



The gaps and the legal system (in)completeness

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ABSTRACT

The paper aims to analyze the discussions about the completeness and the existence of gaps in the legal system. Many people say that the completeness of the legal system is synonymous of no gaps and that, by admitting the existence of gaps, legal systems are therefore incomplete. In addition, we conducted research about the classification of gaps and about the integration methods used by judges to fill gaps in the exercise of their judicial activity. We conclude that gaps are the absence of specific rules to regulate certain conduct. Gaps are deficiencies present in all jurisdictions. This, however, is not synonymous of incompleteness. The legal system will be complete when, by admitting the existence of gaps, it presents the possibilities of solving the problems presented to the magistrates, as in the case of Brazilian legal system.

KEYWORDS: Gaps. Classification of gaps. Completeness. Legal system

As lacunas e a (in) completude do ordenamento jurídico

RESUMO

O artigo visa à análise das discussões acerca da completude e da existência de lacunas no ordenamento jurídico. Muitos afirmam que a completude do ordenamento jurídico é sinônimo de ausência de lacunas e que, por admitir a existência destas, os sistemas jurídicos são, portanto, incompletos. Realizou-se, ademais, pesquisa sobre a classificação das lacunas e os métodos de integração normativa, utilizados pelos magistrados para preencher lacunas no exercício de sua atividade jurisdicional. Concluiu-se que lacunas são a ausência de normas específicas para regular determinadas condutas. São insuficiências presentes em todos os ordenamentos jurídicos. Isso, porém, não é sinônimo de incompletude. O ordenamento será completo quando, ao admitir a existência de lacunas, ele mesmo apresenta as possibilidades de solução dos problemas apresentados aos magistrados, como é o caso do ordenamento jurídico brasileiro.

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PALAVRAS-CHAVE: Lacunas. Classificação das lacunas. Completude. Ordenamento jurídico.

INTRODUCTION

Many debates focus on gaps in the legal system. Many question if they exist or if they are mere fiction to limit the activity of those interpreting normative texts. This article seeks to propose a solution to this debate, presenting the concept of gaps based on a bibliographic study of the theme.

This paper is backed by research on the historical evolution of the appearance of the problems of gaps and presents a classification of the gaps in accordance with their myriad manifestations, correlated with judicial rulings, foremost from the Federal Supreme Court. Other research covered questions related to the interpretation of the text and the application of judicial standards, as well as the concept of permitted, not permitted and prohibited, and studies of the analogy and other methods for normative integration.

With regards to the question of the completeness of the legal system, scholars can be divided into two groups: those that defend that the system is complete and, therefore, has no gaps; and those that defend that the system is incomplete, thereby presenting gaps. The proposal presented herein will work to demystify the idea that completeness means the lack of gaps. It should be understood, and will be made clear further into this text, that a legal system may be complete and, at the same time, show certain gaps. These are concepts that many only seem to be contradictory.

1. Brief considerations of the gaps

Between the 13th and 15th centuries, during which time so-called common law reigned supreme, it had already become clear that on certain occasions, the judge was not aware of the law to be applied. These occasions however, were not gaps, because there was no recognition that the law was lacking, but rather, a lack of sufficient knowledge of the common



law to be applied. In these cases, the judges were authorized to consult with the King, the people or costume from other locations (OLIVEIRA, 1998, p. 34).

Later, during absolutism, there were no questions of the existence or lack of gaps in the legal system, as all decisions were left to the Monarch and depended on his whim. Discussions of the existence or lack of standards quickly lost their relevance.

It is understood that discussions of gaps in the legal system first surfaced at the end of the 19th century, principally after the French Revolution, through the consolidation of liberalism and theory of separation of powers, espoused by Montesquieu (OLIVEIRA, 1998, p. 35). This ideal sought the effective and practical division of the functions of those in power, preventing power from being concentrated in the hands of a single person. The breakdown of power into a number of agents served to protect individual freedoms, prevent abuses and arbitrary rulings, all in order to ensure *le pouvoir arrête le pouvoir* (power holds back power).

As of this point, law became the main source of rights, leading to - quite different from what occurred during monarchical absolutism - the interdiction of *non liquet* (without cause), which was the possibility that the judge would not even take up the case when faced with the lack of standards. This was to say that without a standard, the legal problem would not exist (OLIVEIRA, 1998, p. 35).

Decisions no longer depended on the will of a monarch. Government officials were limited to the dictums of the ruling legal system. It was with this, the diversity of social facts and the impossibility of legislating all form of conduct, that the existence of gaps became clear.

Faced with discussions of this theme, a number of scholars came to deny the existence of gaps. For Savigny (*apud* DINIZ, 2007, p. 31), “when a legal relation does not find a typical institution in the law, it is possible to establish, in compliance with existing law, an institution to fit the situation.” For the author, the law contains the discipline of all social relations, in an implicit or explicit manner, and therefore there is no reason to speak of gaps in the legal system.

According to Hans Kelsen (2009, p. 16-17), law is standard, and the standards of a given legal system regulate all human behavior, either negatively or positively. To use his words, “human conduct disciplined by a normative system is either an action within the given system or the omission thereof.”



Thus, the system prohibits certain conduct and allows other conduct, either positively or negatively. If a given form of conduct is authorized by the system it is positively regulated. Negatively permitted conduct is not prohibited by the system, nor is it positively regulated. The gap, therefore, is mere fiction created to limit magistrates' power of interpretation.

Nonetheless, many authors, such as Maria Helena Diniz and Hugo de Brito Machado, currently understand this differently. The principal that "everything that is not prohibited is permitted" is a logical enunciation and not a legal standard. For scholars of language, this is what could be called meta-language (DINIZ, 2007, p. 297).

Under this standard, according to Carlos Santiago Nino (2003, p. 283), the expression "permitted" may have two distinct meanings, the first of which being "not prohibited." Therefore, it is clear that "that which is not prohibited is not prohibited;" this tautological sentence being true under any circumstance. The other meaning would be as follows: the form of conduct would be permitted if, within a given legal system, there is no standard that prohibits it, but there is another standard that authorizes it. Therefore, the system must present a standard that allows for all non-prohibited conduct. Thus, Kelsen's statement would only be true with regards to certain legal systems that mention this standard authorizing all conduct that is not prohibited within the system.

It is important to note that quite often, reality does not follow what is laid out in standards, meaning that "not all reality can be contained in standards" (OLIVEIRA, 1998, p. 37). To state that no gaps exist would be to admit the uselessness of the Legislative Branch, given that all forms of conduct would already be covered, requiring only the Judicial Branch to choose between a number of possible solutions.

The fact that the judge may not fail to take up cases presented to the bench and that Law should provide an answer for all legal questions does not eliminate the existence of gaps. In this context, gaps should be understood as "the lack of a standard to be applied to a given concrete case" (MACHADO, 2004, p. 178). Given that Law is not limited to standards, the lack of a standard does not mean the absence of Law, but merely the existence of a gap to be filled.

With regards to this subject, the teachings of Karl Engisch (2001, p. 276) stand out. For the author, "a gap is an unsatisfactory lack of completeness in the whole." The author makes



a distinction between legal gaps and gaps in the law. The latter would be gaps in positive Law, while the former would be gaps in positive Law and customary Law.

In this, the author is admitting the existence of gaps, given the understanding that there are problems without a solution in explicit, specific standards. Given that social relations are dynamics, changes will occur, new necessities will appear and new demands will be made, and existing standards will be incapable of keeping up, with the accuracy necessary, with transformations and regulating all existing conduct. Gaps, therefore, are necessary to ensure that the deficiencies of the normative system are found and due adjustments are made, in order to ensure that Law may walk in lock step with the development of society.

Thus, having recognized the existence of gaps in the legal system and proven their importance to the development and evolution of the law, these gaps shall now be classified through an analysis of certain legal rulings on the theme.

1.1 Classification of Gaps

Karl Engisch (2001, p. 281) states that several different types of gaps exist. The lack of specific regulations for a given form of conduct may occur for several different reasons. They may, for example, stem from the platform or options of a legislator. In a conscious and deliberate manner, the legislator understands this through non-regulation. These are political-legal gaps, either critical or inappropriate. The legislator may fill these gaps in the future, in quest for a “more perfect future law (*lege ferenda*)”.

The author also classifies the gaps as primary or secondary. Primary gaps are, foremost, “inherent to legal regulations.” Secondary gaps are subsequent, meaning they are manifest as a result changing circumstances. These gaps may also be called original and posterior gaps, respectively (ENGISCH, 2001, p. 287).

An example of this type of gap can be found in the Brazilian legal system. In the period of the enactment of the Consumer Defense Code, in 1990, when consumer contracts were regulated, there was no need for regulations regarding electronic contracts, given that this was a reality that would only become possible in the future, based on circumstances that were only



manifest in the 21st century. This is currently a gap in the system. At the time that regulations for consumption contracts were laid out, however, online commercial relations were not part of the daily activities of Brazilian society, and therefore there was no need for regulation thereof.

Hugo de Brito Machado (2004, p. 183) classifies gaps as false, political or ideological, and true, or technical. The motivation of a false gap would be political or ideological in nature, however no real gap truly exists. These are not failures in the normative system, which offers an axiologically sufficient answer, meaning that these gaps are not incongruences in the “plan for realization of values found in the legal system.” These gaps are felt because a different solution is being sought out, replacing the solution resulting from the application of an existing general standard.

This type of gap does not allow for correction using existing means for integration. The only possible modification is via legislation. One example would be an increase or decrease in the sentence for a given crime. This is not a real gap – an answer already exists – there is a regulation for this given form of conduct. However, there may be someone that understands that the sentence or punishment should be more or less severe. The legislator, in this case, is the only one that may provide a solution to the question, increasing or decrease the sentence through the legislative process.

Norberto Bobbio (1999, p. 140) also touches on ideological gaps, teaching that these gaps may surface when a solution to a given case exists, but is not satisfactory. Certain people may desire that the solution differ from that offered by the standard. The author states that all existing legal systems are subject to ideological gaps.

True or technical gaps, according to Hugo de Brito Machado (2004, p. 103), are “those that when unresolved, imply in a moment of incongruence with the plan for realization of values found in the legal system.” This gap is in conflict with the values of the system, justice, security and others. The answer in the system may even be found, but the application thereof is inadmissible, given that it is incompatible with the effective legal system.

The decision of the Federal Supreme Court in Extraordinary Appeal 477554, heard on August 16, 2011, which recognized stable unions between people of the same sex, would be an example of a true or technical gap that was filled by magistrates. The lack of regulation of the theme of unions between homosexual couples and the lack of recognition of this right generated



a situation of incongruence with the values, rules and principles espoused by the Federal Constitution².

In February 2012, the Federal Supreme Court issued a ruling on Special Appeal 1183378/RS, recognizing the right to marriage between homosexual couples, based on the constitutional rights to liberty, equality, freedom from discrimination and free family planning, as well as the principle of human dignity³. The articles of Civil Code referring to the family should be interpreted in accordance with the Federal Constitution, with no prohibition of homosexual stable unions or marriage. These are therefore gaps that were filled by a legal ruling, resolving the previous conflict in the Brazilian legal system, which did not regulate the issue.

We must point out the teachings of Carlos Santiago Nino (2003, p. 287) on the concept of axiological or value gaps. For the author, these become clear when a fact *“is related to a normative system with a determined solution and there is a property that is irrelevant to the case in accordance with the normative system, but should be relevant in accordance with certain axiological guidelines.”* The normative system cannot find a just solution to the case, because there is a relevant property that should have been considered at the moment of preparation of the standard, but was not.

In Brazil, there is also the example of the situation prior to the publication of binding precedent 13, covering the issue of nepotism⁴. Prior to this precedent, there was no prohibition of the nomination of family members to commissioned positions or positions of confidence, or to a paid position in the Federal Government, which was a common practice at the time. The fact that the nominated person is a spouse, child or brother or sister was irrelevant to the normative system, but it was an important aspect, which should have been taken into consideration when

² The decision is mainly based on the principle of human dignity, in the constitutional dimension of affection and the constitutional right to the pursuit of happiness, which implicitly touches on the the nucleus related to human dignity. RE 477554 AgR, Relator(a): Min. CELSO DE MELLO, Second Term, ruled on 08/16/2011, DJe-164 DIVULG 25-08-2011 PUBLIC 26-08-2011 EMENT VOL-02574-02 PP-00287.

³ REsp 1183378/RS, Relator(a): Min. LUIS FELIPE SALOMÃO, QUARTA TURMA, ruled on 10/25/2011, DJe 02/01/2012.

⁴ Binding Precedent 13: “The nomination of a spouse, companion or direct relative, either collaterally or by affinity, up to the third degree, including, by the nominating authority or public servant from the same corporation holding the directing position, leadership or advisory, for a commissioned position or position of confidence, or a paid position in direct or indirect public administration in any of the Federal, State, Federal District or City branches of government, including through reciprocal designation, violates the Federal Constitution.”

the standard on the nomination of persons to these positions was published. With the publication of the precedent in question, the axiological gap was filled.

Norberto Bobbio (1999, p. 143) classifies gaps as proper and improper. The former result from failures within the system, while the latter are derived from the comparison between a real system and the ideal system. Improper gaps, to the author, are very common in Penal Law, given that they are related to thoughts of how the system should be. The distinction between them is made in accordance with how they are eliminated: improper gaps are only able to be filled by legislators (just like the false gaps touched on by Hugo de Brito Machado), while the person interpreting the standard may fill proper gaps.

Bobbio (1999, p. 144-145) also classifies the gaps as subjective, when they “depend on a given motivation solely tied to the legislator” (either voluntarily or involuntarily), and objective, when “they depend on the development of social relations. Voluntary gaps, to the author, are not true gaps, given they were intentionally left open by the legislator. The filling thereof, then, was conferred to the “creative power of the lower body on the hierarchical ladder.”

These are called “intentional” gaps (NUNES, 1976, p. 570) when the legislator preferred to not regulate the issue, feeling that it would be inopportune or uninteresting. Involuntary gaps, for their part, are those that are born of the legislator’s failure to perceive the problem at hand, whether because of historic conditions that did not allow for perception of the problem (forgivable gaps) or because the problem was not examined with due caution, which are known as unforgivable gaps (FERRAZ JR., 1997, p. 29).

Finally, in accordance with the teachings of Tércio Sampaio Ferraz Jr. (1997, p. 128), gaps may be classified as authentic, when given a standard, no solution is possible or cannot be found, and inauthentic, when a solution exists but is considered false. The author explains that “doctrine tends to accept only the first type (*de lege lata*) as a true gap, while the second is considered a critical or political-legal gap (*de lege ferenda*).”

Having discussed the existence of gaps and their classifications, we will now move on to an analysis of the question of completeness in the legal system.

3. The (in)completeness of the system

Norberto Bobbio (1999, p. 118) teaches that completeness is the result of the conception that the judge is obligated to rule on all controversies that reach his bench and should do so based on a standard found in the effective system. From that point, completeness should be considered as a necessary element in the system, “a condition without which the system as a whole could not function.”

This is the idea of the dogma of completeness, defended by certain positivists that believe in the lack of gaps and the principle that the legal system is complete, providing the judge with all solutions – without the need for seeking out analogies, general principles of law, etc. This is the idea defended, for example, by the school of exogenesis, based on the belief that the code was enough in its “own completeness,” meaning it showed no gaps at all (BOBBIO, 1999, p. 121).

The error in this theory is in believing that the law is enough and, in that, is sufficient to resolve all existing problems. In truth, codes are insufficient, become outdated, while social relations are dynamic and in constant transformation. The conception and admission of legal gaps is a fundamental step in allowing Law to advance, correcting incoherence and meeting demands that are constantly arising. The error is not in the affirmation that completeness is proven based on the principle that the judge should find solutions to all problems that may present themselves, but rather in Bobbio’s conclusion: the fact that the solution should be based on a standard that belongs to the system.

Tércio Sampaio Ferraz Jr. teaches that “complete is, thus, what is done, wholly and completely, meaning that which has everything it needs, everything that belongs to it” (FERRAZ JR., 1997, p. 126). The system is just that. Admitting the existence of gaps, the system indicates the manner to correct these failures. In the Brazilian legal system, the standard that authorizes the filling of gaps can be found in article 4 of the Law for Introduction of Standards of Brazilian Law: “When a law is omitted, the judge will rule on the case in accordance with analogy, customs and the general principles of law.”

Thus, if the very system presents a manner for correction of the gaps, it therefore has everything it needs. It is done. The issue is the solution is not ready, it is not a written standard, but rather the application of law by the judge, who will use their creative power. In line with Hugo de Brito Machado (2004, p. 180), “the legal system is, without a doubt, logically complete,



as long as it always contains the means to obtain the answer to all legal questions” and continues to affirm that “the incompleteness thereof is revealed on the axiological plane, because the problem that could be brought up, in this case, is if the solution or answer that can in fact be obtained is satisfactory or just...” Corroborating this understanding, Arnaldo Vasconcelos (2000, p. 11) affirms:

the formal expression of Law as the discipline of conduct is a legal standard. It lays out modes for conduct that are interesting for joint social living. The set of these standards is known as a legal system. [...] There is no possible human relation that will not be covered by the Law.

Going against what has been said, one could affirm that the system is not complete, given that the possibility for integration occurs outside of the normative field, meaning only upon the application of law by the judge (OLIVEIRA, 1998, p. 41).

The very problem of the gap is only truly manifest when the judge moves to apply the law; to rule on the question at hand. If the problem is only manifest when the judge moves to rule, it is only natural that the solution to the problem would also present itself at the time of the ruling, at the moment when the judge may utilize the means of integrating the standard, such as an analogy, equality, the general principles of law, customs, etc. It is obvious that the solution may only exist as real after the problem has been manifest.

Carnelutti (2000, p. 171) teaches that gaps appear “true and proper in both the law and in contracts,” but are only interesting upon rulings of case law. With this, the author affirms that the gaps may even exist on the abstract plane, as a theoretical concept, but will only become a problem upon the actual application of law, when the magistrate moves to solve a pending issue (OLIVEIRA, 1998, p. 41). Therefore, it is only natural that deficiencies are only corrected after they are effectively manifest.

With regards to the application of law, it is important to point out that this is a “model for action that is conditioned by a prior axiological choice between a number of possible interpretations” (REALE, 2002, p. 296). Thus, before the application of law, there must be an interpretation of the text, even when clear (this clarity, therefore, may only be recognized through interpretation).



According to Gustav Radbruch (2009, p 216-217), the jurist's duties include interpreting, construction and systematizing the law. Interpretation, in the author's explanation, is not the search for intension – or the legislator's thoughts – but rather the search for meaning existing in the very production of the standard, which may be consciously or unconsciously present.

One must admit that there is a certain measure of creativity in the legislative activity (CAPPELLETTI, 1999, p. 21). Even if a law is written as clearly as possible, gaps may be found and must be filled by the judge in a creative manner. These solutions must, therefore, clarify doubts, ambiguities and contradictions. The question, therefore, is what are the limits and modes for this creation of law by magistrates, even while recognizing that there is a margin of freedom granted to the judge, allowing him to utilize the means for filling gaps when necessary, thereby completing the legal system.

According to Adrian Sgarbi (2007, p. 434), no single standard surfaces before interpretation. In his words, “before interpretation it is not possible to speak of a standard, any standard.” The text is interpreted and the standard is applied. Gaps may also only be found after interpretation (given the fact that it is only through understanding of the meaning of the text that one may affirm of there is a deficiency to be fixed, if there is a standard to be applied to the concrete case). Thus, as explained above, the problem of gaps is only manifest at a later moment, after the interpretation of the text and upon application of the standard.

The argument could be made that the judge, upon ruling on the question, does not even eliminate existing gaps, but rather merely presents a solution to a given concrete case. In other words “the gaps is not filled by the application, to a case not already covered by the law, of an analogy, custom or, furthermore, the general principles of law” (PEREIRA, 2011, p. 330). In fact, in the theoretical, abstract plane, the gap does not cease to exist (it is only filled by the legislative process, which is valid for all). But what is the relevance of the existence of gaps outside of reality?

As has been stated, gaps are only of interest in the act of applying the law, at the moment of the case law ruling. The problem of gaps is only manifest in practice, upon application and after the interpretive act. In this sense, and for all intents and purposes, when the judge offers a ruling on a case with a previously non-existent specific standard, he is, in fact,



filling the gap. In this act, the judge is solving the question utilizing one of the means for legal integration.

It is important to note that many authors confuse completeness with the absence of gaps. Just as Norberto Bobbio (1999, p. 115) stated: “once the lack of a standard is generally called a ‘gap,’ [...] completeness means the ‘lack of gaps.’” These, however, are not synonyms. As we have explained, a gap is present when there is no specific standard to be applied to a given concrete case (MACHADO, 2004, p. 178). Completeness, then, would be when the item possesses everything that it is due.

Therefore, the legal system possess gaps, given the fact that there are pending issues that cannot be solved by a specific standard, but this is not to say that the system is incomplete, since, despite the gaps, the very system provides the instruments needed to solve the pending issues. This is not done by specific standards, but through integration, a method authorized by the system. The solution of a concrete case may be observed, thus, at a later moment, after the manifestation of the gap and at the moment the law was applied.

Tarlei Lemos Pereira (2011, p. 316) understands gaps as the “possible case in which the law does not offer, in principle, a solution.” It is clear that the author also confuses the concepts of completeness and gaps. When the law does not offer a solution, this is not an example of gaps, but rather incompleteness. The system that does not offer the means for integration and filling of gaps is incomplete, because there will always be cases in which the law truly cannot solve the question.

In this sense, the Brazilian legal system, for example, is complete, exactly because the law offers a solution to all cases that are presented to the judge. This is not done through standards (and law cannot be reduced to standards⁵), but rather through integration, which may be conducted via article. 4 of LINDB.

With regards to the means for integration, discussions on analogies should be highlighted. According to the explanations of Karl Engisch (2001, p.294), “the judgments of

⁵ According to the understanding of Arnaldo Vasconcelos. To the author, law is not a standard. A standard is a formal expression of the Law, it is the instrument for the expression and proclamation thereof. Furthermore, he affirms that the Law comes before the standard and prevails over it. In his own words, “the Law is made up of Fact, Value and Standard”, confirming Miguel Reale of three dimensional law. VASCONCELOS, Arnaldo. **Teoria da Norma Jurídica**. 5.ed. São Paulo: Malheiros, 2000, p. 17.



equal value of the law and customary law should regulate and dominate not only cases to which they are immediately pertinent, but also those that present a similar configuration.” Analogies assume the idea that Law is a “system of purposes” (REALE, 2002, p. 296).

Thus, “*ubi eadem ratio, ibi eadem juris dispositio*” (where there is the same reason there must be the same disposition of the law). In Brazilian case law, the case of application of article 57 of Law 8,213/91 to retirees under the special regime, given the legislative inertia regarding the regulation of article 40, paragraph 4 of the Federal Constitution, is an example of when the Federal Supreme Court applied an analogy in the solution of a question, filling a gap existing up to that point (ENGISCH, 2001, p. 294).

Miguel Reale (2002, p. 298) points out that the concept of the analogy should not be confused with the concept of extensive interpretation. Analogies assume the recognition of the existence of a law. Extensive interpretation admits the existence of a standard, but the understanding thereof is extended to beyond the norm. Furthermore, recognizing a gap with no other standard to be applied to the case opens the door to the use of the so-called general principles of the law⁶.

For Arthur Kaufmann (1965, p. 41-42), once the concepts acquire meaning, or rather, are interpreted, they cease to be unique and become analogies. Thus, saying that the interpretation reaches the “possible meaning of the word” is to reach the center of the analogy, as this “possible meaning of the word” cannot be unique or misconceived, but only analogies. From this, the author criticizes the idea of prohibition of the analogy in penal law, as sanctioned behavior may not require a unique interpretation. Prohibiting analogies would, in this sense, be to prohibit interpretation. No illegal fact is marked by exact characteristics laid out by the law: on all sides, the borders are open. The question is knowing the limits of the analogy, which are not the same in the penal and civil spheres.

This thereby proves that interpretation is essential to the verification of the existence of gaps and is the first step to the possible correction thereof. The problem only comes to light through interpretation, which is nothing more than a search for meaning that, once found,

⁶ These are methods of auto-integration. Other instruments for filling gaps may be utilized by the interpreter, such as customs, equality, doctrine, which are means for hetero-integration (they utilize other sources and not only the law). BOBBIO, Norberto. **Teoria do ordenamento jurídico**. 10. ed. Brasília: Universidade de Brasília, 1999, p. 146 e ss.



becomes an analogy. This correction is only undertaken once the interpreter moves to apply the standard, through the use of methods for integration in the solution of conflicts. Thus, the system completes itself. Not in a theoretical, abstract plane, but in the real plane – and it is reality that is effectively of our interest.

FINAL CONSIDERATIONS

Based on what has been touched on herein, one may conclude that gaps are the absence of specific standards to regulate certain conduct. They are, thus, insufficiencies present in all legal systems, given that it is impossible to foresee and regulate all existing forms of conduct. Society is dynamic and is in a constant state of transformation, and legislators are incapable of laying out in normative text all possibilities for interaction and social relations. Furthermore, recognition of the existence of gaps is a necessary condition for law to evolve and keep up with the needs and demands of society.

This work classified the myriad forms in which gaps may present themselves. There are false – political or legal - gaps, true or technical gaps, improper or proper gaps, axiological or normative gaps, primary or secondary gaps, authentic and inauthentic gaps, etc. Even though they may all have different characteristics, all gaps carry the conception of lack, absence or insufficiency in standards.

With regards to the question of the completeness of the legal system, this work has shown that the legal system may be complete, when presenting possibilities for solution of problems presented to magistrates, in the case of legislative omission. The existence of gaps is recognized, but this does not mean that the system is incomplete. It is up to the judge to solve all of the demands placed in front of him. The solution, however, may not come from specific standards, as gaps may exist. Thus, there are methods for judicial integration, such as analogies, the general principles of law, equality and customs, among others.

Finally, we can conclude that completeness does not mean the lack of gaps. This is an error made by most authors and is the main contribution to be taken from the reading of this brief piece.



REFERENCES

- BOBBIO, Norberto. **Teoria do ordenamento jurídico**. 10. ed. Brasília: Universidade de Brasília, 1999.
- BONAVIDES, Paulo. **Do Estado liberal ao Estado social**. 7. ed. São Paulo: Malheiros, 2001.
- CAPPELLETTI, Mauro. **Juízes legisladores?** Porto Alegre: Sérgio Antônio Fabris, 1999.
- CARNELUTTI, Francesco. **Teoria Geral do Direito**. São Paulo: Lejus, 2000.
- COSSIO, Carlos. **La plenitude del ordenamiento jurídico**. Buenos Aires: Editorial de Los Andes, 2005.
- DINIZ, Maria Helena. **As lacunas no Direito**: adaptada ao Novo Código Civil. 8. ed. São Paulo: Saraiva, 2007.
- ENGISCH, Karl. **Introdução ao pensamento jurídico**. 8.ed. Tradução de J. Baptista Machado. Lisboa: Calouste Gulbenkian, 2001.
- FERRAZ jr. Tércio Sampaio. **Direito, retórica e comunicação**. 2. ed. São Paulo: Saraiva, 1997.
- KAUFMANN, Arthur. **Analogia y “naturaleza de la cosa”**: Hacia una teoria de la comprension jurídica. Santiago: Editorial Juridica de Chile, 1965.
- KELSEN, Hans. **Teoria pura do direito**. 8. ed. São Paulo: Martins Fontes, 2009.
- MACHADO, Hugo de Brito. **Introdução ao estudo do direito**. 2. ed. São Paulo: Atlas, 2004.
- MANERO, Juan Ruiz. Algumas concepções de direito e suas lacunas. **Revista Sequência**, n.1, p. 31-60, dez. 2010.
- NINO, Santiago. **Introducción al análisis del derecho**. 2.ed. Buenos Aires: Depalma, 2003.
- NUNES, Pedro. **Dicionário de tecnologia jurídica**. 9. ed. Rio de Janeiro: Freitas Bastos, 1976.
- OLIVEIRA, Régis Fernandes. Lacunas e sistema normativo. **Revista Trimestral de Direito Público**, 2002. ed., fas. 24, p. 34-53, 1998.
- PEREIRA, Tarlei Lemos. Lacunas, meios de integração e antinomias: uma abordagem à luz do sistema jurídico aberto e móvel. **Revista Forense**, v. 414, p. 310-354, jul-dez. 2011.
- RADBRUCH, Gustav. **Introdução à ciência do direito**. São Paulo: Martins Fontes, 2009.



REALE, Miguel. **Lições preliminares de direito**. 27. ed. São Paulo: Saraiva, 2002.

SGARBI, Adrian. **Teoria do direito** – Primeiras lições. Rio de Janeiro: Lumen Juris, 2007.

VASCONCELOS, Arnaldo. **Teoria da Norma Jurídica**. 5.ed. São Paulo: Malheiros, 2000.