

Vagueness and Theory of Gaps

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Preface

This contribution is dedicated to the concept of gap (*lacuna* in Latin, *Lücke* in German), more precisely to the theory of gaps and its role in legal thought, particularly in the Czech Republic. The starting point to this analysis is the notion of vagueness. For the beginning, different meanings of vagueness shall be presented and explained. Then the focus shall be laid on the relation between the „theory of gaps“ and vagueness. Therefore main attention is paid to the theoretical distinctions between various types of legal gaps and their usage in the legal practice. As a conclusion I will try to resolve the question whether or not the notion of „gap“ shall apply for instances of vague terms (uncertainty) of normative text.

I. Vagueness – a threat or a benefit of legal discourse?

There are several possible meanings of what we call „vagueness“. If we apply this term in legal speech (legal discourse), we usually mean that the text does not tell us complete information which we would like to recognise by means of this text. Practitioners usually call for „vagueness“ of normative texts when they want to criticise legislators due to their low quality of normative text (legislative drafting). As a result, vagueness is sometimes understood as a negative connotation – when a normative text (usually a statute) is vague, it is not well elaborated. This point of view is often shared by the legislators (i. e. practitioners participating in legislative drafting). In short, legal community does not want vague laws (sometimes called in practice „gummy“ laws). By the way, this is remarkable even from the point of view of the cult of legal text, which appeared in Europe in 19th century as a result of great codex movement (Code Civil, ABGB, BGB...). As can be seen, we still implicitly participate in this idea of normative text as a complete, precise, certain and wise work of legislators without any deficiencies. Legislature is based on a linguistic approach which is very near to „precization“. Semantically, that means adding more and more features and elaborating complicated legal definitions and explications, also by drafting categorical lists¹ of elements subordinate to the explained term. However, this attitude constitutes eventually a gate to legal entropy.² It is a matter of dispute whether the attitude based on precisizing legal text or employing vague terms represents a more serious threat to the rule of law.³

Legal theory distinguishes precisely and more specifically the term vague or vagueness and other similar notions. Vagueness may be defined as a situation, when an application of a term (notion, concept) is unclear.⁴ This constitutes so called „borderline cases“, in which is uncertain (not clear), whether or not a term covers the situation of its

¹ Tiersma, P. M. (2005) Categorical List in the Law. In. Bhatia, V.K., Engberg, J., Gotti, M. & Heller, D. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang, European Academic Publishers, 2005

² See Holländer, P. (2006) *Filosofie práva*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, p. 217. This effect is called a paradox of legal language – the more precise is the expression of law, the more entropical the law is.

³ See Solan, Vagueness and Ambiguity. In. Bhatia, V.K., Engberg, J., Gotti, M. & Heller, D. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang, European Academic Publishers, 2005, p. 79.

⁴ See Dahlman et. al.(2012) The Effect of Imprecise Expressions in Argumentation. In. Araszkiwicz, M., Myška, M., Smejkalová, T. Šavelka, J., Škop, M. (eds.) *Argumentation*. International Conference on Alternative Methods of Argumentation in Law, p. 17

application. As a result, a legal term is either applicable to the case, or non-applicable.⁵ This kind of uncertainty (imprecision) is one of the reasons why theory and practice talk both about hard cases. Vagueness then is often characterised as a quality feature which may be quantified, i. e. that some legal terms are more vague than other terms. As we could see, there are several synonyms or higher concepts representing vagueness (uncertainty, imprecision or unclarity). Traditionally, the distinction is made between vagueness and ambiguity. By use of ambiguity (ambiguous term) we understand a term, the semantic field of which is formed by two or more separate meanings.⁶ But this is usually a matter of context of the usage of the term. In practice, if a term is applied correctly (from a pragmatic point of view), an addressee would not have the other meanings in mind because of the context. For example, if we use the term „suit“ in legal text, we would prefer to interpret this term as a „law-suit“, i. e. a kind of petition to the court, but not a piece of garment. But, on the other hand, it does not mean that a „suit“ may not be used in a normative text in the second possible meaning – a kind of clothing (descriptive concept). Applying legal terms in practice we are usually not in a non-contextual situation (let us compare it to a „dictionary“), because our mind always begins to interpret from a certain point defined by the situation defining facts of the case.

To give a certain answer to the question whether vagueness is an enemy for legal discourse we shall mention those situations, where vagueness is a part of communicative strategy of the legislator. Among these situations are particularly understood: vague terms, general clauses and discretion.⁷ A vague term is a term whose content and extension are uncertain.⁸ A vague term may refer to facts as well as normative content. General clause is a special case of a vague term, which is in fact a normative clause with a broadly expressed antecedent (e.g. referring to bonos mores, validity of legal conduct, public interest and certain legal values).⁹ Discretion is not a semantic problem itself. Involving discretion in a norm (rule), normative text remains open to creative attitude of a judge or administrative body when applying this norm. Every discretion has its limits which are drawn by legislative context.

Timothy Endicott argues that precision of a normative text has its value both in the sense of guidance and procedure. Indeterminacy is a natural companion of law-making, because „*the law does not say everything*“.¹⁰ Then he concludes that vagueness simply is necessary and distinguishes two types of vagueness: a trivial vagueness and „hedging terms“.¹¹ In my opinion, this „neutral“ view of vagueness is useful. Facing an indeterminate text or more specifically a vague legal term we should always remember that the law does not function without interpretation. Eventually, precision of imprecision are not objective categories, but intersubjective. Vague term is vague as a result of our recognition of its content by means of its linguistic features (semantic field), which is shared by us as members of a communicative legal community.

In my view, vagueness is neither an enemy or a risk to the principles of rule of law. It is a natural companion of the very existence of law. It could be in some aspects a benefit,

⁵ Ibidem.

⁶ See Solan, L. M. (2005) Vagueness and Ambiguity in Legal Interpretation. In: Bhatia, V.K., Engberg, J., Gotti, M. & Heller, D. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang, European Academic Publishers, pp. 73 – 74.

⁷ Engisch, K. *Einführung in das juristische Denken* (2010) 11. Auflage. Stuttgart: Kohlhammer Verlag, pp. 188 – 235.

⁸ Ibidem, p. 193.

⁹ See Melzer (2011) *Metodologie nalézání práva*. Praha: C.H.Beck, pp. 115 – 116 (quoting to this point a Swiss theoretist Ernst Kramer).

¹⁰ Endicott, T. (2005) The Value of Vagueness. In: Bhatia, V.K., Engberg, J., Gotti, M. & Heller, D. (eds.) *Vagueness in Normative Texts*. Bern: Peter Lang, European Academic Publishers, pp. 30 – 35.

¹¹ Ibidem.

particularly where a certain autonomy of addressees of legal normative text is provided (e. g. contract law).

II. Legal Gaps and Relevant Contexts of This Theory

Theory of gaps in law does not represent any consistent theory. There are many authors who have spent plenty of scientific work on this problem, and – as a result – construed certain models (schemes) offering some explanations and classifications. This is the reason why there are many alternatives not for the classification of the legal gaps. On the other hand, the notion of gap seems to be an unavoidable construction to deal with the incompleteness of the law faced by those who are supposed to interpret it (mainly judges and administrative bodies or public authorities in general). Some authors even compare this theory to a legend which is immanent to the legal thinking.¹² One might say that the concept of legal gap is somehow implied in any attempt to analyse law as a system and source of legal rules designed to resolve legal cases stemming from social life of the individuals and the society as a whole. It has become an integral part of both systematic and methodological theoretical analysis of legal systems. Thus, the analysis of the role of gaps in law has remained an important part of both theoretical and practical dimensions of legal life.

Of course, legal gaps are often mentioned as a part of a traditional conflict between iusnaturalism and positivism, more precisely, positivist and non-positivist theories. Theory of gap is supposed to be rather a non-positivist approach in legal theory, however, it depends on the sort of the source used to fill the gaps. Non-positivist authors often see the source for covering legal gaps in morality (or moral discourse). Positivist authors argue that legal gaps can be filled by using judicial and administrative discretion (act of will). Within the framework of positivist theories, contemporary authors often present more detailed insight into the positivist theories and distinguish between exclusive legal positivism (ELP) and inclusive legal positivism (ILP). For example, American theoretist Scott Shapiro argues that law can never be a complete system.¹³ His statement has been criticised by those who can recognise law as conceptually complete phenomenon¹⁴ or as an autopoietic system in which each “operation” can be characterized as legal or non-legal one (N. Luhmann). This problem has been sometimes simplified by the practitioners considering law as an incomplete system using the following (and well known) argumentation: the law-maker is not able to predict all the cases which may arise in future application of his laws. This idea has been reflected also by some theories among which a special attention should be paid to Alchourrón and Bulygin who discussed this problem in their monography *Normative Systems*.¹⁵ These authors argue that the cause of the incompleteness of the legal system of norms is the uncertainty and vagueness of legal concepts.

Another very important context of the theory of gaps is the ideological background of law. This context was analysed by Bernd Rüthers in his famous work „Die Unbegrenzte Auslegung.“ In this book Rüthers concentrated on the methods of interpretation used in the

12 For a deep analysis of the various theories of gaps see Chiassoni, P. *Civil Law, Common Law and Legal Gaps. A Tale of Two Traditions*. Accessible at http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2007/03chiassoni.pdf.

13 Shapiro, S. *The Planning Theory of Law*. See <http://uchv.princeton.edu/workshops/DHVP/Shapiro.pdf>.

14 This critical standing point is made by Beltrán, J.F., Ratti, G.B. *Theoretical Disagreements: A Restatement of Legal Positivism*, pp. 172 – 173 In. Canale, D., Tuzet, G. *The Planning Theory of Law: A Critical Reading*. Springer Science & Business Media. 14. 9. 2012.

15 Alchourrón, Bulygin, E. *Normative Systems*. California University: Springer Verlag, 1971, pp. 110, 114.

judicial practice in the time of National Socialism government in Germany until 1945. From this point of view, recognizing and filling legal gaps seems to be an ideologically determined technique of interpretation which can be very easily misused and abused. Legal system is not protected from the political and ideological influences which are also a part of the pre-understanding of judges and other public authorities deciding legal cases. The more uncertain and vague the wording of legal norms is, the greater space for the person interpreting it to include his or her own ideas, personal views and political and racial prejudices and constructions into the semantics of legal text.

In my view it is neither necessary nor suitable to discuss all of these theoretical contexts of the theory of legal gaps.¹⁶ The scope of this contribution is to offer a brief insight into Czech legal discourse and its ways of understanding the problem of legal gaps. I would like to present a short theoretical survey of this problem first and then demonstrate some of the applications of this model in the judicial practice. I will focus mainly on the role of gaps in the constitutional discourse on human rights and freedoms in the Czech Republic. The Constitutional Court practices both the abstract and the concrete constitutional review. While using both of these competences it applies the notion of the gap in certain contexts. As a conclusion, I would like to discuss the efficiency of the model of gaps in the practice and the relation to the concept of vagueness discussed at the beginning.

II. Concept of Gap in Theoretical Discourse

In my opinion, the usage of the gap model in contemporary Czech legal theory must be seen from the point of view of contemporary Czech legal thinking and its development within the last three decades. Under the socialist regime, the Czech legal thinking derived from the marxist legal theory first and later from the socialist normativism which appeared to be a more simple mixture of formalist and normativist theories. Thus, discussion on the legal gaps in 1960's and 1970's was very rare.¹⁷

In the Czech legal discourse it is essential to distinguish between the genuine and non-genuine (interpretative) gaps (also non-gaps).¹⁸ This conceptual framework of gap model was introduced into the modern legal theory by German legal philosopher Ernst Zitelman¹⁹ and further developed particularly by Hans Kelsen.²⁰ Zitelman analysed the concept of legal gap from the point of view of the German civil code (BGB) assuming that BGB contains legal

¹⁶ For a more detailed survey in a theory of gaps summarizing all important attitudes and differentiation see Večeřa, M. O soudcovském dotváření práva. In: Gerloch, A., Tryzna, J., Wintř, J. *Metodologie interpretace práva a právní jistota*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012, p. 228.

¹⁷ One of those theoretists who analysed this problem at that time was Viktor Knapp, one of Czechoslovak world renown legal philosophers. See e. g. Knapp, V. Některé otázky aplikace a interpretace občanského práva ve vztazích socialistických organizací. In: *Právník*, roč. 97, 1958, p. 235; further also Knapp, V. Soudcovská tvorba práva v socialistických zemích. In: *Právník*, 1969, p. 81 and following, also Knapp, V. Řešení problému tzv. mezer v právu ve velkých buržoazních kodifikacích. In: *Velké kodifikace: sborník příspěvků z mezinárodní konference, taking place in Prague 5th – 8th September 1988. Volume 1*. Praha: Univerzita Karlova, 1989, p. 273 and following.

¹⁸ For instance, one of the latest Czech books published in this field relies upon this difference. See Melzer, F. (2011) *Metodologie nalézání práva*. Praha: C.H.Beck, pp. 224 – 232.

¹⁹ Zitelman, E. *Lücken im Recht*. Leipzig, 1903. Accessible at http://dlib-pr.mpg.de/m/kleioc/0010/exec/wrapsmallpage/%22219074_00000001.gif%22/big/%221%22.

²⁰ On the other hand, this distinction has been criticised by many authors, especially K. Larenz and C. W. Canaris. See to this point Canaris, C. W. *Feststellung von einer Lücken im Gesetz*. Berlin: Duncker&Humblot, 1964, s. 132.

gaps as well as any other code. In Zitelman's view, the problem of the gaps discloses the fundamental problems of both legal theory and practice: the relationship between the judge and the legal system, between the laws and the legal system as a complex of rules, between freedom and coercion and between positive and natural law.²¹ In the theoretical discourse, the notion of the gap serves as a specific figure in reasoning for a) the incompleteness of the legal system (openness of the legal system), b) the methodological tool for solving hard cases.

In the former Czechoslovak legal system, legal theory and the theory of legal interpretation (legal hermeneutics) were affected by the ideology of an „easy“ application of the law. This theoretical attitude was based on the belief that no interpretative gaps existed; had there occasionally appeared a case with the features of a complex (hard) case (which could have been recognised as an interpretative gap) it was believed to be the fault of the legislator who failed to regulate such a legal relationship properly so as to enable the interpreters to do their job well. Indeed, in the socialist normativism as a type of legal thinking there was only space for so called genuine gaps: i. e. relationships not regulated by any statute at all.

During the social and political transformation in the 1990's, the debate on the gaps in law started to be more intensive. It was obvious that building-up a state (based on the rule of law) with functioning human rights protection, division of powers and judiciary based on the respect to these values will need a deeper understanding of the structure of the system of law. This might also be viewed as a result of the activity of the Federal Constitutional Court and the Constitutional Court of the Czech republic (since 1993). Constitutional review had to face the problem of the axiological discontinuity of the legal order which – on the other hand – has remained formally unchanged since the socialist times and has been amended gradually until nowadays. The tension between the formal continuity and the axiological discontinuity was undoubtedly one of the factors which has brought the problem of the legal gaps back to light.

Pavel Holländer (a former judge of the Constitutional Court of the Czech Republic and legal philosopher) argues that the theory of legal should be grounded on the doctrine of *denegatio iustitiae*.²² For him, this problem is a part of so called „traditional toolbar“ of methodology. He distinguishes between the genuine gaps and the interpretative gaps (non-gaps). The genuine gaps could arise in situations in which (particularly public) legal regulation (e. g. procedural rules) are missing although they are necessary for the court to exercise its powers. The non-gaps are - in his view - the axiological gaps in their nature. In these cases, legal regulation seems not to be absent, however, compared to the legal regulation issued in similar cases (but regulated by different laws) the interpreter finds out that the rule is missing. In both these situations, Holländer suggests that the interpreter may fill in the gap with the means of legal reasoning (e. g. analogy, elimination and other teleological approaches).²³ Holländer presents some of the constitutional cases where the gaps of both the above mentioned types had been recognised by the Constitutional Court and either filled in, or not. In this respect, the most important theoretical challenge is to understand for which reasons the Court had to choose one or another way of dealing with certain legal issue where a legal rule is absent.

21 Zitelman, E. *Lücken im Recht*. Leipzig, 1903. Accessible at http://dlib-pr.mpg.de/m/kleioc/0010/exec/wrapsmallpage/%22219074_00000001.gif%22/big/%221%22, pp. 6 – 7.

22 Holländer (2003), P. *Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu*. Praha: Linde, p. 17.

23 Ibidem, p. 18.

Later on, some other theoretical models have appeared and have been based on different theoretical views. In particular, Alchourrón and Bulygin's typology of gaps seems to have a deep influence on the Czech theoretical discourse. This typology is accepted particularly by Zdeněk Kühn²⁴ and Jan Tryzna. These authors distinguish normative and axiological gaps. As for the normative gaps, the explanation is similar to the Zitelmann's notion of the genuine gap: completely missing legal rule – the norm regulating a type of legal relation is missing. On the contrary, the axiological gaps can differ in several alternative situations:

- a) the normative system has not satisfied the normative need of the legal community and has not produced a legal rule that - from the point of view of the values of the particular legal order – would be:
 - Eligible (then analogy is expected); or
 - Superfluous or excessive (then teleological reduction is expected).
- b) there is legal rule regulating the concrete relationship but from the axiological point of view this rule is not applicable (a controversy between the legal norm and equity, fairness, justice in material sense etc.).

The axiological gaps are closely connected with the concept of hard cases. Ronald Dworkin would probably call these cases as „interpretative gaps“ and – according to his own words – these gaps can be identified and filled only by using „*the best political and moral consideration of a judge*“.²⁵ In the Czech theoretical discourse, however, Dworkin's theory of gaps is not often referred to as one of the main ideological sources of this theory. This is mainly due to the fact that German theories have always been regarded as closer to the Czech legal thinking.

Further, but rather rarely in practical context, some authors make use of some other typologies of gaps like technical gaps, apparent and hidden gaps, distinction between *de lege lata* and *de lege ferenda* gaps, as well as the distinction between intentional and non-intentional gaps in the law (from the point of view of the legislator). In practice, lawyers often talk about the legal gaps mirroring the problem of so called *general clauses* (the concept of a very generally formulated legal rule causing the uncertainty and the lack of clarity). These gaps are regarded as the typical example of the obvious legal gaps – missing reference norm, legislative inactivity – creating a very complicated task to deal with (even in the context of the constitutional law).

This is the main area where the problem of vagueness combines with the idea of indeterminacy of legal normative text. The question which is quite apparent sounds as follows: shall we these types of vagueness or uncertainty of legal rule subsume under the concept of gaps? The traditional division between interpretation and creative adjudication (filling-in gaps) is at stake here. Facing this question, K. Engisch stays a bit aside the problem and argues, that these types of incomplete legal regulation is „planned“ by the legislation, and that is why this is not a gap in a „genuine sense“.²⁶ As a result, we shall use terms like not-gap or an interpretive gap to cover these situations. However, he admits that the

24 Kühn, Z. (2000) *Aplikace práva ve složitých případech. K úloze právních principů v judikatuře*. Praha: Karolinum, p. 215-216.

25 This conclusion is made more explicit in R. Dworkin in his work *Justice in Robes*. Quoted in Chiassoni, P. *Civil Law, Common Law and Legal Gap. A Tale of Two Traditions* p. 66, see supra 1.

26 Engisch, K. (2010) *Einführung in das juristische Denken* 11. Auflage. Stuttgart: Kohlhammer Verlag, pp. 240 – 242.

difference between finding the law and creative adjudication is not quite clear. It depends on how far we would like to extend the concept of gap.²⁷

In my view, theory of gaps should comprise also the situations of planned vague expressions used in legal communication. Therefore the concept of a non-gap, let us say an interpretive gap is crucial for this analysis. My reasoning to this point results from the idea of mutual interconnection between interpretation and filling-in gaps (creative adjudication). Both interpretation and filling-in gaps lead to formulation and re-formulation of legal normative text. If vagueness may cause the feeling of incompleteness, then it is legitimate to use the theory of gaps to describe it theoretically.

II. Principles of Dealing with Gaps under Czech Legal Order

The theory of gaps uses traditionally a two-steps process: a) identification of the gap; b) filling-in the gap.²⁸ Of course, both of these two steps can be used only if filling a gap is not forbidden by the principles of the particular legal order (e. g. prohibited analogy in *malam partem* in criminal law) and thus the legislative intent of non-regulation of the concerned relationship is presumed. The crucial step in deciding whether it is possible to fill in a gap is to consider the relevant legal context of the act of interpretation.

The Czech legal order contains some provisions on both the constitutional and statutory level regulating the filling-in activity of the those who interpret law. As far as the constitutional level is concerned, there is no provision in the Czech legal order concerning judicial „*Rechtsfortbildung*“, i. e. filling-in gaps. Unlike e. g. German Grundgesetz, the Czech Constitution provides that judges are to be bound by the statutory law and by the international treaties (only those which have become an integral part of the Czech legal order according to Art. 10 of the Czech Constitution). Judges also vow the loyalty to the constitutional order, however, they are not bound by the secondary legislation (the legislation of the executive bodies) and local authority legislation. For a judge hearing and interpreting a hard case and facing the problem of a gap, there are two possible ways how to deal with such a case: judges may either decide the case according to their best consideration (to fill in a gap) or they may submit the case to the Constitutional Court, seeking the abrogation of the statute (or the derogation of certain provision of the statute) which should have been applied if the judge regards it as unconstitutional. In the context of the EU law, there is also the third way how to deal with the legal gaps; then the court may initiate a preliminary ruling before the Court of Justice of the European Union (Art. 234 TFEU). This tool is semantically based on *lex clara* (*claritas*) doctrine (*acte clair*, *acte éclairé*).²⁹ It is also worth to notice that on the grounds of the principle of *denegatio iustitiae* courts are always obliged to decide about the rights and duties of the individuals (implicitly see Art. 90 of the Czech Constitution).

As far as the private law is concerned, it is traditionally tied with the analogical reasoning and the autonomous status of parties. This supposition has been recognised even by the socialist legal system and is still valid and used in the contemporary Czech legal practice.

²⁷ Ibidem.

²⁸ Recognizing and filling-in gaps can be understood as very closely connected procedures. See e. g. Canaris, C. W. (1964) *Feststellung von einer Lücken im Gesetz*. Berlin: Duncker&Humblot, 1964, pp. 140 – 141; also Rüthers, B. (2005) *Die Unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. 6. erweiterte Auflage. Tübingen: Mohr Siebeck, p. 189.

²⁹ Žák-Krzyžanková, K. (2019) *Právní interpretace – mezi vysvětlováním a rozuměním*. Praha: Wolters Kluwer, pp. 31 – 32.

These principles enabled the parties to enter into contracts not explicitly regulated by the private law. Moreover, the Czech private law has been facing a transition period – the new Civil Code which entered to force since January 1st 2014 has been partly inspired by ABGB, BGB and ZGB and represents the true revolution in some aspects of the Czech civil law discourse. As to the problem of filling in gaps, the new Civil Code provides concrete provision (§ 10) inspired by § 7 ABGB which categorizes the sources of private law provided for filling in gaps as follows:

- a) explicit statutory provision
- b) statutory provision applied on the grounds of an analogy
- c) principles of equity
- d) principles of the Civil Code.

Besides, the Civil Code mentions two corrective aspects designed to lead an interpreter to find the right answer in the sense of „*the eligible (reasonable) state of rights and duties*“: i) settled legal doctrine and ii) well established judicial case law. The crucial methodological attitude has not been changed: the analogical reasoning that is anticipated by the legislator to be used for filling in gaps.³⁰

As far as public law is concerned, the exemption clauses expressing the principle of legality of public power will be used. The crucial (but not largest) legal branch of public law is the criminal law. Norms of the criminal law are subject to the constitutional limit of the principle *nullum crimen sine lege, nulla poena sine lege* expressed in Article 39 of Czech Charter of Fundamental Rights and Freedoms (similarly, Art. 7 of the European Charter). The law itself - in the context of the most evasive limitation of human freedom - restricts itself from extending beyond its semantic limits (Penal Code). As a result, the use of analogy and the purpose filling-in gaps is not allowed; however, the legal theory discusses the application of *argumentum a simile*, in other words, reasoning per analogiam intra verba legis.³¹ The legal regulation of criminal conduct thus seems to be complete and may only be interpreted by means of interpretation *sensu stricto*. This attitude has been criticised by those authors who consider this form of analogy to be prohibited as well as other – more extensive – forms of analogous judgments.³²

The situation is much more complicated in the constitutional and administrative law (the procedural administrative law and the constitutional law are the other branches of the public law). In the administrative law, there are some subsystems in which analogy (and teleological reduction) in *malam partem* of the subjects of rights and duties are prohibited: duties may be laid down by the statutes only (Art. 2 of the Constitution). As far as the administrative punishment law is concerned, there exist similar rules like in the criminal law which have been legitimated mainly by the means of case law of the administrative courts. As far as the procedural laws are concerned, it is not quite clear whether analogy can be used for filling-in gaps and if so, within what extent. The legislator has not implemented any legal norms or principles into the procedural codexes concerning the filling-in gaps. There are no

30 See e. g. Tryzna, J. (2012) Garance právní jistoty z hlediska metodologie interpretace práva předvídané novým občanským zákoníkem. Pp. 190 – 205 In: Gerloch, A., Tryzna, J., Wintr, J. (eds.) *Metodologie interpretace práva a právní jistota*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk.

31 The legislator sometimes includes statutory imperative for searching „similar“ kinds of conduct and opens the antecedent of criminal legal norm to other forms of conduct that are not explicitly mentioned.

32 Marijan Pavčnik mentions this problem. Further see Pavčnik, M. Questioning the Nature of Gaps in the Law [(organic) gaps in the law] in: *i-lex*, 16, 2012, pp. 119-128 (www.i-lex.it). In Czech legal theory, this problem is emphasized by Filip Melzer. See Melzer (2011) *Metodologie nalézání práva*. Praha: C.H.Beck, pp. 236 – 239.

doubts about using the extensive interpretation or analogy *intra verba legis*. On the other hand, the filling-in the genuine gaps has remained a controversial problem. Those who defend the use of analogy in the procedural law refer to the right of fair trial (Art. 36 of the Charter) and therefore, analogy in the procedural law is often hidden in the constitutionally coherent interpretation (in a broader sense).³³ As to the constitutional law, the continuous discussion has been lead on the role of the constitutional customs in the Czech republic as a source for filling-in gaps. This problem is connected with the role of the president and other state bodies (government, Parliament) in the constitutional system of the state. Some authors criticise the lack of constitutional directives on the interpretation which would lay down some guidelines for the creative application and interpretation of law used by both the state authorities and the Constitutional Court.³⁴

III. Relevant Case Law – Constitutional Discourse

The case law of the Constitutional Court has become essential for the understanding, defining and dealing with the problem of gaps. Since 1990's the Federal Constitutional Court followed by the Constitutional Court of the independent Czech Republic have introduced the concept of gaps into the judicial discourse. First of all, the Constitutional Court very clearly proclaimed the duty of the courts to decide in coherence with the constitutional order.³⁵ The directive of constitutionally coherent interpretation comprises two typical situations:

- a) teleological gap (the existing legal rule is interpreted and enriched by the constitutional values and principles)
 - i) open teleological gap
 - ii) hidden teleological gap
- b) genuine gap (the absence of the rule is solved by creating a new rule by means of analogy and teleological approach).

Sometimes a gap results from legislative inactivity of the legislator.³⁶ These cases comprise both the situations of the technical (genuine) gaps where no relevant legal rules exist to be applied in the legal case and the situations where there is some relevant legal framework but it is not constitutionally correct (which is the conclusion usually deduced by the Constitutional Court reviewing the laws in the light of their compliance with the Constitution). This is the reason why some authors talk about „mixed“ or „combined“ gaps³⁷ (the distinction between the gap and non-gap seems to be insufficient to deal with those cases). However, this practical concept has not become very frequent under case law. In the following part I will present some examples from the case law where the tools of the theory of gaps (the main two types mentioned above) appear in the legal reasoning.

III.1 Genuine Gaps

As for the cases belonging to the situations of the genuine loopholes, the Constitutional Court declared that „*only exceptionally analogy may be admissible to fill-in a*

33 Interpretation in broader sense means a creative interpretation. See Barak, A. (2005) *Purposive Interpretation in Law*. Princeton: Princeton University Press, 2005, pp. 67 – 68.

34 Malenovský, J. (2013) O legitimitě a výkladu české ústavy na konci století existence moderního českého státu. In. *Právník*, no. 8, pp. 745 – 772.

35 One of the first judgments was the case decided in 1996 - Pl. ÚS 48/95 issued on 26th March 1996.

36 See more detailed analysis of this problem Tryzna, J. (2008) *Právo tvorba legislativní: role parlamentů a výkonné moci*. In. Gerloch, A. a kol. *Teorie a praxe tvorby práva*. Praha: ASPI, Pp. 63 – 85.

37 Melzer, F. (2011) *Metodologie nalézání práva*. Praha: C.H.Beck, p. 232

*genuine (logical or technical) gap in the law. This kind of gap represents the situation in which legal order regulates certain legal proceedings, though does not regulate which body is competent to rule on it.*³⁸ This kind of genuine gap was also recognized by Hans Kelsen³⁹. In other cases of genuine gaps, in the words of Constitutional Court, interpreters should not come across the semantic borders of the normative text. In one of later cases, the Court decided was dealing precisely with this type of gap. The case concerned the expelling of a judge of the Supreme Court who demonstrated a bias during the proceedings consisting in his friendship with another disciplinary suspected judge (the vice-president of the Supreme Court).⁴⁰ The court was facing the absence of the delegatory norm in the applicable law allowing it to determine the deputy to the vicepresident of the Court. The court finally concluded that this genuine gap could have been filled-in by the application of the internal regulation of the proceedings before the Supreme Court (Code of Proceedings).

Further, an interesting conclusion was also deduced by the Constitutional Court in case concerning so called *leges imperfectae* (legal norms which do not include sanctions). The Constitutional Court held that it is not possible to regard *leges imperfectae* as the situations of the legal regulation having a legal gap; a norm without sanction does not give to the courts or the public authorities an opportunity to create law. In this context, the Constitutional Court makes no difference between the public law and the private law because this opinion was held in the case concerning the review of an under-statutory governmental labour regulation (insurance of an employer for damages resulting from a labour injury or disease).⁴¹

III.2 Teleological gaps (non-gaps)

As far as teleological gaps are concerned, the case concerning the constitutional covenants on the use of the President's veto power (the right of the President not to undersign a statute passed by the Parliament) belongs among the most influential cases decided by the Constitutional Court.⁴² This case is one of the most cited cases with the theoretical ambition to argue for a plurality of sources of law among which legal principles of a general manner play the most important role. The idea that „*a mechanic equivalence between law and legal texts has become a handy tool of totalitarian regimes. It changed/transformed the judiciary into a obedient and non-thinking tool of arranging totality*“,⁴³ has become one of the leading legal opinions of the Constitutional Court of that time (i.e. 1990's) and accompanied the transition period in the Czech society. As to the problem of an interpretive gap faced by the Constitutional Court in this case, the judgment contains the following argumentation: „*Textual approach represents only the first step to reconstrue legal rule from normative text. It is only a ground for its explanation and elucidation of sense and scope; this can be also provided by the means of logical, systemic and e razione legis reasoning.*“⁴⁴ The Constitutional Court found the missing rule in the background of the system of *lex scripta* formed by general principles like *ignorantia legem neminem excusat*, *lex retro non agit* etc. One of those principles is also the principle according to which a legal term may not expire when the consequence of its expiration would be the incapacity of the competent subject to apply his competence. Therefore, the court filled in a

38 See case I. ÚS 318/06, accessible at <http://nalus.usoud.cz>.

39 Kelsen, H. (1960) *Reine Rechtslehre*. 2. Auflage. Wien: Franz Deuticke Verlag, (Nachdruck 1983), pp. 254 – 255.

40 See judgment Pl. ÚS 9/09.

41 See judgment no. Pl. ÚS 7/03, accessible at <http://nalus.usoud.cz>.

42 See judgment no. Pl. ÚS 33/97, accessible at <http://nalus.usoud.cz>.

43 Ibidem.

44 Ibidem.

gap in the Constitution consisting in the absence of the rule for counting the course of time; the case was decided in favour of the president's power to return the statute without signature in fifteen days; if the last day of the deadline falls on a holiday, the deadline would not expire. The rule or the principle which was recognised as absent in the context of the constitutional legislative proceedings was found in general principles of law.

Another very interesting case concerned the situation of the absenting rule for awarding a reward for a bankruptcy administrator nominated by the court in cases where the value of the bankrupted business did not cover the expenses of the bankruptcy proceedings.⁴⁵ The court found a non-gap (axiological or interpretative gap) and employed the *per analogiam iuris* reasoning concluding that the bankruptcy administrator had the right to reward. It is very interesting to note that the Constitutional Court considered the alternative of a direct constitutionally coherent interpretation that may have been used to fill-in this gap; however, eventually resigned to re-create the legal rule and derogated the relevant provision with the reasoning that „...*this attitude is not possible in the present case for the relevant provision could not have been interpreted in the way to find the legal rule stating who is to pay for the reward and by which financial sources.*“ The relevant statutory provisions were derogated in both these cases as unconstitutional.⁴⁶ However, this reasoning seems to be rather a self-justification of what the court simply did not want to do, although the content of the desired legal rule was clear: the obligation to pay for the reward of the bankruptcy administrator binds the state (similarly to the other appointed officials by the court – e. g. attorneys and notaries). These two judgments have become popular for the reasoning heading towards a teleological (axiological, constitutionally coherent) interpretation of law.⁴⁷

In the latest development of the constitutional case law, two important groups of cases should be pointed out. First of them is the case concerning the legality of the state regulation on the rents. This regulation was criticised as an unlawful restriction of the property rights of the landlords (owners of flats). The second group of cases concerns the church restitutions. As far as the regulation of tenancy is concerned, the attitude of the Czech Constitutional Court was influenced by a the Polish case *Hutten-Czapska* decided by ECHR.⁴⁸ The court derogated the unconstitutional legal regulation on flat rents⁴⁹ and appealed the legislator to provide for such a regulation of tenancy which would be in compliance with Art. 4 sec. 4 (minimalisation of limitation of fundamental rights and freedoms) and Art. 11 of Charter (ownership); however, the legislator remained passive. As a result, the Constitutional Court issued an opinion declaring that general (lower) courts are obliged to fill in this gap by creative interpretation applying Art. 4 sec. 4 of the Charter. Otherwise, it would have to be considered as a breach of the principle of *denegatio iustitiae*. The court explicitly held that „...*courts are not allowed to dismiss the claims for damages against the state a priori but they are obliged to consider them individually from the point of view of Art. 11 sec. 4 of the Charter.*...“. This opinion created the explicit directive to the courts to apply this constitutional provision directly without any corresponding statutory regulations (in the Czech republic, there is no statute regulating the state liability for damages in case of not adopting of certain national legislation; the only exception is represented by the European legislation where the liability of

45 See no. Pl. ÚS 36/01, accessible at <http://nalus.usoud.cz>.

Sometimes, Constitutional Court restricts itself from derogating the law and provides some time for the legislator to amend the relevant legal rules.

47 Holländer, P. *Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu*, pp. 31 – 33.

48 See judgment of the great panel of ECHR issued on 19th June 2006 (complaint no. 35014/97).

49 Judgments No. Pl. ÚS 3/2000, Pl. ÚS 8/02, Pl. ÚS 2/03, accessible at <http://nalus.usoud.cz>.

a member state is confirmed by the treaties and the case law of the Court of Justice of the European Union).

Another contemporary legal case tied up with the theory of gaps is the restitutions case law, concretely in cases where the entitled subject was the Church. In the beginning of 1990's, the problem of restitutions of the property (lands and forests) which has been expropriated in the time of the socialist regime (1948 – 1989) appeared. The state adopted the relevant legislation to recover these legal injuries (the law no. 229/1991 Coll). In this legislation, the concrete explicit provision (§ 29) stated that this legislation could not be applied to the churches and religious personalities (monasteries, congregations) to reconstitute their property. These restitutioners were obliged to wait until the proper (special) legislation will be adopted. However, the legislator remained inactive and failed to adopt this regulation. The Constitutional Court in a quite long series of its judgments.⁵⁰ Finally, the court held that this situation represents a gap in the legal order which should be filled in by the courts. As the Court stated, „*the petition of a claimer is admissible, however, it is an untypical petition sui generis aiming an filling in a gap resulting from a long inactivity of the legislator breaching the promise given by the legislation from 1991.*“ Nowadays, this problem has been settled by the treaty among the state and the churches which has been regarded by both the public and by professionals as highly controversial.

Legal conclusions of the Constitutional Court as to the filling-in teleological gaps can be summarised into one idea which, in my view, represents the crucial point of this case law. The request of the Constitutional Court to the judiciary is as follows: Problems with the application of law may not lead the court to resign on the duty to fulfil the constitutional order, and particularly Article 4 of the Czech Constitution. Under this provision, fundamental rights and liberties shall be protected by the judiciary. This must be understood in the sense of the constitutional order as a whole, not taking into account only the rights and liberties in the subjective sense.⁵¹ On the other hand, if the abstract constitutional review is applied, the Constitutional Court often behaves more restrictively and favors the legislator to adopt the relevant provision or statute in a constitutionally correct way instead of filling-in the gap by the means of the judicial law-making (creative interpretation).

IV. Conclusions

The theory of gaps is currently a recognised part of the Czech methodological thinking both in theory and practice. It plays the most important role in the constitutional discourse on human rights and freedoms. In my opinion, the problem of legal gaps is no longer understood as a part of the conflict between the positivism and the natural law theories, even though this reflection can still be influential from the point of view of the legal theory. Legal gaps have been seen more as a matter of the ideology of law – shall the interpret be more creative or more restrictive while dealing with the normative legal text? Answering this provoking question is not only a matter of conviction, theory, tradition and context but also a matter of the interpretive courage of the judges and other interprets.

⁵⁰ For details, see judgments II. ÚS 528/02, followed by judgments no. I. ÚS 663/06, I. ÚS 562/09 remarked on that unfulfilled duty of the legislator.

⁵¹ See Filip, J.(2010) In Bahýřová, L. a kol. *Ústava České republiky: komentář*. Praha: Linde, 2010, p. 74 and following.

Respecting all possible and well-known theoretical differences, for the Czech discourse the traditional difference between genuine gaps and interpretive gap has remained to be influential and relevant. However, the Constitutional Court applies the theory of gaps in two following attitudes: first, to fill-in a non-gap by the constitutionally coherent interpretation, and second, to legitimate the derogation of a statutory or under-statutory regulation in cases where the interpretation would be creative too excessive. An important group of cases analyzed in this article dealt with the problem of the legislative inactivity. Recognising and filling-in gaps are mutually tied procedures of the legal thinking. They follow one another in a scheme of hermeneutic circle.

However, in other areas of legal discourse lead by the general (lower) courts or the administrative authorities, the theory of gaps is not a very useful tool. In case of a teleological gap, the lower courts have to decide according to the present case whether they are entitled to fill-in a gap or to consider the legal rule as unconstitutional and initiate the constitutional review. In my opinion, interpreters who apply law (officials, clerks or judges) have no other possibility than to interpret the normative legal texts in such a way allowing them to find an answer to the question they are dealing with. Recognising and filling-in legal gaps in an interpretive sense is a part of their every day practice. As Bernd Rüter concluded, the judge is to apply the law on the facts and therefore has to interpret it in the way to make the inference possible.⁵² That means that in adjudication process, judge has to deal with indeterminacy, uncertainty, ambiguity and vagueness as to be able to apply the normative text as good as it is possible.

I do agree with Aharon Barak who talks about many „voices of a normative text“. Only one of these voices represent a gap.⁵³ In my opinion, it is not necessary to talk about the non-gaps (teleological, interpretive gaps), because in all these situations the legal rule itself may be re-constructed by the creative interpretation (interpretation in a broader sense). These are the situations of interpreting uncertain concepts, collision of rules etc. The concept of gap does make clear sense (particularly for the practitioners) only in cases of the genuine gaps resulting from the failure or the unconstitutional inactivity of the legislator to adopt relevant legislation. However, the constitutional discourse represents a space where talking about interpretive (axiological) gaps could be understood reasonable, particularly from the point of view of the Constitutional Court as a negative legislator.

52 Rüter, B. (2005) *Die Unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. 6. erweiterte Auflage. Tübingen: Mohr Siebeck, p. 445.

53 Barak, A (2005) *Purposive Interpretation in Law*. Princeton: Princeton University Press, pp. 67 – 68.