the one hand, it presents a *first-order* gap concerning a case to be decided; on the other hand, it presents also a *second-order* methodological gap, concerning the way the first-order gap ought to be filled[15].

3. The *Bulyrronian notion*, finally, is likewise the output of a rational reconstruction of the common sense notion, carried out by Carlos Alchourrón and Eugenio Bulygin. The notion purports to emphasize the *relational character* of a normative gap proper. Indeed, according to the reconstruction they propose (which I rehearse here in a very simplified version), a normative gap consists, *in relation* to *a set of* previously identified *norms* ("normative set"), *a set of* (generic) *cases* ("universe of cases"), and *a set of* normative *solutions* ("universe of solutions"), in the absence of a norm connecting a normative solution to a case of the set of cases. Consider the two-norms normative set (N1, N2):

N1. Citizens ought to pay an income tax (C/OT)

N2. Farmers ought not to pay an income tax (F/O¬T).

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[14] Bobbio claims the gapfilling techniques of analogical and *a contrario* reasoning would be grounded on opposite basic methodological norms. On the one hand, the "inclusive general norm" requires unregulated cases to be regulated in the same way as regulated (like) ones; on the other, the "exclusive general norm" requires unregulated cases to be regulated in the opposite way of regulated ones. See Norberto Bobbio, *Teoria dell'ordinamento giuridico* (Giappichelli 1960), 155.

[15] Chiassoni, *Técnica,* ch. 3, § 3.10.2.

On its basis, a universe of cases can be identified, which encompasses four (generic) cases resulting from the not-contradictory and not-redundant combination of four properties: namely, the properties "C" (Citizen) and "F" (Farmer), and their complementary properties "¬C" (Not-Citizen) and "¬F" (Not-Farmer):

C1. Citizens and Farmers (C&F)

C2. Citizens and Not-Farmers (C&¬F)

C3. Not-Citizens and Farmers (¬C&F)

C4. Not-Citizens and Not-Farmers (¬C&¬F).

Furthermore, the normative set (N1, N2) identifies a universe of solutions, which encompasses two items:

S1. Obligatory to pay an income tax (OT)

S2. Obligatory not to pay an income tax (O¬T).

Armed with the previous distinctions, a (systematizing) matrix can be drawn, which calculates which normative solution of the set (S1, S2), if any, the normative set (N1, N2) connects to each of the four (generic) cases composing the universe of cases (C1, C2, C3, C4):

	CASES	N1 [S1]: C/OT	N2 [S2]: F/O¬T
C1	C & F	OT	O¬T
C2	C & ¬F	OT	—
C3	¬C & F	—	O¬T
C4	¬C & ¬F	—	—

The matrix, notice, brings to the fore two flaws of the systematized normative set. To begin with, the normative set proves to be antinomic (inconsistent) in relation to generic case C1. Furthermore, it proves to be gappy in relation to generic case C4. On the one hand, it provides incompatible solutions to the case of people being, at the same time, Citizens *and* Farmers. On the other hand, it provides no solution at all to the case of people being, at the same time, *neither* Citizens, *nor* Farmers.

One issue must be considered before proceeding. The Bulyrronian notion of normative gap embodies a specific criterion of identification of the *normatively relevant* properties and universe of cases: i.e., of the properties and cases from the standpoint of which the (in)consistency, (in)completeness, and (not)redundancy of a normative set is (to be) assessed. The criterion, as we have seen, ascribes normative relevance not only to the properties that are *expressly considered* in the

norms of the normative set at stake (in the example above, the properties "C" and "F"), but *also* to the properties that are *complementary* to the former (in the example above, "¬C" and "¬F"). It is indeed in relation to the case C4 – identified by the conjunction of the two complementary properties (¬C&¬F) – that the normative set (N1, N2) proves to be *incomplete*.

Suppose, however, that we adopt a different criterion. Suppose we select one ascribing normative relevance only to the cases identified by the *presence* of *one or more of the properties expressly considered* by the norms of the normative set at stake. If we apply this criterion to the normative set (N1, N2), the corresponding universe of cases would encompass the cases C1, C2, and C3, but *not* the case C4. This case would lie *outside of the reach* of the normative set (N1, N2). If the norms of the set were *legal* norms, the case C4 would belong to the "no-law space" (*Rechtsleerraum*)[16], at least from the standpoint of normative set (N1, N2). As a consequence, the normative set (N1, N2) would *not* be *gappy*. It would be *antinomic* in relation to case C1, to be sure; and *complete* as to cases C2 and C3.

The short experiment I have just outlined suggests a couple of points.

(1) Criteria of normative relevance of properties and cases are *contingent* components of normative sets (normative systems, normative orders, legal orders). Their content and existence depend on *stipulations*: either by normative authorities (when *real* sets are at stake), or by jurists or philosophers (when *experimental* sets are at stake).

(2) In dynamic normative orders like positive legal orders, the criteria concerning the normative relevance of properties and cases are auxiliary to *competence norms*. Competence norms are (very roughly speaking) secondary norms establishing the questions, matters, or cases on which the organs of a legal order (e.g., legislators, judges, public regulators, city councils, etc.) are, or are not, permitted ("empowered", "authorized") to pass law-creating decisions. A legally relevant case is one on which, due to some property it happens to possess, some legal organ is permitted to decide. Criteria of legal relevance help defining the content of competence norms.

[16] Chiassoni, *Técnica*, ch. 3, § 3.9.2; Ricardo Caracciolo, *La noción de sistema en la teoría del derecho* (Fontamara 1994), 33 ff.

3.2. Technical Gaps

Technical gaps consist in situations where a positive legal order does not contain one or more norms the existence of which is a necessary condition of the efficacy of another norm. Suppose a principle in the Constitution ascribes to citizens a fundamental right to medical care. The legal order proves technically gappy, if the legislature has omitted to enact any statutory norm whatsoever establishing a national health service and providing citizens with free access to it[17].

Sometimes, technical gaps are presented as gaps, not "inside of the law as a whole" (in traditional Civilian terminology: "*extra legem* gaps"), but, rather, "inside of a (single) legal norm" (in traditional Civilian terminology: "*intra legem* gaps"). The terminology purports to emphasize that the missing norm(s) are needed to fill a "vacuum" that is supposed to exist within specific, not-self-sufficient, norms[18].

Not-self-sufficient norms can be apt to different *degrees* of efficacy (think at the abovementioned constitutional principle of medical care). Considering this possibility, and elaborating a bit the ordinary notion of technical gap, one may tell *technical gaps in a strong (and proper) sense* from *technical gaps in a weak (and improper) sense*. The former obtain whenever a positive legal order contains no norm at all promoting the efficacy of a certain not-self-sufficient norm. The latter obtain, contrariwise, whenever a positive legal order *does* contain some norms promoting the efficacy of a certain not-self-sufficient norm, but these norms guarantee to it a (very) poor level of efficacy.

Technical gaps in a weak (and improper) sense can be considered a variety – a so far overlooked variety – of axiological gaps. From the standpoint of the not-self-sufficient norm whose efficacy is at stake, they concern *sub-optimal* norms. *There are* norms that do not promote or realize the (assumed) optimal level of efficacy of the not-self-sufficient norm at stake. In a properly working legal order, these should be replaced by *optimal* norms promoting that optimal level (e.g., the maximum degree of efficacy obtainable).

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[17] Riccardo Guastini, *La sintassi del diritto* (Giappichelli 2011), 413-414 (hereafter Guastini, *La sintassi*); Luigi Ferrajoli, *Iura paria. I fondamenti della democrazia costituzionale* (2nd edn, ESI 2017), 59-65.

[18] Bobbio, 'Lacune', 97-98. Kelsen claims to be out of place any talking of gaps about norms that, e.g., establish the electoral character of an organ, without specifying the electoral procedure to be followed. Those norms would simply *confer* to the norm-applying organs full discretion as to their implementation (Hans Kelsen, *Reine Rechtslehre* 2nd edn, Deuticke 1960), 254.

3.3. Ideological, political, or axiological gaps (gaps improper)

"Ideological" (Kelsen, Bobbio), "political" (Bobbio), or "axiological" (Alchourrón and Bulygin) gaps are complex situations, obtaining as an effect of the conjunction of two conditions.

On the one hand, the legal order *does contain* a norm that it should *not contain*, the content thereof being *axiologically inadequate* ("inconvenient", "unsatisfactory", "unjust").

On the other hand, the legal order *does not contain* a norm that it *should contain* instead of the former, the content thereof being, contrariwise, *axiologically adequate* ("convenient", "satisfactory", "just")[19].

The first (positive) condition points to the fact that a certain case is actually regulated by the law. There exists, accordingly, no normative gaps proper. The second (negative) condition points to the fact that the norm actually regulating that case is, however, axiologically sub-optimal; an axiologically better norm is available, which unfortunately has not been enacted, but should be enacted to replace the former.

The axiological (ideological, political) adequacy at stake in this kind of gaps can be appreciated from different standpoints. Six are worthwhile mentioning: (1) the not-self-sufficient norm whose efficacy the norm at stake is supposed to promote (§ 3.2 above); (2) the (supposed) actual legislative intent, i.e., what the legislator actually intended to accomplish by enacting the norm that proves sub-optimal; (3) the (supposed) counterfactual legislative intent, i.e., what the legislator would have intended to accomplish by the norm that proves sub-optimal, had it considered certain data or problems that it did not consider; (4) the (assumedly) "objective purpose" of the norm, i.e., the state-of-affair the norm is assumed to promote if considered in itself or as part of a normative set; (5) the fundamental constitutional principles or other superior norms of the legal order to which the norm that proves sub-optimal belongs; (6) the norms of some critical morality a legal professional assumes to be relevant to the "life" of the legal order (like, e.g., some natural law theory).

It is worthwhile recalling the different views a few eminent Civil Law jurisprudents adopt as to this kind of gaps.

Kelsen uses the idea of "ideological gap" as a demystification tool. Positive legal orders, he claims, are structurally gapless[20]. Therefore, whenever judges or

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[19] Bobbio, 'Lacune', 96-97; Alchourrón and Bulygin, *Introducción*, 158-163; Guastini, *La sintassi*, 414-417.

[20] On Kelsen's theory of completeness of legal orders, see, e.g., Chiassoni, *Tecnica*, ch. 3, § 3.10.1; Eugenio Bulygin, 'Kelsen on the Completeness and Consistency of Law' (2013), in Id., *Essays in Legal*

jurists state that "there are gaps in the law", they cannot really be talking of normative gaps proper, which do not exist. Rather, by way of a (legislator's inspired) "fiction", they are *presenting as* genuine normative gaps proper what are in fact ideological gaps: i.e., situations where existing legal norms *do* regulate the behaviours at stake, but they do so in ways that judges or jurists do find unacceptable for ideological reasons[21].

Bobbio sees the difference between normative gaps proper and "ideological" or "political" gaps from the standpoint of the proper ways of filling them. Normative gaps proper are «insufficiencies» of *the law as it is*; they are, he says, "*de lege lata*"; their filling is therefore generally up to the judge. Contrariwise, ideological gaps are «imperfections» of *the law as it is* from the perspective of *the law as it ought to be*; they are, he says, "*de lege ferenda*"; their filling is therefore up to the legislator[22].

Alchourrón and Bulygin, finally, *neither* consider the idea of axiological gaps as a demystification tool, the presence of gaps being a *contingent* feature of legal orders (see § 1 above); *nor* do they conceive the filling of axiological gaps as something necessarily (or properly) up to the legislator. In their view, contrariwise, axiological gaps pose serious problems that can be (and usually are) coped with by judges. An example will help explaining their view. Suppose the following criminal law norm is in force in a legal order:

N1: Assisted suicide ought to be punished with 10 years imprisonment.

Norm N1 can be regarded as sub-optimal (axiologically defective), as soon as we reason as follows:

N1 establishes a sanction for *any case whatsoever* of assisted suicide;

In so doing, N1 also establishes a sanction for *therapeutic* assisted suicide;

Therapeutic assisted suicide, however, should be treated differently by criminal law, having to do with the protection of human dignity, which is a paramount value of the legal order;

It is likely that the legislator that enacted (the legal provision from which) the norm N1 (has been derived by interpretation) did not consider the property *therapeutic* in assisted suicides, and that, had it considered it, it would have enacted a different norm, like, for instance:

Philosophy, Bernal, Huerta, Mazzarese, Moreso, Navarro and Paulson (eds) (OUP 2015) 337-353. See also § 1 above.

[21] Kelsen, *Reine Rechtslehre. Einleitung*, §§ 40-41; Hans Kelsen, *General Theory of Law and State* (Harvard UP 1945), 146-149; Kelsen, *Reine Rechtslehre*, § 4, d), and 35, g)).

[22] Bobbio, 'Lacune', 96-97. On Bobbio's theory of gaps, e.g., Chiassoni, *Técnica*, ch. 3, § 3.10.2.

N2: *Not-therapeutic* assisted suicide ought to be punished with 10 years imprisonment.

Five comments are in order.

First, axiological gaps, as conceived by Alchourrón and Bulygin, consist in situations where the sub-optimal norm *does not draw a distinction* that ought to be drawn. It regulates indiscriminately *in the same way* cases that should be treated differently; it treats *unlike* cases *alike*. Therefore, whenever an axiological gap is afoot, what is missing is a *discriminatory norm*: one that introduces a certain distinction inside of a broadly defined class of cases.

Second, *filling* an axiological gap requires *replacing* the non-discriminatory, sub-optimal, existing norm with the optimal, and so far missing, discriminatory one. This is the norm that, contrariwise, takes the originally neglected, and axiologically relevant, property into account (as it happens with norm N2 above). Notice that, once the norm N2 is being replaced to the norm N1, *therapeutic* assisted suicide turns out to be an *unregulated* case. Replacement of N2 to N1 *creates* a *normative gap proper*. This gap is to be filled, in turn, by introducing a further norm; say, N3, according to which: Therapeutic assisted suicide *ought not* to be punished with any criminal sanction whatsoever (which, for instance, may be justified as the output of an *a contrario* reasoning from norm N2). The "filling" of an axiological gap, therefore, is a complex, two-stages operation. In the first stage, the original sub-optimal norm (in our example, N1) is replaced, by way of restrictive re-interpretation, by an optimal discriminatory norm (in our example, N2). In the second stage, the normative gap created by the replacement operation is filled. In sum, obviating to sub-optimal norm N1 requires replacing it with the conjunction of *two* optimal norms: N2 and N3. For this reason, this sort of axiological gaps might also be named "axiological gaps by replacement" or "switch-over" gaps[23].

Third, Alchourrón and Bulygin claim, as we have seen, that the filling of an axiological gap is generally up to *judges*. We are now in a condition to understand why that can be so. Remedying to a sub-optimal norm consists: *first*, in an apposite *restrictive re-interpretation* of the sub-optimal norm (or of the corresponding legal provision), turning it into an optimal, axiologically adequate, one; *secondly*, in *filling* the normative gap proper that the replacement of the sub-optimal norm with the optimal norm has created. Both operations, in contemporary legal orders, are usually within the reach of ordinary judicial "powers of interpretation" (broadly conceived).

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[23] Pierluigi Chiassoni, *Interpretation without Truth. A Realistic Enquiry* (Springer 2019), ch. 8 (hereafter Chiassoni, *Interpretation*).

Fourth, Alchourrón and Bulygin, as we have seen, equate axiological gaps with the absence of a discriminatory norm. For instance, with the absence of a norm that makes *not-therapeutic* assisted suicide a punished crime, leaving *therapeutic* assisted suicide, contrariwise, out of the scope of penal law. There is, however, another variety of axiological gap by replacement (switch-over gap) worthwhile considering[24]. This variety turns useful in view of capturing the situations where the existing norm is axiologically sub-optimal, not because it treats *unlike cases alike*, but rather, and contrariwise, because it treats *like cases unlike*. Suppose positive law contains legal provision D1: "Mothers have the right to social-welfare-paid parental leave". Suppose a problem arises about whether *fathers* have the right to social-welfare-paid parental leave. Suppose judges are constantly interpreting D1 to express the *biconditional norm* N1: "If, and only if, somebody is a mother, somebody has the right to social-welfare-paid parental leave". Now, the norm N1 may prove axiologically sub-optimal, since it treats mothers and fathers differently in relation to something (social-welfare-paid parental leave) to which they should be equally entitled. In this case, the missing axiologically optimal norm is a norm ascribing the right at stake (also) to fathers. How can such a gap be "filled"? To begin with, by way of a *deflationary re-interpretation* of legal provision D1. This should be to the effect of replacing the *biconditional* (complex) norm N1 with the *conditional* (simple) norm N2: "If somebody is a mother, somebody has the right to social-welfare-paid parental leave"[25]. Once the norm N2 is established – say, in a judicial opinion where it is presented as the "only proper and correct meaning of D1" – the case of fathers becomes *unregulated*; and the normative gap proper can be filled by a norm N3: "If somebody is a father, somebody has the right to social-welfare-paid parental leave", which can be justified, for instance, by making appeal to overriding constitutional principles (like, e.g., the principle of equality as no-discrimination, the principle of parenthood protection, the principle of children's best interest).

Fifth, and finally, it seems worthwhile distinguishing *two varieties* of axiological gaps by replacement. Indeed, gaps of this sort can "show up" not only in relation to sub-optimal *primary norms* of conduct (e.g., the norm sanctioning assisted suicide, not-therapeutic and therapeutic alike). They can also "show up" in relation to *secondary norms* regulating the legal competence of legal organs (e.g., of legislators and judges)[26].

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[24] Chiassoni, *Técnica*, ch. 3, § 3.8.

[25] The biconditional norm N1 is complex, being tantamount to the conjunction of two norms: (N1*) "If somebody is a mother, somebody has the right to social-welfare-paid parental leave" and (N1**) "If somebody is a not-mother, somebody has not the right to social-welfare-paid parental leave".

[26] In Chiassoni, *Técnica*, ch. 3, § 3.9, and Chiassoni, *Interpretation,* ch. 8, secondary axiological gaps by replacement are named "adding-up gaps", to be "filled" by turning legally irrelevant questions

Suppose that, in a legal order, there is a competence norm CN1 that forbids judges to adjudicate on any marriage controversy whatsoever[27]. Marriage controversies are, therefore, *judicially irrelevant* in that legal order. If a husband files a complaint on a law court against his wife, say for violation of the duty of material assistance, judges ought to declare their incompetence to hear the case, leaving the settlement of the dispute to parties' negotiation or decision by religious ministers. Suppose, however, that from the standpoint of some principle of critical morality CM_i, the (in)competence norm in force (CN1) is axiologically sub-optimal, the optimal norm being instead CN2, which permits (authorizes, empowers) judges to adjudicate on marriage disputes pronouncing binding judgments. In such case, remedying to the axiological gap requires *replacing* the sub-optimal competence norm CN1 with the optimal competence norm CN2. One point must be noticed to conclude. Unlike *primary axiological gaps*, the full remedy of which passes through some *re-interpretation* of existing legal provisions (or legal norms) that *modifies* the sub-optimal norm (by way either of restriction, or of deflation) turning it into an optimal one, the full remedying to *secondary axiological gaps* requires, contrariwise, the total repeal of the sub-optimal competence norm. There is room still, of course, for re-interpretation. This, so to speak, can only carve pieces of incompetence out of the extant (in)competence norm, and replace it with as many points of judicial competence. To be sure, the more the pieces carved are very meaningful ones, from a social and cultural standpoint, the more re-interpretation brings about a virtual repeal of the suboptimal (in)competence norm in force.

One final remark is in order, before proceeding. So far, I have followed extant jurisprudential terminology. This refers to the troublesome situations I have just recalled in terms of "ideological", "political", or "axiological" *gaps*. However, if we pause to consider which sort of trouble is afoot, whenever some legal professional claims there being an ideological, political or axiological "gap", and if we take into account that:

i) the sub-optimality of a norm derives from its being *incompatible* with some superior norm of the same or another normative order; and

ii) the remedy always involves the partial or total *removal* of the sub-optimal norm;

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into legally relevant ones, i.e., ones some legal organ has the duty (imperative relevance) or power (discretionary or permissory relevance) to cope with. I am now persuaded the legal relevance of any issue ultimately to depend on the competence norms in force. Accordingly, adding-up gaps are better conceived as a variety of axiological gaps by replacement: the secondary axiological gap variety.

[27] Provided, for instance, that marriage controversies are to be settled by private negotiation or decision by religious ministers.

it seems reasonable concluding that ideological, political or axiological "gaps" are as many situations of *normative conflict* or *antinomy*[28]. With this precisification in mind, we can go on using the extant "gap" terminology, to be sure. In doing so, however, we must be conscious of the antinomic character of the troubles at stake.

4. Normative Gaps Revisited

The typology of normative gaps I have just rehearsed, and in part revisited, is theoretically valuable. Particularly, where it departs from juristic common sense by way of conceptual precisifications.

It is a strictly normativist typology, though. A gap is always defined as the situation where a norm is missing: be it a norm whatsoever, a hard-and-fast norm, a norm in relation to a normative set (a universe of cases, and a universe of solutions), a norm conditioning the efficacy of another not-self-sufficient norm, or a primary or secondary axiologically adequate (convenient, satisfactory, just) norm. In so being, it must be noticed, the typology turns out to be totally *opaque* as to the *interpretive dimension* of law. It is opaque, in particular, because it contains no hinting to the interpretive operations (in a broad sense) the legal professionals carry out whenever they claim that "there is a gap in the law": whenever they *identify* a legal gap.

In view of pushing the conceptual frontier a little bit further, it seems worthwhile (further) revisiting the extant typology of gaps and turning it, so far as possible, into an *interpretation transparent* one.

In the following, taking stock of Alchourrón and Bulygin's relational notion of normative gap proper (§ 3.1, above), but paying attention to the interpretive dimension of the phenomenon, I will distinguish three interpretation-transparent notions of normative gap proper: a general notion and the two more specific notions of *textual gap* and *meta-textual gap.* While doing so, I will cast some light on the gaps-identification problem (§ 1, above)[29].

4.1. An Interpretation-Transparent Notion of Normative Gap Proper

In view of getting an *interpretation-transparent* notion, a *normative gap proper* can be defined as:

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[28] Chiassoni, *Tecnica*, ch. 3, § 3.8.1, ch. 4.

[29] I adopted an interpretation-transparent approach already in former essays, including Chiassoni, *Tecnica*, ch. 3. In the following I am going to introduce a few refinements.

the absence, *in relation to* (i) a set of *legal materials* M_j, (ii) a set of *methodological rules* R_j, and (iii) a set of *methodological resources* A_j, of a *general norm* that provides an answer to a *judicially decidable question of law* Q_j, by connecting to a generic case C_j, *either* the normative solution S_j (e.g., Permitted *p*), *or* its negation $\neg S_j$ (e.g., Prohibited *p*).

A few precisions are in order.

1. A *set of legal materials* (e.g., M_j) is a discrete set of heterogeneous items including *legal provisions* (authoritative norm-formulations, like, for instance, constitutional or statutory clauses), and/or *explicit norms* (norms that are presented and defended as the meaning of some legal provision or customary practice), and/or *implicit norms* (norms that are not presented nor defended as the meaning of some legal provision or customary practice, but are presented and defended, instead, as "derived" from other previously identified norms, jurist-defined legal concepts, and/or juristic theories of law, legal institutes, legal bodies, etc.).

2. A *set of methodological rules* (e.g., R_j) is a discrete set that is tantamount, alternatively, to an *interpretive code* (a discrete set of rules of textual interpretation, i.e., concerning the legally proper or correct way of translating legal provisions into explicit norms), or to an *integration code* (a discrete set of rules of integration, concerning the legally proper or correct way of filling a gap by adding to a previously identified normative set a further implicit norm).

3. A *set of methodological resources* (e.g., A_j) is a discrete set encompassing the assets, data, or pieces of information that have been (selected and) used while employing rules of textual interpretation (*interpretive resources*) or rules of integration proper (*integration resources*).

4. A *judicially decidable question of law* (e.g., Q_j) is a legal problem (like, e.g.: Do *fathers* have a right to social-welfare-paid parental leave?) that judges, from the standpoint of the competence norms of the positive legal order at stake, (are assumed to) have the permission ("power") and/or the duty to decide.

5. The *missing general norm* is a prescription connecting to the generic case pointed to by the judicially decidable question of law (e.g., fathers whose daughters and sons are of an age compatible with parental leave), either a certain normative solution (e.g., the right to social-welfare-paid parental leave) or its negation (e.g., the no-right to social-welfare-paid parental leave)[30].

[30] Legal norms come in two main varieties: prescriptive norms ("Obligatory p", "If q, permitted p") and constitutive norms ("Alligators-killing is murder", "N1 is hereby derogated"). The present typology of gaps deals with prescriptive norms only. It can be adapted to constitutive norms.

The two more specific notions can now be defined as well, and the way of their identification clarified.

4.2. Textual Gaps

A *textual gap* can be defined as:

the absence, *in relation to* (i) a set of *legal provisions* D_j, (ii) an *interpretive code* IC_j, and (iii) a set of *interpretive resources* IA_j, of a *general explicit norm* that provides an answer to a *judicially decidable question of law* Q_j, by connecting to a generic case C_j, *either* the normative solution S_j (e.g., Permitted *p*), *or* its negation $\neg S_j$ (e.g., Prohibited *p*).

A few remarks are in order.

1. The notion of textual gap is meant to capture the situations legal professionals regard as the "gaps in the law" *par excellence*: the paradigmatic, central cases of a gap in the law, if anything. There is a gap, it is ordinarily assumed, whenever no legal provision in force expresses, by way of (a "proper" or "correct") interpretation, an *explicit* norm settling a judicially decidable question of law at hand.

2. The notion of textual gap is *interpretation-transparent*. It emphasizes that any absence-of-an-explicit-norm situation is *relative to* (and *depending on*) a certain set of legal provisions (D_j), a certain *interpretive code* (IC_j), and a certain set of *interpretive resources* (IA_j).

3. An interpretive code is a discrete set of rules of interpretation (§ 4.1, above). Some precisions are in order.

First, any activity of interpretation of any legal provision whatsoever (textual interpretation) by a legal professional depends on a previously selected interpretive code and set of interpretive resources. Consciously or unconsciously, the interpreter stands for *that* code and *that* set of interpretive resources as the *legally correct* ones, at least as to a certain question of law and a certain individual case at hand.

Second, it may happen that the same interpreter (say, the same judge) uses different interpretive codes in different decisions. The shifting of interpretive-codes is a normal feature of our legal world. It may also happen, however, that an interpreter (a judge) sticks to (roughly) the same interpretive code whatever the issue at hand.

Third, provided legal provisions are not self-interpreting linguistic entities, legal professionals cannot avoid selecting interpretive codes, though their selection can be a piece of interpretive conformism (in which event, however, they may be non-conformist as to the set of interpretive resources).

Fourth, if we pause to reflect on the structure of a *well-built interpretive code*, two sorts of interpretation rules must be singled-out: translation rules and methodological rules.

Translation rules provide instructions about how (by which sort of interpretive resource) a legal provision is to be translated into an explicit norm[31]. In particular, translation rules point to interpretive resources which typically encompass: (i) linguistic conventions (linguistic interpretation); (ii) legislative intent (intentional interpretation); (iii) the objective purpose or goal of the legal provision self, or the branch or sector it belongs to (teleological interpretation); (iv) previous interpretations by prominent judicial or juristic interpreters (authoritative interpretation); (v) suggestions from other norms of the legal system (systematic interpretation); (vi) suggestions from external entities like the nature of things or the norms of a critical morality (heteronomous interpretation).

Methodological rules, contrariwise, are meta-rules. Unlike translation rules, they do not immediately give instructions on how legal provisions should be translated into explicit norms. Rather, they set the normative frame inside of which translations should take place. There are different sorts of methodological rules. A well-built interpretive code contains a *purpose rule* (establishing the aim interpreters should realize, the goal or point of the interpretation game[32]), a *selection rule* (establishing which translation rules should be used[33]), a *procedure rule* (establishing the way selected translation rules should be used[34]), a *preference rule* (establishing which meaning is to be preferred, whenever two or more alternative meanings for the same legal provision result from using the selected translation rules[35]), and, finally, a *default rule* (establishing which meaning is

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[31] This is a piece of *intra-linguistic* translation. A legal provision, a sentence in a natural language L_i, is transformed into (and substituted by) another sentence or combination of sentences in the same natural language L_i, presented as semantically equivalent.

[32] Like, e.g., respecting the democratic nature of the constitution.

[33] It may be just one rule (monistic selection rule), a few rules (pluralistic selection rule), or the entire set of the translation rules available (holistic selection rule).

[34] A procedure rule may be pure or preferential. It is *pure* when, given a pluralistic or a holistic selection rule, it prescribes to use *all* the selected translation rules. It is contrariwise *preferential* when, for instance, given a pluralistic selection rule, it prescribes interpreting the legal provision, *first*, according to translation rule TR1, and, if, and only if, the output is not adequate (for instance, it is indeterminate or clearly at odds with some overwhelming principle), using translation rule TR2, and, if, and only if, ..., using translation rule TR3 etc.

[35] Preference rules are necessary whenever the code contains a pluralistic or a holistic selection rule and a pure procedure rule. A criterial preference rule establishes the criterion by which one meaning is to be preferred to alternative ones (e.g., compatibility with constitutional principles).

to be preferred all things-considered, i.e., whenever the previous rules prove ineffective[36]).

5. The notion of textual gap is meant to emphasize that the identification of (textual) gaps is not the ascertainment of something objectively missing "out there" – like, e.g., ascertaining that there is in fact (and unfortunately) no medieval castle on the portion of land I was bequeathed by a distant relative. Rather, it depends on the interpretive code and interpretive resources legal professionals select. An example should clear the point.

Suppose the relevant set of legal provisions D_j includes legal provision D1: "Mothers have a right to social-welfare-paid parental leave"; suppose, furthermore, the question of law Q_j a judge is called to answer is whether *fathers* have a right to social-welfare-paid parental leave.

To begin with, the judge may adopt a literalist interpretive code, containing a *preferential procedure rule* according to which the *translation rule* of linguistic interpretation is to be applied *first*, and interpretation should stop *there*, if the linguistic meaning proves determinate. In such a case, the judge may argue: (i) that legal provision D1, once correctly interpreted, expresses the norm N1: *Mothers* have a right to social-welfare-paid parental leave; (ii) that the norm N1 does not say anything about *fathers*' right to social-welfare-paid parental leave; (iii) that, therefore, there is a (textual) gap in the law, calling to be filled.

The judge, however, might also adopt an intentionalist interpretive code, according to which: (1) legal provisions are *always* to be interpreted by applying *both* the translation rule of linguistic interpretation, *and* the translation rule of intentional interpretation (understood, say, as an appeal to the actual semantic intent of the historical legislator) (pure procedure rule); (2) whenever the linguistic meaning and the intentional meaning of a legal provision are at odds, the meaning more in tune with supreme constitutional principles should prevail (criterial preference rule). In such case, the judge may argue: (i) that legal provision D1 expresses the norm N1 (*Mothers* have a right to social-welfare-paid parental leave), *if* it is read according to the rule of linguistic interpretation, and the norm N2 (*Mothers and fathers* have a right to social-welfare-paid parental leave), *if* it is read according to the rule of intentional interpretation; (ii) that, following the criterial preference rule, norm N2 should be preferred to norm N1; (iii) that, therefore, there is no (textual) gap in the law concerning the right of fathers to social-welfare paid parental leave.

[36] Suppose the application of the preferential procedure rule or the criterial preference rule fails. The default rule steps in, e.g., prescribing to select the meaning more in tune with the purpose of the interpretation game.

Interpretation plays a crucial role in the identification of textual gaps. The existence of textual gaps is interpretation-dependent. Interpretation can make gaps to exist (gaps "creation"), as well as it can prevent gaps from coming into existence (gaps "prevention")[37]. From a strictly methodological standpoint, there is no limit to taking the one or the other course. Limits as to the identification or prevention of textual gaps usually come from sources other than interpretation rules. They depend, ultimately, on factors like what a legal culture considers axiologically viable or unviable, together with prudential considerations by individual interpreters.

4.3. Meta-Textual Gaps

A *meta-textual gap* can be defined as:

the absence, *in relation to* (i) a previously identified set of explicit and/or implicit norms NS_j, (ii) an *integration code* IGC_j, and (iii) a set of *integration resources* IGA_j, of a *general implicit norm* that provides an answer to a judicially decidable question of law Q_j, by connecting to a generic case C_j, *either* the normative solution S_j (e.g., Permitted *p*), *or* its negation $\neg S_j$ (e.g., Prohibited *p*).

A few remarks are, again, in order.

1. The notion of meta-textual gap is aimed at emphasizing that a "gap in the law" can also consist in the missing of an *implicit norm*. Civilian thinking, however, is used to conceive of gaps as *textual gaps*, tacitly assuming that in the boundless sea of implicit ("invisible") law, it is always possible for a (skilled) legal professional to "find" an implicit norm filling a gap of explicit ("visible") law. Civilian jurists and jurisprudents, in other words, are used to conceive of gaps as lying at the surface of visible, written law, and floating on a deep normative sea where no judicially decidable question of law remains unanswered.

2. No gap – textual or meta-textual alike – is self-filling. As a consequence, legal professionals cannot avoid selecting integration codes, though their selection can be a piece of integration conformism (in which event, however, they may be non-conformist as to the set of integration resources they put to use).

3. The existence of a meta-textual gap depends primarily on a certain *integration code*, pointing to a *negative* answer: namely, justifying the claim that there is *no* general implicit norm providing a solution to a certain judicially decidable question of law (for which no *explicit* norm is available either). Integration codes, however, are usually employed *to fill* (textual) gaps, solving

[37] Guastini, *La sintassi*, 409-413; Chiassoni, *Tecnica*, ch. 3, § 3.7.

the problem of gaps repair (§ 1, above, and § 5, below). How can it happen, then, that a meta-textual gap ever "show up"?

Let us consider again the situation where a judge has identified a textual gap, concerning fathers' right to social-welfare-paid parental leave (§ 4.2, above). How can a meta-textual gap about that question of law (be said to) exist? By which integration code can such a negative result be justified? How can it be that, to recall Bobbio's example (§ 2, above), neither integration by analogy, nor integration by *a contrario* reasoning are viable?

There seems to be only one way out of this riddle. Only an integration code prohibiting judges to create any implicit norm whatsoever will do. In such a case, however, judges will have to declare that the law is irreparably incomplete and dismiss the claim. This is not something judges working in contemporary Civil Law systems are allowed to do, though. The notion of a meta-textual gap works, accordingly, as a frontier concept, marking the borders of possible gaps.

5. Filling Textual Gaps

The problem of gaps repair comes in a descriptive and a prescriptive variety (§ 1, above). In the following, only a few lines dealing with the descriptive variety will be dropped, concerning the filling of textual gaps. On the "filling" of axiological gaps by replacement I have already cast some light (see § 3.3, above).

Law professionals fill textual gaps by a discrete set of integration rules making up an integration code (see § 4.1., above).

If we pause to reflect on the structure of a *well-built integration code*, two sorts of integration rules must be singled-out: integration rules proper (addition rules) and methodological rules.

Integration rules proper provide instructions about *how* (by which sort of *integration resource*) a textual gap is to be filled by an implicit norm. In Civilian methodological tradition, the more frequently employed integration rules to cope with textual gaps include as it is well known those that point to: (1) the relevant similarity between the expressly regulated case, on the one hand, and the unregulated case, on the other (analogical reasoning); (2) the silence of explicit law as an index of the will to connect to the unregulated case a solution that is the negation of the one expressly provided for the regulated case (*a contrario* reasoning); (3) the stronger reason that justifies an implicit norm connecting to the unregulated case the same solution expressly provided for the regulated case (*a fortiori* reasoning); (4) the counterfactual intention of the historical or present legislator (legislative intent); (5) higher norms of the legal order at stake, like, e.g., constitutional principles,

general legal principles, etc. (systematic reasoning); (6) the nature of the case to be regulated (naturalistic integration, integration by the nature of things); (7) integrations previously set forth by prominent judicial bodies or juristic personalities (authoritative integration); (8) the norms of some critical morality (e.g., a certain natural law theory) (heteronomous integration).

Methodological rules, contrariwise, are meta-rules. Unlike integration rules proper, they do not immediately give instructions about *how* textual gaps should be filled. Rather, they fix the normative frame inside of which textual gapfilling should take place. There are different sorts of methodological rules. Like its interpretive counterpart (§ 4.2, above), a well-built integration code contains a *purpose rule* (establishing the aim the activity of gap filling should realize[38]), a *selection rule* (establishing which integration rules proper should be used[39]), a *procedure rule* (establishing the way selected integration rules proper should be used[40]), a *preference rule* (establishing which implicit norm is to be preferred, whenever two alternative implicit norms for filling the same gap result from using the selected integration rules proper[41]), and, finally, a *default rule* (establishing which implicit norm is to be preferred all things-considered, i.e., whenever the previous rules prove ineffective[42]).

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[38] Like, e.g., the purpose of advancing the liberal values of the constitution.

[39] It may be just one rule (monistic selection rule), a few rules (pluralistic selection rule), or the entire set of integration rules proper available (holistic selection rule).

[40] It may be pure or preferential. It is *pure* when, given a pluralistic or holistic selection rule, it prescribes to use all the selected integration rules proper. It is *preferential* when, given for instance a pluralistic selection rule, it prescribes filling a gap, first, according to integration rule proper IR1, and if, and only if, the output is not adequate (for instance, it is an implicit norm at odds with some overwhelming principle), using integration rule proper IR2, and if, and only if, ..., using integration rule proper IR3, etc.

[41] Preference rules are necessary whenever the integration code contains a pluralistic or a holistic selection rule and a pure procedure rule. A criterial preference rule establishes the criterion by which one implicit norm is to be preferred to alternative ones (e.g., compatibility with constitutional principles).

[42] Suppose the application of the preferential procedure rule or of the criterial preference rule fails. The default rule steps in, say, prescribing to select the implicit norm more in tune with the purpose of the integration game.