The Uncertain Limits of Law.
Some Remarks on Legal Positivism and Legal Systems

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Abstract

Legal positivists often claim that law is a limited normative domain. Understanding the limits of law requires an answer to two related problems. On the one hand, the problem of unregulated cases and, on the other hand, the problem of the alien norms. The first problem refers to the distinction between legal gaps and unregulated cases. Many legal philosophers claim that the identification of legal gaps presupposes an evaluative judgment. Thus, contrary to legal positivism, the determination of the content and limits of law (i.e., the domain of regulated cases) does not only depend on the cognition of certain social facts, but it actually also requires an evaluation of such facts. The second problem refers to the fact that judges often recognize as legally binding norms that are not issued by competent authorities of their systems. Therefore, a positivistic theory would not provide a satisfactory account of law if it failed to explain the legal force of this kind of norms. In this paper I analyze some solutions to such problems that can be found in three well-known positivistic theories (Kelsen, Raz and Bulygin). I show that none of them offers a sound answer to the problem of the unregulated cases and the alien norms.

Keywords: Limits of Law. Judicial Discretion. Legal Positivism. Legal Gaps.

1. Introduction

The social sources thesis entails that the law has certain limits[1]. In order to explain this fact, legal positivists offer a reconstruction of law in terms of norma-

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[1] Raz 1979: 45-50.

tive systems and highlight the role played by legal institutions in the identification, creation and application of legal norms[2]. As Joseph Raz emphasizes, «it is a consequence of the institutionalized character of the law that it has limits. Legal systems contain only those standards which are connected in a certain way with the operation of the relevant adjudicative institutions»[3]. From the idea that law is a normative system follows that legal norms do not exist in an isolated way, but rather they are *unified* by specific *internal* relations (i.e., relations of *validity*). For example, Kelsen claims in the opening paragraph of his *General Theory of Law and State*, «Law is not […] a rule. It is a set of rules having the kind of unity we understand by a system»[4]. According to his reconstruction, a norm N_1 (e.g., a law enacted by Parliament) is valid if it is created according to another higher valid norm N_2 (e.g., the Constitution). Thus, in the *Pure Theory* the dynamic relation between norms is the main criterion of validity and this *genetic* criterion determines not only the identity and the (hierarchical) structure of legal systems but also the limits of law.

The separation between law and morals could be regarded as the classical expression of the limits of law. However, many other consequences must be pointed out. In particular, four intrinsically related theses are often connected with the thesis of the limits of law:

(i) There is no necessary coincidence between the norms of a legal system and other socially relevant norms.
(ii) Law does not necessarily regulate all possible cases (i.e., there could be legally unregulated cases).
(iii) In legally heretofore unregulated cases (cases where the settled law fails to provide a specific answer), judges must discretionally exercise an 'interstitial' lawmaking power.
(iv) Judges have no discretion to solve cases regulated by law.

The main objective of this paper is to deal only with (i) and (ii). Theses (iii) and (iv) will only be incidentally analyzed, although it must be kept in mind that both are essential for a complete explanation of the meaning of the thesis of the limits of law.

In this paper I am interested in the following problems:

1.1. *The problem of unregulated cases*

Unregulated cases are often regarded as normative gaps, and according to legal positivism such indeterminacies can be neutrally (or objectively) identified. However, this is a challenging task because many legal philosophers claim that the identifi-

[2] Raz 1979: 111 ff.
[3] Raz 1979: 44.
[4] Kelsen 2006: 3.

cation of normative gaps presupposes an evaluative judgment[5]. Thus, according to this argument, the determination of the content and limits of law (i.e., the domain of regulated cases) not only does depend on the cognition of certain social facts, but it actually also requires an evaluation of such facts.

1.2. *The problem of alien norms*

In a legal system S judges often recognize as legally binding norms that are not issued by competent authorities of S (for the sake of simplicity, such binding norms will be called "alien norms"[6]) and, therefore, a positivistic theory would not provide a satisfactory account of law if it failed to explain the legal force of this kind of norms. Nevertheless, what is the criterion for separating "alien norms" from "own norms" in a certain legal system?

A sound answer to this second question requires clarifying the connection between valid norms and a very heterogeneous class of norms. "Validity" normally refers to the membership of norms in a legal system and, on the contrary, "alien norms" are those norms that do not belong to a legal system. But, what norms are the alien ones? It seems to be clear that the most paradigmatic type of alien norms is constituted by foreign rules. However, in this paper I will also analyze the relationship between the legal validity and binding force of moral standards and logically derived norms. In this respect, it is worth emphasizing two related issues. On the one hand, the very different nature of the social facts that are invoked as truth grounds of legal statements. Our descriptions of legal positions (e.g., duties, rights, etc.) sometimes refers to norms that are legally binding even if it is plainly true that they are not part of our legal system. On the other hand, the fact that the limits of law do not mean that law is exhausted by the explicit legal material. Sometimes it is also necessary to take into account the implicit content of law and it is not altogether clear that a satisfactory solution only refers to social facts.

I will use the *Pure Theory of Law* as an *input* of my reconstruction and Kelsen's solutions to the above-mentioned problem will be compared with two sophisticated positivistic approaches to law and legal systems provided, respectively, by Joseph Raz and Eugenio Bulygin. However, my purpose is modest. I defend here no new approach different from the ones offered by those leading positivist philosophers, but I claim that their theories are defective because relevant aspects of the problem of alien norms are not adequately solved. Thus, my analysis is more a proposal of reorganization of our conceptual scheme than a creative solution.

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5 For example, Nino 1995: 72.

6 "Alien norms" is, as it were, an egocentric expression. This terminology assumes that the norms of our own particular normative system (e.g., the Spanish legal system) are the implicit reference required by the predicate "alien".

Both Raz and Bulygin have been inspired by Kelsen, but they emphasize different (and potentially conflicting) aspects of Kelsen's theory of legal systems[7]. For example, Raz develops certain important Kelsenian insights on the normativity of law and legal statements[8], but he is not actually worried by the reconstruction of a genuine legal science[9]. On the contrary, Bulygin is not interested mainly in the normativity of law and, certainly, he rejects the normativity of legal statements[10]. Another example: Raz believes that an important task for legal philosophy is to explain the "unity of law", i.e. the systematic nature of the *entire* positive law of a particular community[11]. On the contrary, Bulygin almost completely overlooks the problem of the unity of law[12]. Rather, he mainly focuses on deductive systems as logical consequences of micro-normative bases[13], and his remarks on the unity of legal systems are only incidental[14].

Both Raz and Bulygin offer a reconstruction of the concepts of legal norm and legal system clearly different from the one articulated in the *Pure Theory*. Two issues are worth stressing: first, contrary to Kelsen, Raz and Bulygin stress the primacy of legal systems in the explanation of the nature of law. As Raz says in the introduction to his main work on legal systems[15]:

> It is a major thesis of the present essay that a theory of legal system is a prerequisite of any adequate definition of "a law", and that all the existing theories of legal system are unsuccessful in part because they fail to realize this fact.

Second, Kelsen fails to realize that there are crucial differences between legal systems as *momentary* systems, i.e. the set of valid norms at a certain time and legal systems as the historical development of the law in a certain community (i.e., *non-momentary* legal systems)[16], and he focuses only on genetic relations of validity. Raz and Bulygin claim that there is a primacy of *momentary* systems in the explanation of the identity and structure of legal systems[17]. For this reason, Raz attempts to

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7 Bulygin 2015: 235-251. See also, Paulson 1996: 49-62.

8 Raz 1979: 148-160.

9 Raz 1994: 202.

10 Bulygin 2015: 136-145.

11 Raz 1979: 81-105.

12 For a criticism of this omission, see von Wright 1989: 876-877.

13 Bulygin 2015: 220-234.

14 Alchourrón and Bulygin 2002: 57-60.

15 Raz 1970: 2. See also, Alchourrón and Bulygin 1971. However, as Stanley L. Paulson has recently stressed, both Kelsen and Verdross also claim that the legal system determines the structure of legal norms. See Paulson 2018. Also, Verdross 1930: 1303.

16 A different explanation of the distinction between momentary and non-momentary legal systems is provided by Harris. See Harris 1979: 111 ff.

17 This distinction was introduced by Raz 1970: 34-35.

show that an entire collection of norms is unified as a momentary legal system by *operative relations* (i.e., punitive and regulative relations) and Bulygin establishes that logical consequences determine the *deductive* structure of momentary legal systems[18]. On both theories, genetic criteria play a marginal role in momentary legal systems, but they define the structure of non-momentary systems[19]. For the sake of simplicity, "momentary legal systems" will simply be called "legal systems", while I shall not deal here with non-momentary systems.

2. Unregulated Cases and Positive Law

There is a tension between the limited number of positive norms that legal authorities can create in a certain system and the potentially infinite actions that individuals can perform in a certain community. For this reason, Kelsen[20] recognizes that a

> minimum of liberty is inherent to legal systems because positive law can limit an individual's freedom more or less by commanding or prohibiting more or less. But a minimum of freedom, that is a sphere of human existence not interfered by command or prohibition, always remains reserved.

To some extent, this conclusion suggests that unregulated cases are unavoidable because it makes no sense to claim that a specific norm solves each particular situation. In this respect, Honoré says: «how can legal systems be complete? Where is the inexhaustible code by which the state classifies a citizen's conduct, after the event, as rightful or wrong?»[21]. Honoré answers this question with a distinction between "strong" and "weak" complete system. A system is strongly complete if its norms solve every problem that may occur and this 'inexhaustible code' could only be built with the help of a closure rule. Thus, «armed with implausible gap-filling rules of this sort, we should have a complete but inflexible system»[22]. The inflexibility stems from the fact that in normatively determined situations judges are not free to ignore such pre-existent legal solutions.

Honoré believes that in our real world there are no strongly complete systems. In fact, he remarks[23]:

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18 See Alchourrón and Bulygin 1971: 72-77. Also, Bulygin 2015: 172-173.
19 Raz 1970: 184-185; Bulygin 1991: 257-279. See also Caracciolo 1988: 68.
20 Kelsen 2005: 43.
21 Honoré 1987: 1.
22 Honoré 1987: 29.
23 Honoré 1987: 29.

> If in the real world legal systems are complete, their completeness does not depend on the claim that the solution to every problem can be known in advance. It resides rather in the fact that the system has the resources to provide a solution to every problem. The resources available consist, of course, in the first place of rules and principles. But even together these do not suffice. […] the rules and principles of the system have to be supplemented by brute decision making. Judges, no less than legislators and administrators, may just have to decide.

The main problem of Honoré's argument is not the odd stipulation of "weak completeness" that only seems to be an alternative description of normative gaps, but rather two dubious assumptions. On the one hand, closed systems are "inflexible" because judges have no normative powers for changing the law and solving axiological problems. On the other hand, the creation of either a strong or weak complete system would be a matter of choice, i.e. normative authorities can make a 'balance' between inflexibility and discretion and they can actually decide between the enactment of closure rules and the preservation of unregulated spaces.

Both assumptions may be challenged. For example, Kelsen offers a very different picture of the relation between completeness and judicial discretion. He emphasizes that if a conduct C is not expressly prescribed by a legal norm, C is *negatively* regulated and this means that C is a negatively permitted action[24]. The unavoidable minimum of freedom is compatible with the completeness of law because certain actions that have not been anticipated by authorities are also legally regulated. In this respect, legal gaps are impossible insofar as every human conduct is either expressly prescribed or negatively permitted[25].

In order to solve possible axiological problems originated by the closed nature of legal systems, judges declare that law contains normative gaps, even if – according to Kelsen – this claim is actually just a particular legal fiction. Therefore, legal systems are (strongly) complete, but this characteristic prevents neither judicial discretion nor judicial creation of law. If Kelsen were right, law would be, by its own nature, a complete legal system. Thus, it would make no sense to claim that legal authorities can voluntarily leave certain domains of actions void of normative (deontic) qualification. Irrespective of authorities' decisions, every action would be either positive or negatively regulated.

Two reasons ground Kelsen's rejection of legal gaps. On the one hand, the fact that every action is either expressly regulated or negatively permitted and, on the other hand, the fact that positive law can always be applied to a concrete case. As is well known, in his reconstruction of legal gaps, Kelsen argues against the "traditional theory". According to this theory, the legal system «is not applicable in a

[24] Kelsen 2005: 16.
[25] Kelsen 2005: 245-246.

concrete case if no general norm refers to this case; therefore the court is obliged to fill the gap by creating a corresponding norm»[26].

Such a theory also subscribes to another controversial thesis: the necessity of an evaluative argument in order to distinguish between legal gaps and irrelevant cases[27]. This is precisely the problem of the unregulated case and a radical solution to this problem of demarcation is to "cut the Gordian knot", i.e., to deny the existence of legal gaps. As Alchourrón and Bulygin explicitly claim, this is the position adopted by Kelsen. The Argentinian legal philosophers also regret that Kelsen does not distinguish between axiological gaps and other evaluative problems; consequently, he cannot see the special role played by the notion of relevance in the application and change of legal norms[28].

Both criticisms seem to me unwarranted. Alchourrón and Bulygin do not mention the evaluative problems that Kelsen confused with the so called "axiological gaps" and it seems unjustified to assume some mistake in his approach without other arguments. At the same time, in the *Pure Theory of Law* there are no references to the separation between normative gaps and other unregulated cases[29]. Rather Kelsen criticizes the traditional theory for a very different reason. He points out[30]:

> the legal order permits the behavior of an individual when the legal order does not obligate the individual to behave otherwise. The application of the valid legal order is not impossible in this case in which traditional theory assumes a gap. The application of a single legal norm, to be true, is not possible but the application of legal order […] *is* possible.

Thus, Kelsen only claims that there are no legal gaps because judges apply the legal order when they recognize that expressly unregulated actions are negatively permitted. Kelsen does not reject the existence of normative gaps *because* this would be the best alternative to the confusion between conceptual and axiological levels.

However, two problems with Kelsen's solutions are worth mentioning.

On the one hand, actions that are not positively regulated (that is, those actions that the law allows negatively) are practically innumerable and their legal relevance depends on highly heterogeneous factors. In particular, the class of negatively permitted actions includes two kinds of different situations. First, irrelevant behavior (e.g., moving the pinkie, choosing a place for vacations, etc.) that the law does not

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26 Kelsen 2005: 246.

27 Alchourrón and Bulygin point out that this controversial thesis stems from confusion between conceptual and axiological problems. See Alchourrón and Bulygin 1971: 110.

28 Alchourrón and Bulygin 1971: 113-114.

29 See Kelsen 1992: 84-86 and Kelsen 2005: 245-250. See also Kelsen 2006: 146-149.

30 Kelsen 2005: 246.

regulate and it does *not intend to regulate* (henceforth, Cases ~IR). Second, other actions and cases that the law does not regulate because normative authorities voluntarily left them unregulated. They are cases *intentionally not regulated* (or Cases I–R) because they are part of a sphere of individual autonomy (for example, actions assumed voluntarily as binding in the context of private institutions or transactions). For this reason, it would be better, as Joseph Raz occasionally suggests[31], to reject the idea that the law regulates those conduct that it has simply not prohibited and to elaborate a finer typology of unregulated cases.

On the other hand, if the law (positively or negatively) regulates all actions, then it is more difficult to capture the differences between closed and open normative systems[32]. This distinction is blurred if we assume that unregulated cases are also negatively permitted and the thesis of the limits of law (at least, the version drawn by the unregulated cases thesis) would be abandoned because no case would be outside the limits of legal systems. This is tantamount to saying that by its own nature law is a closed legal system and it always regulates every possible case.

The debate about the open or closed nature of legal systems has been largely related to the controversy about the logical necessity of closure rules that ensure a legal solution to any possible case, e.g., a rule according to which everything that is not prohibited is permitted. Thus, it could be said that *logically* closed systems contain such a rule, and *logically* open systems are defined by the absence of a closure rule[33].

The main difference between closed and open systems is that the former are necessarily complete, while completeness is only a contingent feature of the latter. In other words, closure is stronger than completeness. In the case that an open system contains a normative gap, we find "empty spaces", i.e. cases and actions that legal authorities have not expressly qualified. Nevertheless, it is clear that the absence of a legal regulation says nothing about the solutions provided by other non-legal norms. In particular, alien norms could be legally binding and they could determine a right legal answer to an unregulated dispute. Moreover, in certain cases alien norms prevail over our own valid norms in regulated cases. In this respect, legal systems are open normative systems, but in a very different sense than the one previously considered (i.e. logically open/closed systems): they are open systems because they "validate" alien norms.

In order to avoid confusions with *logically* open (closed) systems, I will say that law is a *normatively* open system because its norms provide binding force to alien norms. Logically open systems and normatively open systems are independent con-

[31] Raz 1979: 117. In Raz 1979: 73-80, Raz denies that there are gaps when "law is silent" because closure rules prevent this kind of indeterminacy, but he stresses that other type of normative indeterminacies arises when law speaks with "uncertain voice", i.e. in cases of vagueness or conflicts between legal reasons.

[32] Von Wright 1968: 85. Alchourrón and Bulygin 1971: 116-119.

[33] Alchourrón and Bulygin 1971: 144.

cepts that can be used for analyzing different types of limits of law. On the one hand, law is limited if and only if it does not regulate all possible cases, but, on the other hand, law is limited if and only if it does not include all legally binding norms. According to this second proposition, a deontic modality imposed by a logically closed system could be replaced by a solution provided by an alien norm. Consequently, it is worth considering whether the thesis of the social sources is compatible with the reconstruction of law as a *normatively* open system.

According to Raz[34]:

> A normative system is an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it. The more 'alien' norms are 'adopted' by the system the more open it is. It is characteristic of legal systems that they maintain and support other forms of social grouping. Legal systems achieve this by upholding and enforcing contracts, agreements, rules, and customs of individuals and associations and by enforcing through their rules of conflict of laws the laws of other countries, etc.

This perspective on the function of legal systems helps us to understand some consequences that stem from different types of unregulated cases. On the one hand, "Cases ~IR" or simple irrelevant cases, e.g. the movement of the pinkie. On the other hand, "Cases I~R", i.e. cases legally unregulated but determined by solutions that stem from other normative contexts recognized by our legal system, e.g. contracts, agreements, etc. In Cases I~R, no discretional decision is allowed, but rather judges have to enforce such alien norms created by private associations or persons (i.e., not legal authorities). Thus, although a certain action A is not regulated by a specific valid legal norm, its "negative permission" guaranteed by the legal system is replaced by another privately created norm. The obligation that this last norm imposes is relative only to individuals that have voluntarily assumed such a normative regulation.

How can we distinguish between both types of cases? It seems to me that it makes no sense to separate them "in advance", as it were. For example, the color of my vehicle is irrelevant and if my neighbor says that it has to be painted according to his own tastes, judges need no special legal reason for rejecting such a demand. The claim would be a "Case ~IR" type. But let me slightly modify the example. Suppose that I sell my car to my neighbor and in our contract we agree that it has to be painted with a specific color. Now, there is a legal reason for enforcing my neighbor's claim and consequently the case becomes a "Case I~R" type. Both types of cases are legally unregulated ones, but from this fact nothing can be inferred about the necessity of judicial discretion.

[34] Raz 1979: 119.

It is clear that the problem of unregulated cases arises only in relation to irrelevant cases because (i) they are unregulated ones, (ii) no external or alien normative standard provides a right solution, and at the same time, (iii) legal philosophers disagree on the necessity of a discretional judicial solution to this type of cases, even if they can agree on the fact that legal gaps need a discretional decision. Thus, the problem of the unregulated cases turns to be the problem of the scope of judicial discretion. In the next section I will explore this idea at some length.

3. The Problem of Unregulated Cases

In general, the problem of unregulated cases is the scope of judicial discretion. Traditionally, legal positivists claim that in cases of legal gaps judges interstitially create new law, but as has been shown above, there are other innumerable unregulated situations (e.g., ~IR or I~R cases) that are not discretionally solved. Thus, how could legal gaps be separated from those unregulated cases? A well-known answer is as follows: legal gap is an evaluative concept; its reference cannot be established without a moral argument. For example, according to Soeteman[35],

> The question whether a gap exists is, however, a question of valuation: it considers whether the conflict of interests has indeed not received attention and whether the consequence to the latter is that the giving of norms or more specific norms has *wrongfully* been omitted.

Therefore, legal gaps are *something more* than unregulated cases and the distinction between both types of situations would not depend on social facts, but rather on a certain evaluation of them. In this respect, many legal philosophers attempt to provide a general evaluative criterion that captures whether a certain situation is either a merely unregulated case or a legal gap. For example, Juan Ruiz Manero claims that law includes not only expressly enacted norms but also underlying reasons (or principles) that justify these norms. Explicit norms only provide prima facie solutions, but conclusive or definitive regulations are given by the balance of prima facie legal materials (i.e., explicit norms, principles, etc.). Although Ruiz Manero agrees with the idea that a (prima facie) legal gap is an unsolved generic situation, he adds that in cases of *genuine* legal gaps the balance of underlying reasons conclusively prescribes the relevant action as obligatory or forbidden[36]. In other words, there are genuine gaps because there are reasons of principle that indicate a conclusive mandatory solution to a certain unregulated case. Thus, in cases of

[35] Soeteman 1989: 137-138.
[36] Ruiz Manero 2005: 123.

genuine legal gaps, law fails to solve a case that it *intends* to regulate, but in merely unregulated cases there are no failure.

I cannot offer here a detailed analysis of Ruiz Manero's reformulation, but I will stress three odd consequences. First, in this new reconstruction legal gaps are no longer connected to judicial discretion because in cases of genuine gaps judges have to apply the norm that stems from the balance of underlying reasons. As in other unregulated cases, there is no room for judicial discretion, his proposal is actually a rejection of judicial discretion *tout court*.

Second, Ruiz Manero rejects a permissive norm as an adequate result of the balance of reasons in unregulated cases. His argument seems to be that permissive norms do not make practical differences in relation to the addressee's behaviors, and it makes no sense to allow something that is already (weakly) permitted[37]. However, this proposal cannot explain certain significant legal disagreements. Let me illustrate this criticism with a famous example taken from *Normative Systems,* referring to the restitution of a real state. In the first chapter of this book, Alchourrón and Bulygin show that the articles 2777 and 2778 of the old Argentinean Civil Code did not regulate certain case of the eight elementary cases of the universe of relevant cases[38]. As is well known, these cases are formed by the combination of three properties: good faith of the transferor, good faith of the present holder, and the onerous character of the act of assignment (so-called "consideration"). Both articles provided no solution to the first case defined by the presence of the three above-mentioned properties, but in the other seven cases lawyers regarded restitution as obligatory. As Alchourrón and Bulygin stress in the Spanish version of their book, in this case, two famous Argentinian lawyers (e.g., Allende and Molinario) disagreed on the legal solution[39]. On the one hand, Allende said that the restitution is not obligatory, but Molinario claimed that the actual holder must restitute the real state. I am not interested in their arguments, but in the fact that Ruiz Manero cannot identify such a case as a genuine legal gap. If Allende was right, the balance of underlying reasons results in the permission of the relevant action. But, according to Ruiz Manero, if a permission is the conclusive result of the balance of reasons the situation is no a legal gap, but an irrelevant case. On the contrary, if Molinario was right, the restitution would be obligatory, but this means that the eight cases of the universe UC would be solve with the same solution. The normative system would have become a categorical system, its eights cases would have also become irrelevant and no gap would arise because categorical norms regulate every possible case.

Finally, in Ruiz Manero's approach, the balance of reasons is understood in an "objective" sense. In his opinion, legal disagreements like the above mentioned be-

37 Ruiz Manero 2005: 123-124.
38 Alchourrón and Bulygin 1971: 18-21.
39 Alchourrón and Bulygin 1974: 47-48.

tween the Argentinean lawyers (i.e., Molinario and Allende) are not a controversy about what the law ought to be, but rather it is a discrepancy about what the law actually is[40]. Thus, although legal answers are not explicitly established in positive norms, law objectively imposes a solution as the result of the balance of underlying reasons. Judges have no discretion because they must discover the implicit right answer and, for the same reason, we must conclude that there is no legal gap.

It must be kept in mind that evaluative approaches to legal gaps attempt to find a philosophical criterion for dealing with (unrestricted) judicial discretion. Contrary to these approaches, Alchourrón and Bulygin favor a reconstruction of legal gaps only in neutral terms, i.e., a concept that can be applied without any evaluative reasoning. Paradoxically, they occasionally confuse normative gaps and unregulated cases. For example, in his reply to Fernando Atria, Bulygin says that «many of the possible actions and possible cases do not interest the law, which does not intend to regulate them and which, therefore, are not considered normative gaps»[41]. However, in a reply to Opalek and Wolenski, Alchourrón and Bulygin analyze a situation where actions p and ~p belong to the unregulated sphere and they say[42]:

> There is no norm concerning p or ~p; both p and ~p are not regulated: both belong to the extranormative sphere. Both are weakly permitted (= non prohibited). The system is incomplete regarding p and ~p.

The most interesting characteristic of complete systems is the fact that legal systems are complete when every possible maximal solution is entailed or excluded by their norms for each elementary case. However, from the fact that we can prove in each elementary case of a certain Universe of Cases that every maximal solution, e.g. OR (or its contradictory solution ~OR) is implied by the norms of a certain system S, nothing follows in relation to another independent action. Thus, a complete system S in relation to an action A is always incomplete in relation to another action B.

This is a new and more general concept of legal gap because it is no longer restricted to a specific universe of actions. Let me suppose that norms of a system S only regulate an action q, but say nothing about another action p. The action p belongs, as well actions p_1, p_2 … p_n, to the extranormative sphere and, contrary to Alchourrón and Bulygin, it seems to be unnatural to say that S is incomplete in relation to this other set of infinite actions. Otherwise, from the fact that a certain criminal offence CO is not regulated by the norms of the Civil Code, it follows that (i) CO belongs to the unregulated extranormative sphere and (ii) Civil Law

[40] Ruiz Manero 2005: 111-112.

[41] Bulygin 2005: 39.

[42] Alchourrón and Bulygin 1984: 362. The same argument is repeated in Alchourrón and Bulygin 1988: 234-235.

is incomplete because it does not apply to CO. Rather, the controversy about the unregulated cases and the limits of law seems to refer to all the valid norms of the entire legal system. In other words, the ordinary understanding of "extranormative sphere" refers to situations that *entirely* escape from legal regulations. In this respect, the limits of legal systems are also the limits of law.

The problem of the reconstruction that Alchourrón and Bulygin offered of the relation between extranormative spheres and incomplete systems is more than a linguistic inaccuracy; it is an implicit rejection of a very important thesis of *Normative Systems*: the contingency of legal gaps[43]. Legal systems either contain or do not contain a rule of closure. *Tertium non datur*. In the first case, no legal gap arises because every action is implicitly regulated. In the second case, a normative system is always an incomplete one because positive norms can regulate only a limited (restricted) set of actions.

It must be pointed out that even if a normative system is always incomplete in the new, more general sense, no conclusion on the judicial discretion can be drawn from this rather odd meaning of incompleteness. An action belonging to the extranormative sphere can be so irrelevant that judges have no discretion for modifying its permitted status. Moreover, according to Alchourrón and Bulygin, lawyers are not interested in the systematization of the entire legal order (henceforth, "the *total* system"). Rather, legal gaps are relative to a *partial* system or a portion of all valid legal norms. So, we need to distinguish between partial systems, total systems and the extranormative sphere. It could be true that the partial system S, composed only by norms N_1 and N_2, is incomplete in a case C owing to S does not regulate R in a relevant case and, at the same time, it could be false that R belongs to the extranormative sphere because other valid norms in the total system, e.g., N_3 provides a solution to R in C. For example, Alchourrón and Bulygin show that the articles 2777 and 2778 of the old Argentinian Civil Code do not regulate certain elementary case of the relevant universe of cases, but they add[44]:

> Of course, to say that the system […] constituted by 2777 and 2778 is incomplete is not equivalent to asserting that the Civil Code is incomplete. It may well be that some other paragraph of the Code provides a solution for those cases to which we can find no solution in 2777 and 2778.

I agree with Alchourrón and Bulygin that a gap in the partial system says nothing about gaps in the total system, but the remaining problem is the connection between legal gaps and the judicial creation of law. If the existence of a legal gap in a partial system does not guarantee that a certain case is legally unregulated, then we

[43] Alchourrón and Bulygin 1971: 117.
[44] Alchourrón and Bulygin 1971: 19-20.

have no reason for accepting that in this case judges discretionally create new law.

Finally, I reject the idea that an evaluative general criterion for distinguishing legal gaps and unregulated cases can be discovered by legal philosophers. However, as Alchourrón and Bulygin have made clear, in a restricted sense the distinction between legal gaps and other unregulated cases depend on valuations, but the only relevant valuations are those made by positive legal authorities[45]. From a legal point of view, the relevance of an action is always related to a set of cases (i.e., a Universe of Properties)[46]. For example, legislators believe that a certain action A must be regulated and they correlate A with a set of circumstances that make a deontic difference; they create general norms that regulate this action in a certain universe of cases UC. As nothing can guarantee that in a particular generic case belonging to UC a solution is positively provided by enacted norms, there could be a normative gap. Thus, normative gaps only arise in a context of circumstances previously evaluated by legal authorities and, in such cases, judicial decisions are discretional.

Leaving aside categorical normative systems, we could say that many actions (perhaps, an infinite number) are irrelevant because they have not been selected as relevant by legal authorities. These actions are merely unregulated ones and no judicial discretion is necessary in order to provide a solution to them. As it is clear, the extension of the class of unregulated cases depends on the extension of the class of regulated ones. Therefore, in order to identify an unregulated case, it is necessary to take previously into account the evaluations made by normative authorities.

4. The Problem of the Alien Norms

In a normatively closed legal system S, the *origin* or *pedigree* of alien norms (not their contents) explains why they cannot be invoked as legal justification in S. As they are invalid in relation to our own system, we need not pay attention to their content in order to discard them as adequate legal solutions. At the same time, the moral content of a certain *valid* norm plays no special role in the explanation of its legal force. Rather, the main reason for regarding it as an adequate legal justification is a peculiar *fact*: its membership in a certain system.

How could the *fact* that a norm belongs to a certain set be relevant in the sense that it makes a practical difference between norms? Why is the membership in a legal system – instead of its binding force – a fact that makes certain legal state-

[45] This solution is implicit in Alchourrón and Bulygin's *Normative Systems*, although they do not mention the irrelevance of *actions*. They only characterize *properties* as irrelevant in relation to cases and actions. See Alchourrón and Bulygin 1971: 101-102.

[46] This means that there are no categorical general norms in the legal domain. See for example, Kelsen 2005: 100-101.

ments true? Two radical answers are worth mentioning. On the one hand, Dworkin claims that we could understand better the normativity of law if the systematic reconstruction of law were abandoned[47]. On the other hand, Bulygin maintains that «the problem of membership is absolutely independent of any speculation about the binding force of legal norms»[48].

As is well know, Kelsen rejects these radical solutions. He offers a complex answer that attempts to preserve not only the relevance of membership in a legal system but also the normative force of binding laws. Thus, Kelsen dissolves the problem of the binding force of alien norms, although he pays a conceptually high price. He rejects that invalid norms (and, by implication, also alien norms) could be legally binding. According to his approach, the only relevant fact for explaining legal force is the membership in a legal system and alien norms are legally binding only to the extent that they are not really "alien" ones. So, neither the thesis of the social sources, nor the thesis of the limits of law is threatened because judges actually justify their decisions in norms of their own systems. This solution deserves a closer inspection[49].

The recognition of foreign norms in cases regulated by Private International Law is the paradigmatic mechanism for dealing with the legal force of alien norms. In such cases, the norms of an alien State are applied by judges of our own legal system. However, in his *General Theory of Law and State*, Kelsen claims[50]:

> The essential point of the problem seems to be the application of the law of one State by the organs of another State. But, if the organ of a State, bound by the law of this State, applies the norm of a foreign law to a certain case, the norm applied by the organ becomes a norm of the legal order of the State whose organ applies it.

And, he adds[51]:

> The rule obliging the courts of a State to apply norms of a foreign law to certain cases has the effect of incorporating the norms of the foreign law into the law of this State. Such a rule has the same character as the provision of a new, revolution-established constitution stating that some statutes, valid under the old revolution-abolished constitution should continue to be in force under the new constitution. The content of these statutes remains the same, but the reason for their validity is changed.

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47 Dworkin 1967: 45-46.

48 Bulygin 2015: 247.

49 A complete reconstruction of Kelsen's solutions to the problem of the validity and binding force of legal norms must take into account the role played by the Basic Norm. I cannot revise such a doctrine here. See Paulson 2000: 279-293.

50 Kelsen 2006: 244.

51 Kelsen 2006: 244.

This solution is grounded on two intertwined reasons. First, the unity of a system requires normative coherence. There can be neither extra-systematic nor intra-systematic normative conflicts. In particular, valid norms cannot contradict each other without destroying the systematic unity. Second, there is a conceptual relation between the force of legal norms and their membership in a legal system. According to Kelsen, validity *is* 'binding force' and norms are valid if and only if they belong to a particular legal system. In the case of Private International cases, the reason for the validity of a foreign norm N_F is not a norm of our own system. So, we face a dilemma: on the one hand, N_F would be a binding norm without a legal ground for its validity, or, on the other hand, our judges are legally obliged by an external or alien legal system. The first horn destroys the dynamic relation of validity and the second horn destroys the unity of the law. Kelsen avoids the dilemma with the fiction of a re-enactment of a new norm with the same content than foreign norms.

In a famous paper on the relation between international law and municipal law, Hart persuasively criticizes Kelsen's ideas on the unity of legal systems[52]. It makes no sense to repeat here his arguments, but let me briefly explore one criticism that Hart did not mention in his paper.

In Kelsen's reconstruction of Private International Law cases, three general norms play a decisive role[53]. The first is the foreign norm (i.e., N_F); the second is the criterion of applicability (i.e. N_{CA}) of alien norms, that is, «the rule obliging [...] to apply norms of a foreign law». Finally, there is a new valid norm (i.e., N_N); it is created by judges and has the same content than the foreign norm N_F. Kelsen says that «strictly speaking, the organ of a State can apply only norms of the legal order of its own State»[54], so norms like N_N are foreign only with respect to its content, but not regarding the reason for its validity.

However, the preservation of the systematic unity is threatened by this strategy. As foreign norms often regulate actions and institutions (e.g. marriage) differently from our own norms, the reproduction of the content of foreign norms in a new own norm N_N could be in contradiction with the content of another own norm N_L. Therefore, the problem of the "inter-systematic" antinomies is reproduced at an internal level because it is possible (and highly probable) that the creation of a new norm leads to an "intra-systematic" conflict.

Let me now consider the equivalence between legal validity and binding force.

As is well known, Kelsen does not accept the existence of invalid norms, or norms that are in conflict with higher norms because norms are valid only if they

[52] Hart 1983: 309-342.

[53] There is also an individual one, i.e. the judicial decision of the case, but since the validity of this norm is not in question, I will not discuss here its membership into the legal system. Bulygin denies that individual norms like judicial decisions are valid norms (i.e., part of the legal system). See Bulygin 1991: 262.

[54] Kelsen 2006: 244.

are created according to higher norms, e.g. constitutional norms. Thus, to say that there are unconstitutional norms is a "contradiction in its own terms". But as it is obvious that a Parliament may issue a norm in conflict with the constitution, Kelsen is forced to assume that a tacit authorization in higher norms confers validity to "unconstitutional" inferior norms. Many legal philosophers have shown that such a solution is incompatible with some basic aspects of the own *Pure Theory* and it is not necessary to revise here their criticism[55].

Bulygin offers a solution to this Kelsenian puzzle. He points out that it is necessary to distinguish clearly between membership in a legal system (the validity of a norm) and applicability (the binding force of a norm) to a particular case[56]. A norm N_1 belongs to a legal system if and only if it has been issued by a competent authority and its competence is relative to another higher norm N_2. This higher norm is the reason for the validity of N_1. In turn, a norm $N_1$is applicable if and only if judges are obligated by another norm N_2 to apply N_1 to a certain case C. Thus, it can be said that N_2 provides a "criterion of applicability" in the legal system. Validity and binding force refer to a relationship between hierarchically ordered norms (e.g., N_1 and N_2), but there is no necessary coincidence between membership and applicability. An applicable norm may no longer be valid in the system (cases of ultra-activity of a norm) and it may also occur that a valid norm in the system is not yet applicable (*vacatio legis* cases).

This proposal is attractive because it allows analyzing the role sometimes played by invalid norms in the justification of judicial decisions and, at the same time, it seems to avoid Kelsen's problematic solution (i.e. the recognition of a tacit alternative clause). Nevertheless, I would like to revise some problematic consequences that follow from Bulygin's reconstruction.

First, Bulygin stresses that[57]:

> The distinction between valid and invalid norms is relevant above all for the problem of the annulment of norms. Invalid norms cannot only be derogated; they can also be annulled. Nevertheless, invalid norms are binding if they have not been annulled.

Annulment and derogation can be regarded as different legal techniques for eliminating the validity and binding force of legal norms. It is obvious that valid norms as well as invalid norms can be derogated and annulled. This is tantamount to saying that both valid and invalid norms are legally binding if they have not been derogated. As these two classes are exhaustive of the universe of legal norms, it

[55] See for example, Vernengo 1960: 207 ff., Nino 1985: 32 ff., Ruiz Manero 1990: 51 ff., Bulygin 1995: 16 ff.

[56] Bulygin 2015: 82-83.

[57] Bulygin 2015: 84.

follows – as Kelsen claims by means of his theory of alternative clause – that every non-eliminated legal norm is binding[58]. In this respect, the distinction between validity and applicability does not help us to understand better these aspects of legal dynamics[59].

Second, derogation plays two functions: on the one hand, it affects the membership in a legal system, i.e. it eliminates a norm from the legal system and, on the other hand, it cancels the binding force of legal norms in future cases. In the *Pure Theory*, these functions are intrinsically related to each other, but in Bulygin's approach the relation is more complex. In general, Bulygin claims that derogation is the elimination of a norm from the legal system[60], and he argues against an "alternative explanation" of the connection between derogation and applicability. According to this alternative, a norm is a member of a system so long as it is applicable:

> Thus, a derogated norm – provided it is still applicable to certain cases – has not been eliminated from the system. It continues to be a member of the system although its applicability has been restricted by derogation to a more limited range of cases.[61]

Bulygin offers several arguments against this reconstruction. For example, he points out that membership has conceptual primacy over the applicability because it is not possible to identify the applicable norms previously identifying the applicability criteria that are part (are valid) in the legal system. However, if derogation is mainly the elimination of norms from a certain system, it seems that it makes no sense to derogate invalid norms. Invalid norms are not part of the legal system, so they cannot be eliminated by means of derogation. This reconstruction is at odds with our legal practice since it is sometimes the case that a Parliament derogates unconstitutional norms. Moreover, the derogation of a certain norm N can be a political and legal change motivated by a judicial decision that declares N unconstitutional[62]. What is the effect of such derogation? Bulygin says that unconstitutional norms are not valid, then an unconstitutional norm cannot be "expulsed" from the legal system, but N has also been deprived of applicability as a consequence of a judicial decision on its constitutionality. So, the conclusion seems to be baffling:

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58 See Comanducci 1997: 165-182.

59 A detailed analysis of this problem can be found in Rodríguez, Orunesu and Sucar 2001: 11-58. See also, in the same volume, Guastini 2001: 59-63.

60 Bulygin 2015: 172.

61 Bulygin 2015: 184.

62 For example, in 1986 the Supreme Court of Argentina declared unconstitutional an article of the Law of Civil Marriage (1888) that forbids new marriages after divorce. Eight months later, in 1987, the Argentinian Parliament derogated this regulation and promulgated a new law that recognized divorce as a right to marriage again.

although derogation is essential in legal dynamics, it affects neither the membership nor the applicability of the unconstitutional norm.

Against this it could be argued that when a law is declared "unconstitutional", it is declared inapplicable only to a particular case (at least, in the Argentinean legal system) and its derogation eliminates its applicability to future cases. However, contrary to Bulygin's assumption, this reply assumes that derogation, at least in certain cases, does not eliminate the membership of a norm in the legal system (unconstitutional norms are not part of the system), but it only affects its binding force.

Finally, Bulygin does not explain why invalid norms are binding until they have been either derogated or annulled. In a decentralized system of constitutional control, it makes no sense to claim that there is a criterion that confers applicability to every invalid norm and, to the extent that they are not part of the legal system, it seems that the most intuitive conclusion is the rejection of the binding force of invalid norms. There is no need of a general criterion of applicability for invalid norms, even though in some exceptional circumstances, a specific criterion of applicability confers binding force to invalid norms.

To sum up: on the one hand, Kelsen cannot provide a sound reconstruction of the binding force of alien norms because he believes that only valid norms are binding. On the other hand, Bulygin also fails in his reconstruction because he claims that all invalid norms are binding (until their derogation or annulment). Although the distinction between validity and applicability is a useful conceptual tool, a further improvement seems to be necessary in order to explain the binding force of alien norms.

5. The Limits of Law and the Incorporation of Morality

Perhaps, incorporation of morality is the most controversial topic on the reception of alien norms. Inclusive legal positivists, for example, often claim that specific references to morality that we find in our legal systems incorporate moral norms into them. Joseph Raz illustrates this claim in the following way[63]:

> The first amendment of the US Constitution says, among other things, that 'Congress shall make no law […] a bridging the freedom of speech', assuming, as it is generally assumed, that the freedom of speech referred to in it is not the freedom of speech existing in the common law before the passing of the Bill of Rights, but a moral right to free speech. This Amendment, too, is often taken as an example of the incorporation of morality by law.

[63] Raz 2009: 193.

From a historical point of view, inclusive legal positivism was developed as an answer to Dworkin's emphasis on the role played by legal principles[64]. However, in a book published more than twenty years before the Dworkin's seminal paper[65], Joseph Esser defended that moral principles are part of the legal systems[66], and Kelsen, in a specific chapter of the *General Theory of Norms,* offers a detailed reply to the so-called Esser's "Transformation Theory"[67]. Kelsen makes clear that the controversy on the validity of *legal* principles does not refer to the fact that legislators – motivated by their acceptance of some moral principles – often issue general norms that reproduce the content of those principles. Rather, the problem is whether we must accept the legal force of certain principles because their contents are morally justified.

Kelsen stresses that there is an intrinsic relation between "legal" principles and positive law and, in particular, that no ethical-political principle would be a legal one unless positivized by a legal authority. Where Esser wonders «Where do legal principles get their character as positive law»[68], Kelsen answers[69]:

> That presupposes that principles can be *legal* principles even before they are positive law. They can be "legal" principles only in the sense of Natural Law. But if one rejects Natural Law doctrine, as Esser does, one can only ask when a principle can be called a "legal principle".

Later, he adds[70]:

> That principles of morality, politics, and manners are "incorporated" by law-forming acts can only mean that legal norms created by law-forming acts agree – in virtue of their content – with these principles. But that is no reason for considering these principles to be positive law.

The connection between legal principles and positive law is even more clearly expressed in the analysis of the reasons for the validity of a judicial decision that "adopt" a moral principle. In this respect, Kelsen points out[71]:

> The judicial decision in a concrete case which is not the application of an already valid, materially determinate general legal norm can be influenced by a principle of

64 See for example, Waluchow 1994.
65 Dworkin 1967: 14-46.
66 Esser 1956.
67 Kelsen 1991: 115-122.
68 Esser 1956: 132.
69 Kelsen 1991: 117.
70 Kelsen 1991: 118.
71 Kelsen 1991: 115.

> morality […] The reason for the validity of this decision is the formal positive-law principle concerning *res judicata*, and not the principle of morality, politics, or manners, influencing the decision. There can be no question of 'decisions of principle'… in the sense that the court applies a principle of morality, politics, or manners as it does a positive general norm. For it is only the later and not the principle which can be the reason for the validity of judicial decision. In virtue of the fact that similar cases are regularly decided in similar ways and become valid in virtue of the principle of *res judicata*, a general norm is created whose content agree with the principle which influenced the decision. But even then, the principle of morality, politics, or manners with which the content of the general norm agrees remains a norm different from this general legal norm.

There is a striking similarity between Kelsen's solution to the binding force of legal principles and the recognition of foreign norms. In both cases it is stressed the fact that no norm is legally binding unless it is also part of the legal system. As I have advanced certain doubts on Kelsen's solution to the problem of the reception of foreign norms, it would be appropriate to consider another explanation of the binding force of moral norms. For this reason, I will briefly revise Raz's solution to this problem.

Although the existence of a rational (critical) morality does not play a major role in Kelsen's analysis of legal principles, the objectivity of morality makes an important difference in Raz's rejection of the incorporation of moral norms into legal systems. In other words, the problem is the connection between legal references to morality (e.g., cruel punishment) and "true" moral principles[72].

Contrary to Kelsen, Raz denies that an explanation of the binding force of morality depends on the incorporation or re-enactment of moral principles into the legal systems. In particular, Raz states[73]:

> I believe that so-called 'incorporating' reference to morality belongs, with conflicts-of-law doctrines, to a non-incorporating form of giving standards legal effect without turning them into part of the law of the land.

However, can the analogy between morality and alien laws explain the binding force of moral norms? It must be kept in mind that Raz identifies two types of alien norms[74]:

> Norms are 'adopted' by a system because it is an open system if and only if either (1) they are norms which belong to another normative system practiced by its norm-

[72] As Raz says: «"Morality" is used to refer only to true or valid considerations. In saying this, I merely clarify the sense in which I will use the term». Raz 2009: 186.

[73] Raz 2009: 195. See also, Raz 1979: 46.

[74] Raz 1979: 120.

> subjects and which are recognized as long as they remain in force in such a system as applying to the same norm-subjects, provided they are recognized because the system intends to respect the way that the community regulates its activities, regardless of whether the same regulation would have been otherwise adopted, or (2) they are norms which were made by or with the consent of their norm-subjects by the use of powers conferred by the system in order to enable individuals to arrange their own affairs as they desire. The first half of the test applies to norms recognized by the rules of conflict of laws, etc. The second part of the test applies to contracts, the regulations of commercial companies, etc.

To be sure, Raz would not place morality next to the norms of the second group since the reason for adopting them is that they are voluntarily made by certain individuals in order to develop their autonomy. Law confers discretion on them by designing such normative contexts and helps for enforcing such voluntary agreements. However, morality also aspires to regulate actions that individuals do not want to carry out. For this reason, it seems more natural to equate the adoption of moral standards only with the "reception" of foreign law. In this respect, Raz says[75]:

> while the rule referring to morality is indeed law (it is determined by its sources) the morality to which it refers is not thereby incorporated into law. The rule is analogous to a 'conflict of law' rule imposing a duty to apply a foreign system which remains independent of and outside the municipal law.

However, Raz limits the remission to foreign norms of other systems effectively practiced (in force) in a community and this requirement is not necessarily satisfied by the norms of objective morality. Moreover, in international law we defer to other systems as a way of expressing a certain respect for the norms practiced in a foreign community because we recognize that individuals had good reasons to perform certain acts and comply with certain formalities (e.g., getting married according to certain rites, publicizing certain acts, etc.). This allows Raz to point out that the adopted norms are binding even though in our community we would have chosen to regulate the behavior in another way and also grant that the "openness" of a system is not necessarily a laudatory property since adopted norms may be wrong. Of course, these distinctions are perfectly natural in the recognition of foreign law, but completely inappropriate to account for the binding force of morality. First, objective morality is not contextually dependent and this implies that something cannot be morally appropriate in one community, but morally incorrect in another. Second, it is not possible to adopt wrong moral standards since they are simply not part of objective morality.

The solution to these deficiencies is apparently simple: it would be necessary

[75] Raz 1979: 64.

to add a new criterion according to which a legal system is open when it recognizes the validity of the moral standards to which it refers through its sources. But what is the point of stipulating this criterion? Would not be a circular reasoning to argue that the thesis of sources explains why morality is not part of the law and, simultaneously, argue that morality is not part of the law precisely because it does not satisfy that thesis? I will not answer these questions here, but I conclude that neither Kelsen nor Raz provide a convincing explanation of the binding force of moral norms.

6. Social Sources and the Incorporation of Logical Consequences

One of the most important changes in the development of the *Pure Theory of Law* is the rejection of the application of (certain) logical principles to law. More precisely, in his *General Theory of Norms*, Kelsen denies two specific theses: (i) the conflict of legal norms is a kind of logical contradiction and (ii) there could be a relation of logical entailment between norms[76]. This important shift in Kelsen's ideas completes another change referred to the nature of norms. In the first period of the *Pure Theory*[77], there is no a clear distinction between legal norms and propositions, thus the relation between law and logic is not put into question. In the second edition of the *Pure Theory* there is a tension between norms and propositions that are partially hidden by the fact that Kelsen claims that logic principles can be indirectly applied to legal norms. However, in his last writings, Kelsen concludes that (i) norms are prescriptive statements (i.e. they are neither true nor false propositions), (ii) logical principles only apply to descriptive (i.e., true or false) propositions, and (iii) there is no logic of norms (i.e., logical principles cannot be applied to norms). Thus, at the end of his life, Kelsen stresses that only positive laws belong to a legal system and no law is a positive one if it is not created by an explicit act of will ("No imperative without imperator").

Admittedly, Kelsen is not a logician and many details of his arguments need to be drastically improved, but his intuitions on the connection between law and logic are still inspiring. For example, in 1991 von Wright wrote[78]:

> I came to think that logical relations such as contradiction and entailment could not hold between (genuine) norms and that therefore, in a sense, there could be no such

[76] See Hartney 1991: ix-liii. Also, Paulson 1992: 265-274; see specially, Paulson 1992: 270-273.

[77] A sophisticated reconstruction of the development of the *Pure Theory* can be found in Paulson 2017: 860-894.

[78] Von Wright 1991: 265. Later, he wrote: «Hägerström and Kelsen […] had been my guides and heroes. I still think that there is an undeniable and important elements of correctness in their views». Von Wright 1999: 31.

> thing as a "logic of norms". This was a position not unlike that reached by Kelsen in his later years.

Kelsen's skepticism about the validity of logically derived norms is rooted in his rejection of deontic logic, but it must be stressed that an affirmative answer to the question of the possibility of a genuine logic of norms is not by itself a justification of the validity of derived norms. For example, Raz (and other exclusive positivists like Marmor[79]) accepts deontic logic, but at the same time, he denies the validity of all entailed laws. Moreover, according to Raz, the unrestricted acceptance of derived norms would be just another repudiable form of incorporationism[80]. On the contrary, Bulygin (and Alchourrón) asserts that a legal system is a deductive normative system, i.e., it contains all logical consequences. I have elsewhere argued at length on this controversy and I believe that a definitive argument on the validity of derived norms is still missing[81]. Nevertheless, let me add here only a few more comments.

It seems to be clear that derived norms lack a special social source; but their binding force is almost never questioned by lawyers or judges in their legal decisions. In other words, it is "grammatically correct" – as Wittgenstein would say – to ground a legal claim in the fact that a certain duty logically follows from an explicitly enacted norm. Of course, this does not mean that such a logical conclusion will be the definitive answer to a legal problem, or that judges would be compelled to recognize this duty. In this respect, neither explicitly enacted norms nor logically derived ones can make sure the result of a particular controversy.

Thus, we can assume that logically derived norms are legally binding, but the remaining doubt concerns the reason for their legal force. According to Raz[82],

> We want a test which will identify as belonging to a system all the norms which its norm-applying institutions are bound to apply (by norms which they practice) except for those norms which are merely 'adopted'. But how are we to characterize the adopted norms? How are we to define with greater precision the character of an open system?
>
> Many have tried to find the distinguishing mark in the manner or technique of the adoption. It seems to me that this is a blind alley. These distinctions inevitably turn on formal and technical differences which bear no relation to the rationale of drawing the distinction and lead to counter-intuitive results. We must rely on the reasons for recognizing these norms as binding, for our purpose is to distinguish

79 Marmor 2001: 69-70.
80 Raz 1994: 229-230.
81 On this point, see Navarro and Rodríguez 2014: 223-232.
82 Raz 1979: 119-120.

> between norms which are recognized because they are part of the law and those which are recognized because of the law's function to support other social arrangements and groups.

To a certain extent, I agree with Raz on the fact that the reasons for recognizing the legal force of certain norms determines that alien norms are only adopted norms. But I must point out that Raz's claims threaten his own ideas on the alien nature of entailed laws for the following reason. The legal relevance of derived norms cannot be explained by analogy with Private International Law cases, morality or other mechanisms of reception of norms. For example, no criterion of applicability of derived norms could be, as a matter of logical necessity, valid in positive legal systems, and no empirical generalization could demonstrate that all legal systems necessarily incorporates derived norms. The only reason for accepting the legal force of derived norms is the fact that they are part of the law; that they are implicit in expressly enacted norms. Thus, every judge who recognizes the binding force of derived norms also assumes that they are valid in the legal system. No additional arguments or reasons are required other than the fact that entailed laws are implicit in the content of valid norms

Against this it could argued that derived norms are only a rational (ideal) state of affairs that legal authorities must respect in order to avoid incoherence. Thus, although the inner logic of law compels to recognize norms that can be coherently integrated to our legal systems, it is not necessary to assume that derived norms are as legally binding as other valid norms in the legal systems[83]. However, I do not believe that this is a persuasive answer because it seems to confuse the fact that derived norms are actually binding with a rational expectation on the development of law. In other words, our beliefs on the rationality or irrationality of some regulation have no bearing on the claim that law actually prescribes some action because such a prescription logically follows from other valid norms. In this respect, logical consequences can be regarded as legally relevant not because they were intended by legal authorities, but because we cannot make sense of what authorities actually attempt to decide without taking into account the logical consequences of the norms they enact.

7. Conclusions

Almost every legal philosopher accepts the idea that law has limits, but they pervasively disagree on the nature of such limits. To a certain extent, the disagreement is not a controversy about certain facts, but rather it refers to our understanding of

[83] Raz 1994: 248-250.

them. Perhaps, this is not a strange situation in philosophy. In this respect, it would be useful to remind von Wright's comments on Moore's analysis of the philosophical relevance of some common and widely accepted ideas[84]:

> Philosophical views which deny things we all take for granted also the philosophers when they do not philosophize must be rejected as absurd or senseless […] With this, however, philosophizing about such matters has not come to an end. Of that Moore was completely clear. The problem, however, is not with the *truth* of the common sense opinions and statements, but with their *meaning*… To answer such questions is the task of *analysis*.

Following von Wright's recipe, one can ask what it *means* to claim that law has limits. It seems to me that the meaning of certain statements is shown by the consequences that we could draw from them. Thus, in this paper I have revised two theses that are often regarded as the implicit content of the idea of the limits of law: the existence of unregulated cases and the difference between legal norms and alien norms. The intuitive content of both theses leads to the problem of the open nature of legal systems. At the same time, they are intrinsically related to the scope and type of judicial discretion. For example, if all possible cases are regulated by legal systems, then there are no legal gaps and the only type of judicial discretion is the change of established legal consequences. On the other hand, if law is a normatively open legal system, then legal norms do not solve every possible case because in certain circumstances the law itself intentionally leaves certain cases unregulated. This fact does not mean that a judicial solution of such cases is discretional because law can provide binding force to some alien norms.

The meaning of the metaphor of the binding force of a norm is elusive and I have shown that three leading contemporary philosophers offer incompatible solutions to the problem of the alien norms. Taking into account their different philosophical backgrounds, this is not a surprising fact, but it is worth noticing that none of such theories explains adequately the connections between unregulated cases, the systematic nature of law and the binding force of legal norms. For example, although we accept that, for example, positive law cannot explicitly regulate every human action, we disagree on the existence of legal gaps and the rules of closure. Besides, even if no legal philosopher denies that, for example, the French law is different from Italian law, we still disagree on the reason why in certain occasions Italian judges must take into account the content of French law in order to justify their decisions.

As a conclusion, it would be useful to offer a summary of the answers provided by Kelsen, Raz and Bulygin to the two problems that have structured this paper:

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84 Von Wright 1995: 30.

1. ***Unregulated cases***

This first problem refers to the existence of unregulated generic cases and it has been analyzed in relation to the question of the existence of closure rules and legal gaps[85].

	Law necessarily contains closure rules	*Law can contain legal gaps*
Kelsen:	YES	NO
Raz:	YES	NO
Bulygin:	NO	YES

2. ***Alien norms***

This second problem refers to the distinction between validity and binding force and it has been analyzed in relation to three questions:

a) *Foreign norms*

	Foreign norms are valid in our legal system	*Foreign norms are binding in our system*
Kelsen:	NO	NO
Raz:	NO	YES
Bulygin:	NO	YES

b) *Moral norms*

	Moral norms are valid in our legal system	*Moral norms are binding in our system*
Kelsen:	NO	NO
Raz:	NO	YES
Bulygin:	NO	

c) *Derived norms*

	Derived norms are valid in our legal system	*Derived norms are binding in our system*
Kelsen:	NO	NO
Raz:	NO	YES
Bulygin:	YES	YES

[85] Here I have only analyzed generic cases, because Kelsen, Raz and Bulygin agree on the fact that many individual cases are legally indeterminate.

The consequence of this reconstruction is that the limits of law can be understood in very different ways. Although this seems to be an obvious fact, it is not a triviality to invite attention to the fact that the disagreements on the limits of law is only another aspect of the controversy about the *nature* of law.

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