One of the most persistent controversies in law is related to its completeness or incompleteness. In the context of the debate between inconclusive law or the completeness of the law, the main argument of the paper is that Hans Kelsen paradoxically converges with Ronald Dworkin in denying legal indeterminacy, and albeit from radically different and opposing positions, both of them would arrive at the same conclusion in the discussion about completeness or incompleteness in the law: the law is ‘complete’. Both advocate a position contrary to HLA Hart.

Roughly speaking, the law is complete when within the universe of foreseeable (real) and unforeseeable (possible) cases, all are envisaged by the legal system in their full scope. Fullness or completeness is synonymous with ‘regulation’ or ‘deontological qualification’ and its consequence on implementation and interpretation is the absence of legal indeterminacy. An action or situation is ‘regulated’—and consequently ‘determined’—in a legal system if there is a
rule or principle belonging to this system that qualifies the action or system. Thus, law is declared to have fullness or completeness when it provides a legal qualification in every specific case for every action or situation, real or possible. On the other hand, the law is inconclusive when it does not contemplate a specific solution for each and every given case.

There are three areas that can provide information on whether the law is or isn’t complete: the criteria of legal validity; the rules and principles of law; and judicial decisions. In this text I will refer to the question of fullness or incompleteness in relation to the rules and principles of law, as well as the influence of the aforementioned positions on legal interpretation (judicial decisions). To this end I will take into account canonical legislative formulations (rules), but also the implicit content of legislation (principles); in other words, both statutory law and the law implicit in statutory law.

As mentioned by Rafael de Asís, the problem under discussion can be approached synthetically as follows: we begin with the fact that it’s obviously difficult to believe that the legal system has sufficient rules to solve all conflicts, even though the legal system is obliged to view the law as something capable of providing solutions to all problems that may arise. Fullness is therefore a kind of ideal view of the law to be pursued by legal practitioners who should act as if the legal system were complete. This allows us to distinguish two senses of the term ‘fullness’ (completeness) of the law: an absolute and a relative sense. From the ‘absolute’ point of view fullness is associated with the existence of norms that solve, as it were, all problems. From the ‘relative’ point of view, the absence of specific norms for solving certain problems is accepted, but (at the same time) so is the existence of mechanisms that integrate these problems into the legal system. In both senses (absolute and relative), the law is full and complete.

In this respect, of the three cases that diminish the occurrence of fullness or incompleteness of the law, it is only the absence of a norm with a precise solution and (furthermore) the impossibility of finding a solution through various techniques that would allow us to say in the strict sense that ‘fullness has deteriorated’. The other two cases (the existence of a norm that provides a precise solution to the problem –in a legal dispute--; and the absence of a norm with a precise solution, but the possibility of reaching a solution through various techniques) would not constitute cases

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2 Rafael de Asís Roig, Jueces y normas. La Decisión Judicial desde el Ordenamiento (prologue by G Peces-Barba, Marcial Pons 1995) 29 and 32.
of incompleteness of the law.³

From the above we can infer that the fullness or completeness of the law is assessed according to the following criteria:

_Firstly_, the ability of the rules and principles to cover any _actual_ or _possible_ (future) case that presents itself within the legal system. If the rules and principles apply to _any_ actual or possible case, they constitute a _factor_ of the completeness of the legal system. If the opposite is the case, the law lacks fullness.

_And secondly_, for the law to be full or complete, its rules and principles must ‘regulate or contemplate in _all_ their scope’ those cases which they cover, without leaving _any_ aspects of these cases indeterminate. If this is the case, and the rules and principles extend their application to ‘_any aspect_’ of the cases they relate to, this favours the completeness of the law; if they do not, they affirm incompleteness as a characteristic of inconclusive law.

In section two of the paper I will briefly describe the conceptual context, in the sphere of legal theory, in which the debate on the indeterminacy or completeness of the Law is developed. In section three I will refer to this discussion in the area of adjudication. In addition to the above, in sections four and five I will discuss the doctrine of the norm as a framework and the thesis of indeterminacy in Kelsen. And I will conclude, as a central argument of the paper, that whilst Kelsen paradoxically converges with Dworkin in denying legal indeterminacy set out from opposing positions and moving in different directions, both of them would arrive at the same conclusion that the law is ‘complete’: both theories include a thesis of the completeness of the law against the position of Hart.

**II. INCONCLUSIVE LAW OR THE COMPLETENESS OF THE LAW**

Approaches to inclusive law or the completeness of the law vary according to the various _theories of law_ and of the _legal argument_ used.

Thus, the _completeness_ of law is discussed by contemporary legal positivism with the idea that the law is indeterminate because it is incomplete, as it is impossible for it to regulate the entire universe of _foreseen_ (real) and _unforeseen_ (possible) cases. Consequently, _not_ all legal controversies that judges must resolve can be solved through established law, but rather sometimes (partial indeterminacy) or always (complete indeterminacy) the

³ ibid 32 ff.
judge must use his powers of discretion to resolve a particular case.4 Positivists believe that this conceptual framework—which includes a significant thesis on legal indeterminacy—receives the greatest support when testing the suitability of legal theory to the practice of law.5

In this debate, an argument that has increasingly gained favour in determining the fullness or incompleteness of the law is related to the explanations given by various legal theories as to why genuine disagreements occur between jurists in a legal case. As Albert Calsamiglia rightly states, one of the fundamental characteristics of the legal profession is controversy; jurists discuss and have numerous disagreements about the solutions offered by positive law, and yet very few theories have paid attention to the analysis of these disagreements.6 However, the genuine disagreement between jurists involved in a legal case, in terms of legal reasoning, has been explained primarily from two points of view: firstly, from the fundamentals of law applicable to the particular case (theoretical disagreement); and secondly, from the question of whether or not these fundamentals are in fact satisfied in a particular case (empirical disagreement).7

The main explanation supplied by legal positivism is empirical and is directly related to: a) the notion of ‘open texture’ in law; b) the consideration of ‘borderline cases’ in the legal system; and c) the significant affirmation of (partial or complete) indeterminacy of the law. Borderline cases (doubtful, indeterminate or marginal cases) must be taken into consideration, as must those legal cases that involve indeterminacy at the moment of application and interpretation, whether in all legal controversies (if it is believed that the law is always indeterminate) or only in some of them (if it is believed that the law is sometimes indeterminate). In other words, the mechanisms of legal interpretation that may be able to solve borderline cases will either never be able to solve them (complete indeterminacy) or sometimes will and sometimes won’t (partial indeterminacy).

One legal positivist has been most successful in explaining genuine disagreements between jurists: Hart, with his notion of the *open texture* of the law,⁸ which arrives at the conclusion that the genuine disagreement between jurists is an *empirical* disagreement. Thus, when jurists must apply a legal term to a particular case, genuine disagreement arises because this particular case has fallen into the *twilight zone* of the area in which the *paradigm* case of a legal term can be applied. This generates *subjective uncertainty* or *doubt* (which may lead to legal indeterminacy) as to whether the particular case falls *within* or *outside* of the area of clear application or clear non-application. The result in this case is that the legal term is ‘indeterminate’ within the legal system, which consequently lacks fullness and is inconclusive. The disagreement or dispute is an *empirical* one because it centres on the act of applying (qualifying) a legal concept to a particular case. It is true, as Jules Coleman warns, that if we pay too much attention to the genuine controversies between jurists when resolving the issue of fullness or incompleteness we may end up understanding law exclusively in terms of *litigants* and judges, and overlook the important role of law as a ‘guide’ for citizens.⁹

In opposition to the current positions of legal positivism, the contemporary anti-positivist approach, as developed by Lon L Fuller and Dworkin, uses two core arguments to support the fullness of the law: a) the radical statement that the *implicit contents* of the law are *integrated* into the judicial sphere, and that these implicit contents avoid legal indeterminacy by producing an *‘ex post’ determinacy* of law in relation to any given legal case, whether in relation to the explicit law of rules or the implicit law of principles;¹⁰ b) the ‘argument of controversy’ in response to the question as to why genuine disagreements arise between jurists.

The anti-positivist theory of Fuller already provided an argument in favour of *implicit* law.¹¹ Fuller also uses other arguments in the field of constitutional law to explain why a *theory on the sources of law* must include implicit law:

(i) because the drafting of any Constitution would be impossible unless the

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¹¹ Lon L Fuller, *The Anatomy of Law* (Frederick A Praeger Inc 1968) 44, 48 and 57: in the law or in legal provisions there is always a substratum of implicit law.
writer can assume that the legislator will agree to accept certain implicit notions;\(^2\)

(ii) because it is necessary to anticipate emergency situations, and to foresee the necessary modifications in order to confront such situations;\(^3\)

(iii) another reason why a written Constitution cannot avoid assuming implicit principles on the integrity of the law that cannot be formulated is that the words of a Constitution must be interpreted before they can be applied. Fuller talks of the ‘implicit sources’ of law, which are derived from the uses, practices, community attitudes and a sort of consensus in relation to them, which allows the law to cover the whole range of cases the judge is presented with, and to do so to their full extent.\(^4\)

Given that for Dworkin the legal norm is an ideal more noble than the norm of a legal text, only a theory on the sources of law as described above (that includes implicit law) can allow the rules and principles to cover any legal case, in such a way that the judge is able to determine the ‘demands’ of the law in every legal dispute.\(^5\) For citizens, this would make it possible for every one of them to have rights and duties in relation to other citizens and in relation to their government, even when not all of these rights and duties are codified and written down in books.\(^6\) This leads him to reject the positivist claim that if a legal dispute is not regulated by explicit law it is because the law is indeterminate. From this anti-positivist approach, a legal system will always have rules and/or principles (identified and determined by the criteria of legal validity) that are able to contemplate any problems of any case that presents itself to the legal system. This means that any legal dispute can always be resolved—and to its full extent—by the law, and that the law is therefore complete.

This position depends largely on the ‘argument of controversy’ as an explanation of genuine disagreements between jurists. In fact, modern anti-positivism resolves this issue in such a way that, through interpretation, rules and principles can be determined for every real or possible case. This is the case even where these rules and principles include imprecise terms that may at first appear to generate indeterminacy in their application to a particular case. Thus, in contemporary anti-positivism the argument of controversy constitutes a factor of the completeness of law in relation to

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\(^{12}\) ibid 63.

\(^{13}\) ibid 65.

\(^{14}\) ibid 58–59 and 66.


\(^{16}\) ibid 339–342.
rules and principles, and in the two following senses:

a) In relation to the ‘disputed’ nature (as opposed to open texture) of law, and the Dworkian distinction between the concept itself (legal) and conceptions (of the concept).\(^{17}\) One should bear in mind that Dworkin, in opposition to the ‘open texture’ nature of law described by Hartian legal positivism, claims that the law (rules and principles) is always ‘determinable’ (for every case) even when it is ‘disputed’. This means that any problem in law dealt with by legal practitioners that is initially indeterminate can always be resolved by the mechanisms of legal interpretation and integration.\(^{18}\)

There is a prior reasoning that underlies the anti-positivist explanation as to why jurists disagree. It is crucial to understand that when the argument of controversy distinguishes between a ‘concept’ (legal) and ‘conceptions’ (of the concept) it is not referring to the difference between the meaning of a legal term that is part of a norm and its empirical application (extension) or non-application to a given case. Rather, the distinction is a ‘conceptual’, theoretical one concerning differing conceptions (of a theoretical/ doctrinal nature) that each of the parties have in a legal dispute in relation to the term or legal concept included in the norm that the legal practitioner is interpreting. In other words, the argument centres on the distinction between the ‘abstract idea (or conception)’ and the ‘specific idea (or conception)’ that the legal practitioner applies to the legal term in order to particularise the abstract idea in a given case.\(^{19}\)

Therefore, the reason why genuine disagreements occur between jurists is not, as the positivists wrongly claim, because the legal terms or concepts under discussion (as to whether they should or shouldn’t be applied in a particular case) have an open texture and are therefore indeterminate. They occur because such legal terms are ‘abstract’ concepts. And in order for the abstract concepts contained in a rule or principle to be applied to a specific case, it is not enough to simply observe the facts and subsume them under some applicable paradigm; but rather a particular ‘conception’ of the legal concept must be developed in relation to the given case. In short, the key to explaining legal controversy is the fact that each party to the dispute

\(^{19}\) Dworkin, Law’s Empire, (n 7) 71.
develops a ‘different conception’ of the same legal term. This is where legally controversy truly derives from.

In fact, Dworkin classifies abstract concepts (those that necessarily require a particular theoretical/doctrinal conception in order to be applied) as ‘disputed’ concepts. Of course, to say that a concept is disputed does not in any way imply that the concept is vague and indeterminate. In fact, disputed concepts are not indeterminate but simply subject to litigation: the parties dispute over their specific meaning in a given legal case.

b) In view of the above, the argument of controversy that states that in legal disputes there is a theoretical disagreement between jurists regarding the conception of legal terms, and not an empirical disagreement regarding their application, represents, for anti-positivists, an important factor in the completeness of the law in relation to rules and principles. In fact, according to Calsamiglia, the argument of disagreement between jurists is the Dworkian anti-positivists most potent weapon for challenging contemporary positivism: if jurists agree on which laws are in force, and agree on the meaning of the wording of the law, theoretical disagreements about what the law demands (in each case) can and do arise.

The conclusion is that, from a contemporary anti-positivist – and especially Dworkian – point of view, the controversies between jurists are ‘interpretative’ and can therefore be resolved through the methods of interpretation afforded by the legal system. Consequently, these controversies do not imply any legal indeterminacy.

III. Completeness, Indeterminacy and Adjudication

The issue of whether or not the law is complete or incomplete has an impact on how judges approach the task of legal interpretation. They can either accept the thesis that cases which are (partly or completely) non-regulated, and the rights and duties of citizens that are argued over judicially, are ineradicably indeterminate, meaning that the law is an

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20 For Timothy Endicott, the ‘abstract’ concepts that Dworkin speaks of are ‘vague’ concepts. See Timothy AO Endicott, ‘Herbert Hart and the Semantic Swing’ (1998) 4.3 Legal Theory 283-300.

21 Calsamiglia, ‘El Concepto de Integridad en Dworkin’, (n 6) 160: Dworkin would suggest that the law is an interpretative concept and that texts say nothing in and of themselves. A particular approach is required and that is what positivism has not understood.

inconclusive system. Or they can preserve their decision-making capacity through interpretative methods and rules of construction that always and in every case resolve the initial indeterminacy, meaning that the law is a complete system.

So, according to the anti-positivists, the resolution of a legal dispute is never indeterminate as long the judge is always able to identify a unique and correct response within the law. This statement that the law is complete is of crucial importance to anti-positivism, as it is the final and most important step of the argument that it uses to reject the conclusion of legal indeterminacy. It is so important that anti-positivist law is largely reduced to a theory of adjudication, a theory of how to construct the judicial decision: it practically views law as an argumentative practice, wherein the most important development is the judicial process. Naturally this may give the impression that, according to anti-positivism, what makes the law complete is not that it is complete in and of itself, but rather that the anti-positivist theories of law (particularly its theories of adjudication) act as a factor of completeness (and the main factor) while constructing the judicial decision.

A closely related point is that the anti-positivist approach has largely focused on how to tackle the hard cases that arise in law, a test bed for theories of law and adjudication in observing how the judicial decision is constructed in legal practice. Indeed, Dworkian anti-positivism largely reduces contemporary positivism to an erroneous ‘theory of hard cases’ where Dworkin understands hard cases as those that arise in a legal system when a particular litigation cannot be clearly subsumed under a legal norm previously established by an institution, (and that in order for them to be settled) the judge has ‘discretion’ to decide the outcome of the case.

However, Dworkin argues that where, in positivism, the judge has discretion to decide the outcome of the case, this implies that if one of the parties has a pre-existing right to win the case this idea (from the positivist point of view) is no more than a fiction. Indeed, when positivism settles a legal case in this way it is creating ‘new rights’: the judge has introduced new rights (through the interpretative solution, granting them to the party that wins the case), and applying them, retroactively, to the case.

From an anti-positivist point of view, the description of the judicial function in terms of discretion in hard cases does not give a satisfactory

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account of what adjudication is or of the structure of judicial duty.\textsuperscript{25} The alternative for anti-positivism is to try to present and defend a better theory that more plausibly reflects legal practice.\textsuperscript{26} To this end, Dworkian anti-positivism must construct the ‘judge Hercules procedure’: a model of an \textit{ideal} judge, a paradigm of how to construct the judicial decision in \textit{hard} cases, although equally valid for \textit{easy} cases.\textsuperscript{27} The Hercules procedure is also a \textit{descriptive} and \textit{prescriptive} perspective on adjudication, based on the idea of law as an \textit{integral} social practice that takes into account the internal point of view of those who participate in the legal practice; in other words, arguments in the practice of law that develop within the judicial process while solving the legal controversies that arise therein.

In fact, the Herculean procedure constitutes one of the most important strategies that anti-positivism (in its paradigmatic Dworkian version) uses to provide grounds for the \textit{completeness} of the law, and to counter the thesis of its partial or complete indeterminacy. The basis of the Herculean procedure is the conceptual link between law and morality, based on a \textit{theory of the sources of law} that includes both explicit statutory law and the implicit content of statutory law. This theory leads to the claim that the legal system has always envisaged a ‘correct’ response to every real or possible legal dispute. The result is that the judge can settle all cases in law.

As an argument generated by anti-positivism in favour of completeness, the unique \textit{characteristics} of the Herculean procedure which provide an ideal model of judicial decision-making, do a great deal to vindicate the view of law as a full system. I refer to the following characteristics:

\begin{enumerate}
\item Always settling a dispute \textit{according to} the law; that is, through \textit{arguments of principle}, and not with \textit{political} or \textit{opportunistic} arguments (discretionary arguments).\textsuperscript{28}
\item The bivalent structure of the judicial decision, by virtue of which the Hercules procedure contains a ‘bivalent’ logical and conceptual scheme for judicial decision-making. The judge does \textit{not} have a third possibility available in which a rule and/or principle neither applies nor does not apply, as this would constitute an ‘indeterminate’ response. In anti-positivist theories, \textit{judicial bivalence} is a technical resource for the \textit{completeness} of the law, even for confronting the
\end{enumerate}

\textsuperscript{25} Dworkin, \textit{Law’s Empire} (n 7) 37-39.
\textsuperscript{26} Dworkin, \textit{Taking Rights Seriously} (n 15) 81-82 ff.
\textsuperscript{27} Dworkin, \textit{Law’s Empire} (n 7) 352-354.
\textsuperscript{28} According to the opinion of Dworkin, \textit{Taking Rights Seriously} (n 15) 82-83, 90-96 and 111.
most complex legal disputes.

(3) The correct univocal response that the law has for any present or future legal dispute.²⁹

(4) The strength of principles in constructing the judicial decision: to bring about a situation wherein the law covers all cases (foreseen and unforeseen), the (implicit) principles of law play a very important role in the legal argument of the Herculean procedure. The use of principles for the completion of law has often been used in contemporary anti-positivism as, for example, Fuller's theory on adjudication when used to solve what he called problematic cases.³⁰

(5) The ‘unlimited capacity’ of the interpretative resources of law as a factor in the completeness of law.³¹

By virtue of these premises, judges perform their duties with the supposition that for any legal dispute that citizens bring before them ‘there is some solution inherent in law that is waiting to be discovered’. For this reason, the judge ‘must never assume that the law is incomplete, inconsistent or indeterminate’; and when it appears to be so, he must realise that the defect is not within the law but rather due to the limited abilities of the judge himself to discover the solution that the legal system envisages for the particular dispute, whether by virtue of rules (explicit statutory law) or principles (implicit law). So the judge not only has no room to create law in the performance of his duties, but he must also justify what he believes the law to be. He must work to identify the principles that are objectively enshrined within the system, and if divergent ideas (conceptions) on these principles exist, he must decide which of these ideas corresponds to the best conception of these principles.³²

Completeness in the area of the judicial decision means that every case compiled involves an opinion (the judge’s decision) that maintains that one of the parties has, after the judge’s assessment, the best legal argument and therefore wins the case within the legal dispute.³³ Thus, according to this

²⁹ Dworkin, Law’s Empire (n 7) 239-240.
³⁰ Fuller, The Anatomy of Law (n 11) 105 and 144; see also Dworkin, Taking Rights Seriously (n 15) 81 ff.
³¹ Timothy AO Endicott, Vagueness in Law (OUP 2000) 99-100; Spanish translation: Timothy AO Endicott, La vaguedad en el Derecho (translated by Juan Alberto del Real Alcalá and Juan Vega Gómez, Dykinson 2006) 159-160; also, Dworkin, Law’s Empire, (n 7) 44.
³² Dworkin, Law’s Empire, (n 7) 337-350.
³³ See Ronald Dworkin, ‘Is There Really no Right Answer in Hard Cases?’, in
anti-positivist position, if the judges did not follow the Herculean procedure as an objective and decisive procedure for resolving both hard and easy cases, it would be impossible for them to fulfil the professional duty required of them by the Rule of Law to always settle any legal dispute raised by citizens. This is the sine qua non for satisfying the fundamental right of citizens to effective justice.

However, two significant kinds of objections have been made to the anti-positivist view of adjudication. First of all, is it really possible (and not merely conceptually) to totally eliminate the indeterminacy that sometimes occurs in law? Or is this not a useless task, or even a not really desirable one, as Hart or Timothy Endicott claim, for any theory of adjudication, given the structure of the law? Another objection relates to the question of whether this doctrine can adequately respond to challenges such as the argument of higher-order vagueness (for example, the distinction between clear cases and hard cases is not always clear cut). According to Endicott, the legal theory of Dworkin –to which the thesis of the completeness of the law is fundamental– cannot respond to this argument.

IV. The Doctrine of the ‘Norm as a Framework’ and Legal Indeterminacy in Kelsen

According to the criteria discussed in the text, Hans Kelsen’s theory of law, a paradigm of legal positivism, should be classified as one of the legal theories that accept the incompleteness of law due to its indeterminacy. Traditionally, it has been claimed that Kelsen’s thesis of the indeterminacy of law derives from his doctrine of the ‘norm as a frame’.

However, I would like to briefly present a number of important points that question this affirmation. If these reasons are valid, it would be more correct to say that Kelsen’s legal theory contains a ‘thesis of the completeness’ of law than a thesis of indeterminacy. Consequently, whilst Dworkin and Kelsen set out from opposing positions and move in

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35 See art 24 of the Spanish Constitution.
different directions, both of them would arrive at the same conclusion that law is ‘complete’.

The reasons I put forward can be resumed as one: Kelsen’s legal theory does not really contemplate borderline cases, as long as it can settle all present and possible cases ‘according to the law’. And it would seem meaningless to ‘accept’ the thesis of legal indeterminacy, while simultaneously ‘denying’ the existence of indeterminate cases in law. In my opinion, this is precisely what Kelsen’s thesis of law does. I therefore question the traditional view that Kelsen accepts the thesis of legal indeterminacy.

Four strong arguments serve to undermine the view that Kelsen’s theory of law contains a thesis of indeterminacy. They are as follows:

1. **The Argument for the Distinction between ‘Individual’ and ‘General’ Norms**

From a Kelsenian point of view, ‘a norm is individual if it decrees a once-only individually specified instance of behaviour to be obligatory’; when it dictates a unique and individually determined required behaviour; ‘for example, the judicial decision’. And ‘a norm is general if it decrees some generally specified behaviour to be obligatory’; when it dictates a required behaviour determined at a general level.38

From the Kelsenian perspective, the individual norm seems to correspond to clear cases. Logically, the Rule of Law provides judges with precise, and largely objective cases, and these are used to settle clear cases in accordance with pre-established law. In this type of court case the ruling must be made from within the law, in contrast to cases that can only be settled discretionally. However, these procedures are insufficient when the legal case has no solution within the legal system because it is a borderline case.

If we consider the fact that Kelsen equates the individual norm with the typical situations of clear cases, it is probably true that the general norm should correspond to those represented by borderline cases. However, this is where the contradiction arises in Kelsen’s legal theory, as will now be explained.

2. **The Argument of the ‘Norm as a Framework’, Based on the Above Distinction**

As Hart observed, borderline cases are located in the area of indeterminacy or twilight zone of the area in which rules can be applied,

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for in any legal system there will also be cases that are not legally regulated. These cases are then *indeterminate*. \(^{40}\)

**Borderline** cases are characterised as being:

i) 'marginal cases', in that they are at the limit between the *clear* applicability or *clear* inapplicability of the law.

ii) ‘doubtful cases’, in that it is uncertain whether or not the law can be applied to them with certainty.

iii) *indeterminate cases* by virtue of the consequence of *indeterminacy* they produce when applying the law.

iv) ‘hard cases’, by virtue of the *complexity* involved in constructing the judicial decision in these indeterminate cases, which are either *incompletely* regulated or even *not regulated* in any sense by the legal system. This contrasts with the simplicity of constructing a decision in *clear* cases.

According to Endicott, **borderline** cases can be synthetically defined as those cases in which one does not know whether the rule should be applied or not, and the fact that one does not know is not due to ignorance of the facts. \(^{41}\) I use the nomenclature **borderline** cases or *marginal cases*, as this is the most common in legal theories that accept the thesis of indeterminacy.

Traditionally, the category **borderline** cases and the thesis of legal indeterminacy are common to positivist legal theories. However, an interesting case arises in this context: Kelsen’s theory of law, considered as one of the paradigms of legal positivism. Kelsenian legal theory *supposedly* allows some type of a thesis of legal *indeterminacy*, but it also tries to make it compatible with the opposite thesis of the *completeness* of the law. In my opinion, stating one thing alongside its opposite is inevitably paradoxical. This contradiction arises because in Kelsenian legal theory, genuinely *incomplete* legal cases do not really arise. In fact, all legal cases that this legal theory considers can be resolved ‘according to the law’. This seems to run counter to the very nature of an authentic borderline case.

The work of completing the law, and of consequently eliminating all legal

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\(^{39}\) Hart, ‘Postscript’ (n 36) 272–273.

\(^{40}\) Hart, *The Concept of Law* (n 8) 126–128.

\(^{41}\) Endicott, *Vagueness in Law* (n 31) 31–33
indeterminacy, is performed by Kelsen through his theory of the ‘norm as a framework’. For Kelsen, the legal system is a system of general and individual norms that are interrelated in accordance with the principle that law regulates its own creation. Every law of this system is created according to the prescriptions of another and, ultimately, according to the fundamental norm that constitutes the unity of the system.\(^{42}\) In this regard, ‘From a dynamic point of view, the decision of the court represents an individual norm, which is created on the basis of a general norm of statutory or customary law in the same way as this general norm is created on the basis of the Constitution’.\(^{43}\) And, for this reason, the judge is always a legislator, even in the sense that the content of his rulings can never be exhaustively determined by a pre-existing norm from substantive law.\(^{44}\)

Consequently, for Kelsen, a judicial decision ‘is an act by which a general norm, a law, is applied; but at the same time it is an individual norm that imposes obligations on one or both of the parties in conflict’. So ‘by resolving the dispute between two parties’, what occurs is that ‘the court actually applies a general norm of customary or statutory law’. And although, as Kelsen claims ‘the court simultaneously creates an individual norm establishing a particular sanction to be imposed upon a certain individual’, this creation does not mean that the judge is going ‘beyond’ the law. This is because ‘this individual norm can be referred to general norms just as the law is referred to the Constitution’.\(^{45}\) From this it can be deduced that the legal system can always provide the solution to any legal case from ‘within’ the law.

What seems to be clear is that the judicial decision in Kelsenian indeterminate cases, which are resolved using the notion of the norm as a framework, does not present exactly the same characteristics as those typical of the judicial ruling in genuine borderline cases: that is, those that do not just present themselves as indeterminate ‘initially’ but ‘ultimately’ turn out to be indeterminate. And for this reason they find no solution within the legal system. However, Kelsen does not consider this type of case. Moreover, from his point of view, when the judge resolves indeterminate (Kelsenian) cases, he is not ‘stepping outside’ of the law, but rather reaches a resolution from within the possibilities of the norm, and hence, according to the law.

The question that now arises is whether a genuinely indeterminate case


\(^{43}\) ibid 144.

\(^{44}\) ibid 145, 146, 148-149 and 166-168.

\(^{45}\) ibid 125-131.
can be resolved according to the law, because then it would not ‘ultimately’ be an indeterminate case, but rather a hard case contemplated by the law (a pivotal case).

3. **The Argument that the Kelsenian Legal Theory Refutes the 'Theory of Gaps' in the Law**

Even where Kelsen accepts the notion of the judge as legislator, Kelsenian legal theory refutes the ‘theory of gaps’ in the law: ‘This theory [of gaps] is erroneous because it ignores the fact that the legal order permits the behaviour of an individual when the legal order does not oblige the individual to behave otherwise’.46 The theory of gaps is based on ignorance of the fact that when the legal system does not impose any obligation upon an individual, his behaviour is permitted. And where an isolated legal norm cannot be applied, it is nonetheless possible to apply the legal system, and this is also an application of the law.47

Moreover, Kelsen believes that ‘the theory of gaps in law – it is true – is a fiction; since it is always logically possible, although sometimes inadequate, to apply the legal order existing at the moment of the judicial decision’.48

4. **The Argument for the 'Completeness' of the Law and the 'Consistent Positivism'**

The argument for the ‘completeness’ of the law, which he advocates from a legal positivist position that he defines as ‘consistent’, is incompatible with the thesis of legal indeterminacy. Kelsen tries to safeguard first and foremost the postulate of legal positivism that every specific case must be resolved on the basis of current positive law; and, in his opinion, it is essential for a consistent positivist theory of law to show that the system of positive law contains this express or tacit authorization (to fill this or that gap).49 But the idea that positive law can resolve any type of case does not seem very compatible with the thesis of indeterminacy.

**V. Conclusion**

For contemporary legal anti-positivism, the law is clearly complete in

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48 Kelsen, *General Theory of Law and State* (n 42) 149.
relation to laws and principles, because the legal system is always able to
provide complete regulation through the interpretation of these laws and
principles in relation to any real or possible case. This approach argues for
the completeness of the legal system through a theory on the sources of
created law, including explicit and implicit law, from which a solution to
the Universe of real and possible cases can be provided. Non-regulated
cases are seen as gaps, a sort of defect of the law, but one that can be fixed
through a theory of interpretative adjudication, which is always able to
provide a correct response to any legal dispute. It follows that the
completeness of law is one of the theses that most clearly distinguishes
anti-positivism (especially the Dworkian paradigm) from contemporary
legal positivism. On the other hand, legal positivism claims that the nature
of the legal practice is such that the law is inconclusive as it is incomplete,
and supports a (partial or complete) thesis of legal indeterminacy.

This has a consequence on the application of the law and on legal
interpretation. For anti-positivists, completeness necessarily evokes a
‘model judge’ capable of resolving all current or future disputes, regarding
which the law will never be indeterminate; and even if a case is initially
indeterminate, this has no significance or relevance to the law, as the case
can always be resolved through the interpretative methods supplied by the
law itself. Legal positivism, by contrast, questions the fullness of the law by
noting its open texture, the existence of borderline cases and the resulting
conclusion of legal indeterminacy that gives rise to judicial discretion. The
inevitable result is that the law is inconclusive as it is incomplete.

The disagreement between the two legal theories seems to reside in the
‘ideal description’ of the law given by anti-positivism and the more realistic
description of the legal practice given by Hartian positivism and by the
followers of this doctrine. In any case, both theories currently compete
with each other to provide the best description of the legal system
underlying the Constitutional Rule of Law.

However, this account of the differences between positivism and anti-
positivism breaks down when we consider the thesis of indeterminacy in
Kelsen and his doctrine of the norm as a framework. If the four arguments
we put forward to consider his (apparent) thesis of legal indeterminacy are
correct, they may put into question the claim that Kelsen’s legal theory
allows for legal indeterminacy. This is because it does not appear logical to
accept a system of law that both ‘indeterminate’ and yet ‘without gaps’, as
suggested by Kelsen. In other words, if we accept that Kelsen’s legal theory
allows both one thesis (legal indeterminacy) and its opposite (the
completeness of the law), we must at least accept that Kelsen’s legal theory
contains a ‘paradox’ in relation to indeterminacy.
In my opinion, these considerations show that this legal theory is closer to
the thesis of the *completeness* of law than it is to the thesis of the
*indeterminacy* of the law. Or at least, they seem to seriously challenge the
idea that this theory of law is really a thesis of indeterminacy.

Perhaps the issue can be clarified by distinguishing between cases that are
indeterminate in the *Kelsenian* sense, which are not real borderline cases as
they can be resolved *within* the law and *according* to the law; and cases that
are indeterminate in the *Hartian* sense, which can only be resolved by
‘stepping outside’ the legal system, as they consist of cases that are really
*not contemplated* by the law, or incompletely contemplated. Only these latter
cases constitute genuine *borderline* or *indeterminate* cases.

It seems that contemporary legal positivism of the *Hartian* variety
understands indeterminacy in terms of cases that are ‘un-regulated’ (or at
least incompletely regulated) by the law. And indeterminacy from Kelsen’s
perspective refers, by contrast, to cases that are *regulated* by the law ‘within
the norm as a framework’. Therefore, whilst cases that are indeterminate
in the Hartian sense cannot be resolved by the legal system, the
indeterminate cases considered by Kelsen can *always* be resolved by the
law and by the system of established sources by applying the doctrine of
the ‘norm as a framework’. Consequently, such cases never *ultimately* imply
the indeterminacy of applicable law. So why is it claimed that Kelsen’s
theory of law contains a thesis of legal indeterminacy? It should also be
considered that if Kelsen’s legal theory does indeed contain a thesis of
indeterminacy, it would be a thesis of indeterminacy that denies the
existence of *indeterminate* cases, which seems meaningless.

Thus, if this reasoning is valid, it means that the legal theories of Kelsen
and of Dworkin paradoxically converge in denying legal indeterminacy,
albeit from radically different and opposing positions. It would also follow
that both theories include a thesis of the completeness of the law. Both
advocate a position contrary to Hart.