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Article

Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them

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ABSTRACT

The presented article considers the essence and content of the most common defect in legal science—"legal gaps". This study presents various scientific approaches to the definition of legal gaps. Considering various scientific approaches, the authors of this study formulated their original version of this concept considering its absence from the theory of penitentiary law. The study analyses the main conceptual approaches to the problem of the progressiveness of law in the historical context. The main features of legal gaps are named to become able to distinguish them from conflicts of law. The authors outlined a set of features indicating the presence of a legislative gap in a particular case and provided a scientifically sound classification of gaps. The article also focused on the main types of legal gaps. In addition, the authors addressed the presence of legal gaps in Ukrainian legislation. The originality of this study lies in the formulation of new theoretical conclusions and generalizations that will help identify, eliminate, and overcome gaps in civil procedural law.

INTRODUCTION

Public relations in general and legal relations in particular are in constant development and change. Evidently, in this process, irrelevant legal relations are constantly disappearing and new legal relations are emerging, which, in turn, requires their legislative regulation. Under such circumstances, it is not surprising and quite natural that so-called "defects of the legal system" appear, which traditionally include gaps. At the present stage of reforming the legal system of Ukraine, it is impossible to avoid gaps in legislation, this is, as it were, commonplace. It is explained by the fact that the legislator is incapable of providing for all these circumstances and create an "impeccable law". A law is frequently adopted without sufficient knowledge, and

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therefore the gap may go unnoticed by the legislator. Such a gap is detected long afterwards, upon law enforcement.[1] The problem of legislative or legal gaps is not new and has attracted the attention of lawyers since ancient times. Thus, back in the times of the ancient Rome, the following statement was formulated: neque leges neque senatus consulta ita scribi possunt ut omnis casus qui quandoque in sediriunt comrehendatur.

The treatises of B. de Montesquieu "The spirit of the laws"[2] and C. Beccaria "On crimes and punishments"[3] consolidated the idea of absolute priority of the law and its "gaplessness". However, as the position of the positivist legal understanding strengthened, there was a metamorphosis in solving the problem of legal gaps, which was virtually reduced to the tasks of eliminating missing legal provisions within the current legislation. In the 20th century, adherents of normativism made the case about the "gaplessness" of law.[4]

This issue remains relevant to the present day and is traditionally the subject of study among many prominent Ukrainian and foreign researchers. Analysis of the state of development of the issues under study indicates that recently a number of monographic Ukrainian studies have addressed it, where the authors focus on the definition of the term, the essence of gaps in legislation, as well as ways to overcome them. However, the number of such scientific developments remains insignificant. Although in comparison with previous historical periods, during the independence of Ukraine the research devoted to this legal phenomenon has expanded, so far it is fragmentary and is not integrated into the holistic scientific knowledge.

Some researchers consider gaps to be shortcomings of the legal system, the result of the legislator's negligence, a measure of the perfection of the law, "legislative flaws", and therefore a purely negative legal phenomenon that needs to be eliminated. For example, O.V. Kolotova notes that legal gaps are an atypical phenomenon that hinders standard law enforcement in conditions of legality and regulatory certainty. Overcoming them requires applying a special institution of analogy of law in accordance with the conditions and rules developed by legal science.[5] However, increasingly more researchers are inclined to believe that gaps are, if not positive, then a natural phenomenon. For example, V.S. Nersesyants considers it impossible to have a non-threshold regulation of life and preventive control over it.[6]

Considering the dynamism of law and the expansion of the boundaries of legal regulation, one can agree with the well-known opinion that the presence of gaps is a natural phenomenon that is inherent in any legal system, since no system of positive law, even the most perfect one, can fully cover all the variety of life situations. Regarding the above, the American lawyer L. L. Fuller pointed out that unforeseen circumstances created by life's accidents will always take place under all, even the most carefully created provisions.[7] E.A. Kharitonov draws attention to the fact that in modern conditions, despite the growing number of legislative acts, laws, and even codes, the impossibility and inexpediency of comprehensive regulation of public relations, especially in the sphere of civil turnover, is becoming increasingly obvious.[8] Agreeing with the opinion of the latter, the authors come to the conclusion that the emergence of gaps is quite natural and inevitable, indicating a constant movement, and therefore the development of legal relations and their regulators.

[1] O M Kalashnik 'Gaps in law: legal nature, their features and types' (2013) Law Ukraine 1, 36–42.
[2] B. de Montesquieu *The spirit of the laws* (Prometheus New York) 700.
[3] C. Beccaria *On crimes and punishments* (Hackett Publishing United States) 105.
[4] D A Tumanov *Gaps in civil procedural law* (Norma Moscow 2008) 208.
[5] O V Kolotova 'Separation of gaps in the law from related legal phenomena' (2009) J Kyiv Univ Law 3, 55–59.
[6] V S Nersesyants *Philosophy of law* (Norma Moscow 1997) 652.
[7] L L Fuller *Anatomy of the law* (The Pall Mall Press London 1968) 122.
[8] E A Kharitonov 'Gaps in civil law: errors in lawmaking or the adoption of legislative techniques' (2013) *Leg Bull* 1, 72–81.

LEGAL GAPS: THEORETICAL APPROACHES

The term "gap" is defined by the Academic Explanatory Dictionary of the Ukrainian language as: a space between something; fig. loophole, omission, flaw.[9] Sometimes in the theory of state and law, apart from the terms "gap" and "error of law", the term "defect in law" is also used. O. Karmaza notes that the dictionary of foreign words interprets "defect" (from Latin defectus—shortcoming; defecere—to lack, to fall short) as a drawback, vice, weak point, damage, etc.[10] The Explanatory Dictionary of the Ukrainian language considers "error" as a wrong opinion, a false idea, an inaccuracy in the law. That is, one should agree that these terms differ. Although in literature the term "defect" is used in most cases not in the sense of law, as in "defect of law", but as in "current defects of legislation". Determining the place of the term "defect of law" in the system of other legal categories, it is necessary to distinguish between these terms in a broad and narrow meaning. In a broad meaning, the term "defect of law" is more voluminous than the term "legal gap", since a legal gap is one of the types of legal defects, one of the manifestations of imperfection of law. In a narrow meaning, it can be identified with one of the types of legal gaps—with subjective gaps, gaps that indicate shortcomings in legislative technique. That is, these are internal contradictions, conflicts of substantive provisions, mistakes of the legislator, etc.[11]

The legislator has formed a legal definition of a legal gap, which is contained in the Letter of the Ministry of Justice of Ukraine No. N-3526718 to the appeal on the procedure for applying regulations, according to which legal gaps are the complete or partial absence of the necessary legal provisions in the current regulations. Legal gaps are the complete or partial absence of the necessary legal provisions in a given law.[12] This opinion is supported by O.F. Skakun and A.M. Shulga.[13,14] A similar definition is given by P.M. Rabinovich, according to whom legislative gaps constitute the absence of statutory regulation of the first group of public relations in the sphere of legal regulation in question, outlined by particular historical general principles of law.[15] Modern researchers of civil law consider the absence of a particular legislative provision necessary to resolve a conflict-of-laws situation to be a gap.[16] Y.O. Zaika suggests that a legal gap should be understood as cases when certain social relations require legal regulation, but it is not provided for by a particular law or legal provision.[17] I.V. Spasibo-Fateeva points out that legal gaps are referred to when there is no provision for a particular case or when there are several contradicting provisions, or when the current provision is incomplete, that is, it does not fully consider all the specific features of a particular case.[18]

E.A. Kharitonov notes that a gap is an incompleteness in the expression of civil law regarding the facts of public life that are in the sphere of civil law regulation.[19] According to V.N. Khropanyuk, a gap in legislation is the absence of a legal provision in solving particular life situations that are covered by legal regulation and should be resolved on the basis of law.[20] P.E. Nedbaylo defines this term as "a gap in the content of current law regarding the facts of public life that are in the sphere of legal influence".[21] The researcher notes that a legislative gap can exist

[9] K I Bilodid *Dictionary of the Ukrainian language* (Naukova Dumka Kyiv 1970) 827.
[10] O Karmaza 'Ways to overcome gaps in housing legislation' (2011) *Bull Taras Shevchenko Nat Univ Kyiv Jurid Sci* 86, 67–70.
[11] Ibid (see n 10)
[12] Letter from the Ministry of Justice of Ukraine No. H-3526718 (2009) https://zakon.rada.gov.ua/laws/show/v3526323-09.
[13] O F Skakun *Theory of state and law* (Konsum Kharkiv 2001) 656.
[14] A M Shulga *Theory of state and law* (NUVD Kharkiv 2000) 121.
[15] P M Rabinovich *Fundamentals of the general theory of law and the state* (Krai Lviv 2007) 191.
[16] V Borisova and others *Civil law of Ukraine* (Yurinkom Inter Kyiv 2004) 232.
[17] Y O Zaika *Ukrainian civil law* (All-Ukrainian Association of Publishers Legal Unity Kyiv 2008) 312.
[18] I V Spasibo-Fateeva *Kharkov civil school: In the spirit of traditions* (Pravo Kharkiv 2011) 296.
[19] E A Kharitonov *Essays on the theory of civilization* (concepts and concepts) (Phoenix Odesa 2008) 464.
[20] V N Khropanyuk *Theory of state and law* (Omega-L Moscow 2008) 384.
[21] Ibid (see n 7).

only in the absence of legislative provisions relating to facts that fall within the scope of legal regulation in their content.

According to A.S. Pigolkin,[22] legal gaps are gaps in the sphere of factual legal regulation, gaps in the system of current law, within the framework of public relations governed by current legislative and other regulations. They occur when it is possible to confidently maintain that a particular issue is included in the scope of legal regulation, and should be resolved through legal means. However, its more specific solution is either entirely omitted or is stipulated in any of its parts or is stipulated only partially. In turn, E.I. Spector defines a legal gap as a phenomenon socially determined by objective and subjective factors of legal formation, which denotes complete or partial unsettled public relations, expressed in the imperfection of legal regulation. In accordance with this, the author suggests to refer to the gaps cases relating to:

1) The absence of a particular legal provision to regulate a particular case that falls under the scope of legal regulation;
2) The absence of a certain set of legal provisions;
3) The absence of a separate legal provision, its part;
4) The need for legal regulation of a particular public attitude, based on the interest of the state and the expediency of regulating these relations;
5) A particular circumstance known at the time of the creation of a legal provision, which at that time did not require regulation.[23]

From the standpoint of F.R. Uransky, a legal gap implies the absence (incompleteness, contradiction) of the necessary legal provision in the entire array of legislation, and not just in a particular law.[24] A similar position is held by S.S. Alekseev, who defines a gap in legislation as the absence of a particular provision necessary to govern relations that fall within the scope of legal regulation.[25]

It is possible to raise the question of the existence of a gap in positive law only in cases where the disputed issue falls precisely within the scope of public relations that has already been regulated by legal provisions and, accordingly, is already covered by the current legislation. Upon analysing the formal criteria for determining such a sphere of public relations, S.S. Alekseev suggests, the following approaches:

1) One that is focused on establishing the type of public relations, the attributes of which are described in the hypothesis of a legal provision (while it is assumed that each provision has its "section" in the general sphere of legal regulation; a set of similar "sections", if one keeps in mind all the provisions of any branch without exception, and will make up the general sphere of legal regulation of a certain branch of law);
2) The second approach to determining the scope of public relations that are subject to legal regulation, which is focused on analysing the content of specialized provisions describing the scope of "responsibility" of a particular branch of law in a particular legal act.[26]

A legislative gap, according to Y.I. Matat, can be defined as the absence of a legal norm in the legislation or its incompleteness relating to factual circumstances that fall within the scope of

[22] A S Pigolkin 'Detection and overcoming gaps in law' (1970) Soviet State and Law 3, 49–57.
[23] E I Spector *Gaps in the legislation and ways of their overcoming* (Institute of Legislation and Comparative Law under the Government of the Russian Federation Moscow 2003) 127.
[24] F R Uransky *Gaps in the law and ways to fill them in law enforcement: dissertation candidat of juridical sciences* (Lomonosov Moscow State University Moscow 2005) 29.
[25] S S Alekseev *Theory of state and law* (Norma Moscow 1998) 431.
[26] Ibid (see n 25).

legal regulation, provided that the consolidation of these circumstances in the legislation is appropriate and objectively necessary.[27] As a result of the dissertation research conducted by O.V. Kolotova, the following definition of legal gaps was formed—it is, in her opinion, the complete or partial absence of legal regulation of public relations that fall within the scope of legal influence and require legal regulation, according to the opinion of the subject of law enforcement.[28]

When distinguishing the attributes of gaps, researchers note that to draw a line between legal gaps from other related phenomena, it is necessary to focus on the main features that describe legal gaps. Such features include:

1) The complete or partial absence of legal regulation of public relations (cases) that fall within the scope of legal influence and require legal regulation;
2) The value nature of legal gaps, a positive opinion, the presence of which depends on the legal awareness of the subject of law enforcement;
3) Legal gaps are shortcomings in law, the lack of what should be a necessary component of it, justifying the need to overcome the existing flaw;
4) Legal gaps are atypical situations and cause atypical law enforcement activities that lose their conventional consistency as a system of logically connected, sequential actions;
5) Legal gaps are objective life situations that are caused as a result of the objective development of public relations, and in some cases subjective reasons relating to law-making and law enforcement actions of legislative, executive, and judicial bodies of state power.[29]

According to V. Prigodsky,[30] a sign of the existence of a legal gap is the absence of a provision exclusively in the sphere of public relations subject to mandatory legal regulation. V.M. Marchuk points out that legal gaps are described by the following features:

1) The lack of the necessary legal provision, the lack of corresponding legislative prescriptions;
2) The practical need for the statutory regulation of certain life situations, that is, regulation by legal means;
3) The real presence of such situations faced by law enforcement agencies, which are obliged to solve them, including them into their proceedings.[31]

Compliance of a particular legal situation with these features will serve as a necessary and simultaneously sufficient sign of the presence of a legislative gap.[32] The above analysis suggests that for the most part, researchers agree in their opinions on the definition of the term "gap" and understand it closely to each other. All researchers point out the nature of gaps in a certain context, wherein such nature lies in the absence of a legal provision necessary to regulate legal relations, and the fact that unregulated social relations should be included in the sphere of legal influence. Therefore, to conduct further research on the gaps for the purpose of determining the role of legal doctrine in overcoming them, it is appropriate to focus on defining the gap as the absence of a particular legal provision in positive law, necessary for regulating public relations that fall within the scope of legal regulation and require it.

[27] Y I Matat 'Subsidiary application of law as a means of overcoming gaps in legislation' in A P Getman (Ed.) Legal Autumn 2012: Collection thesis add and science message participant All-Ukrainian scientific-practical conference young scientists and applicants (pp. 47–50) (National University Yaroslav Mudriy Law Academician of Ukraine Kharkiv 2012).
[28] O V Kolotova *Gaps in the law and ways to overcome them* (V.M. Koretsky Institute of State and Law Kyiv 2010) 19.
[29] Ibid (see n 5).
[30] V Prigodsky 'On gaps in the law as a determinant of administrative and economic dispute, their detection and overcoming' (2009) Admin Law 11, 137–140.
[31] V M Marchuk, L V Nikolaev *Essays on the theory of law* (Istina Kyiv 2004) 304.
[32] V V Lazarev 'On the types of gaps in law' (1969) Jurisprudence 6, 30–35.

Therewith, it is crucial to highlight the correlation between the legal gap and the legislative gap, which will relieve lawyers from possible misinterpretation of terms and misunderstandings in this regard. Thus, some researchers identify these concepts directly or indirectly, while others consider them to be separate legal categories, to which the corresponding tools should be applied, and still others assume that there is only one radically true concept.

ANALYSIS OF THE CORRELATION BETWEEN THE LEGAL GAP IN THE LEGISLATIVE GAP

D.A. Tumanov[33] notes that based on the fact that "a gap in legal regulation" in the general meaning of this concept should be considered incomplete regulation of public relations in legal regulation, it appears that one should clarify what, in fact, should this refer to: a "legal gap" or a "legislative gap". The need for such clarification is also conditioned by the fact that scientific research in this area uses the terms "legal gap", "legislative gap", "gap in legal regulation", etc. Therewith, the concepts of "legal gap", "legislative gap", "gap in positive law" are often identified.

In particular, V.V. Lazarev notes that gaps in laws and legislation are gaps in law and vice versa.[34] This opinion is supported by N.N. Voplenko,[35] S.S. Alekseev,[36] and others. According to V.M. Marchuk, a legal gap is a gap in legislation, that is, the absence of a law, legislative provisions that would govern certain situations faced in practice and even more so—in law enforcement practice, provided that such situations require legal, and not any other regulation.[37] A similar conclusion about the identification of concepts can be drawn from the statement of M.V. Tsvik, who noted that legal (legislative) gaps are a gap in the regulation of certain relations.[38]

The legislator has a radically opposite approach, which is expressed in the Letter of the Ministry of Justice of Ukraine No. N-3526718[39] to the appeal on the procedure for applying regulations, where the terms "legal gap" and "legislative gap" are clearly contrasted and differentiated. Namely, legal gaps are defined as the complete or partial absence of the necessary legal provisions in the current regulations, and legislative gaps are defined as the complete or partial absence of the necessary legal provisions in the legislative act in question. In this regard, legal science has developed ways to fill in gaps upon applying the law, which are called analogies. The following analogies are distinguished: analogy of statute—the decision of a case or a separate legal issue based on a legal provision designed for similar cases. The use of an analogy is not allowed if it is explicitly prohibited by law or if the law connects the occurrence of legal consequences with the presence of particular provisions; an analogy of law is the decision of a case or a particular legal issue based on the principles of law, general principles and content of legislation. That is, the legislator went by identifying two types of gaps, relying on legal ways to overcome them that are formally defined by civil legislation.

However, there is also a third approach to this issue, which, in the opinion of the authors of this study, has been very appropriately expressed by Y.I. Matat,[40] who noted that the modern approach to legal understanding largely departs from the position of strict normativism, which to a certain extent has led to the juxtaposition of such concepts as law and legislation. Law as a regulator of social relations is currently considered at least as relatively independent of the state and the legislation and as such that precedes the legislation in time, for example, as a supra-historical

[33] Ibid (see n 4).
[34] V V Lazarev *Gaps in law and ways to eliminate them* (Juridical literature Moscow 1974) 184.
[35] N N Voplenko *Official interpretation of the law* (Juridical literature Moscow 2006) 118.
[36] S S Alekseev *Problems of the theory of law* (Sverdlovsk Juridical Institute Publishing House Sverdlovsk 1973) 399.
[37] Ibid (see n 31).
[38] M V Tsvik *General theory of state and law* (Pravo Kharkiv 2009) 584.
[39] Ibid (see n 12).
[40] Y I Matat *Gaps in legislation and means of overcoming them in law enforcement* (Pravo Kharkiv 2015) 176.

natural law; the state, in turn, is exclusively the creator and source of legislation, but not law. Therefore, from the standpoint of modern institutional legal understanding, law appears as a gapless, ideal phenomenon, and as such that the legislation should approach. The latter, in turn, can contain gaps, is an imperfect sphere and should be improved with the help of law.

In a similar fashion, S. Pogribny notes that there can only be gaps in legislation.[41] This opinion is quite logical from the standpoint of the natural law theory of law, since law emerges, exists objectively and mediates the needs of society in regulating certain social relations. A similar opinion is expressed by V.M. Orzikh, who pointed out that legal gaps can only exist within the framework of a positivist approach to law. Within the framework of the natural law approach to law, the analogy of law takes on the nature of a technical legal technique for removing defects in legislative regulation and the source of law.[42]

This opinion is covered in more detail by E.A. Kharitonov,[43] who explains that the concept of "civil legislation" is not identical to the concept of "civil law", since the latter includes not only legal provisions, but also the doctrine of civil law, ideas, and other achievements of civil thought, which acquire practical significance in the interpretation of civil law provisions (legislation), etc. Therefore, it should be taken into account that although civil law constitutes the content of civil legislation, the latter is a set of forms of expression of only the statutory part of civil law. Based on this understanding of the concepts of "private law", "civil law" and "civil legislation" and considering the above-mentioned understanding of gaps in legal regulation as incompleteness of the regulation of public relations that fall within the scope of legal regulation, the following conclusions can be drawn regarding the correlation of these categories in the private law sphere.

As for "private law" as a supranational (basic) system of law, the term "gap" cannot be applied at all, since the regulation of relations between private persons in any case exists: in the absence of norms of "positive" law, it is carried out by the norms of natural law and agreements of the parties (the implementation of which is ensured by the same norms of natural law). Evidently, a similar situation occurs in relation to the category of civil law (the so-called objective civil law), where the relations of participants in any case are governed by the principles of civil law, their agreements, the moral principles of society, reflected in legal customs, etc.

Therefore, it is obviously incorrect to discuss "legal gaps" here, since there is no "incompleteness of legal regulation" in this case: participants in civil relations can in any case establish rules of conduct by their agreement (provided that such agreement is not prohibited by law). If they do not do this, then, evidently, there is simply no need to settle certain relations. However, the question remains whether one can refer to "gaps in civil legislation", which, being a relatively limited set of provisions and rules of conduct, at the same time is not intended to establish provisions for all life situations, further raising the question of so-called "legal (legislative) gaps" and their overcoming.

To answer this question, it is necessary to return to the definition of civil legislation, namely to mention the possibility of narrowing and spreading the use of this term. In a narrow meaning, "civil legislation" constitutes a set of acts of civil legislation, that is, a hierarchically ordered system of regulations governing civil relations, built on certain principles. With this understanding of civil legislation, one can refer to "gaps in civil legislation", since each system of legislative acts, as a structured set, is limited to certain parameters (subject, method, principles, purpose of legal regulation, etc.) and strives for an ideal. Until such ideal is achieved, there is an "incompleteness of legal regulation" of the corresponding public relations.[44]

[41] S Pogribny *Mechanism and principles of regulation of contractual relations in civil law of Ukraine* (Alerta Kyiv 2009) 259.
[42] V M Orzikh 'Gaps in the civil law of Ukraine and the reasons for their occurrence' (2017) Entrepreneurship Econ Law 9, 34–37.
[43] Ibid (see n 32).
[44] Ibid (see n 9).

Based on the symbiosis of positivism, which implies the regulation of legal relations exclusively by formally defined sources of law (laws and sub-legislative acts) and iusnaturalism, which, in turn, establishes that law is a comprehensive phenomenon that exists both in a formally defined form and in other forms, the author concludes that there may be gaps in legislation, and not in law. When discussing gaps, the author means precisely legislative gaps, since, guided by the principle of the rule of law, there can be no legal gaps a priori, since the law covers not only legislation, but also other sources and social regulators.

Legislative gaps should not be confused with the so-called qualified silence of the legislator, when it deliberately leaves the issue open, refrains from adopting a provision, thereby expressing unwillingness to adopt it, and provides an opportunity to resolve the case outside the legislative scope. The state of legal gaps should also be distinguished from those cases when the legislator submits the decision of the issue for review by law enforcement agencies, expecting that its legislative will is going to be concretized by other legal acts.[45] Researchers believe that the concept of "qualified silence of the legislator" means those cases when the legislator deliberately leaves the issue open, refrains from adopting the provision, thereby expressing unwillingness to accept them, referring the decision of the case outside the legislative scope. The legislator leaves the decision of the issue to the discretion of the law enforcement body, hoping that its legislative will is going to be concretized by other legal acts.[46]

As for "qualified silence", Y.I. Matat pointed to the fact that in this case there is an unwillingness of the legislator to govern certain relations through the mediation of legal provisions.[47] This phenomenon is quite common, especially in civil law (this refers, for example, to the custom of business turnover, etc.). However, situations defined as qualified silence of the legislator, in contrast to legislative gaps, do not find their legislative consolidation at the direct discretion of the legislator, while gaps indicate a lacking statutory regulation.

O.F. Skakun notes that a legal gap cannot be identified with an "error of law" as the result of an incorrect assessment of objective conditions and the manifestation of the wrong legislative will that should be implemented in a regulation. "Error of law" is possible in cases when the law-making body:

1) Mistakenly considers some relations not subject to legal regulation;
2) Mistakenly relies on the specification of law in the course of its application;
3) Mistakenly transfers the issue to the discretion of the person who applies the law;
4) Issues a provision that is not needed;
5) Erroneously resolves the issue in the established provision. In the first three cases, "error of law" suggests the presence of gaps.[48]

Furthermore, the absence of prescriptions for those public relations that are outside the scope of legal regulation (non-ius scope) should be distinguished from legislative gaps. As G.F. Shershenevich fairly points out, "there is no gap here—it is just a legally empty space that surrounds the environment of law", while in the situation with a gap, this refers to the absence of an answer to a question in positive law that requires a legal solution.[49]

Legal gaps should be distinguished from the concept of legal conflicts. In contrast to gaps, legal conflicts constitute an excessive number of regulations or legal provisions that contradict

[45] O M Tarnopolska 'See the clearing at the right' (2008) Bull Academy Advoc Ukr 12, 10–15.
[46] Ibid (see n 7).
[47] Ibid (see n 40).
[48] Ibid (see n 13).
[49] G F Shershenevich *General theory of law* (Publishing House Bashmakov brothers Moscow 1912) 320.

each other or duplicate each other.[50] There are many similarities in conflicts and gaps, but these legal phenomena are not identical. They intersect when it comes to incomplete or partial settlement of legal relations (there may be both a conflict and a gap). A gap occurs when there is no regulation whatsoever. A gap is created where there is a radical contradiction of provisions of equal force, when one of them "eliminates" the other.[51]

By their legal nature, conflicts of legal provisions and legislative gaps in most cases are logical and structural defects of the legal system. They appear due to non-compliance with the rules of formal logic and logic of law in the construction of a legal provision and its consolidation in the text of a regulation, which complicates the achievement of the purpose of legal regulation.[52] Therewith, in some cases, conflicts of legal provisions, as well as legislative gaps, may be objective in nature.

According to V.V. Lazarev, the "conflict gap" in law enforcement should be overcome by using the institution of analogy.[53] A similar opinion regarding the existence of the phenomenon of "conflict gap" is expressed in the pre-revolutionary legal literature. According to Y.V. Vaskovsky, "if two mutually contradicting provisions can in no way be reconciled with each other, and if there are no sufficient grounds to give preference to one of them, then there is nothing left but to recognize them as mutually destructive, that is, non-existent, that is, to act as if they do not exist at all, that is, as if there is a gap in the current law on the issue that they solve in the opposite ways".[54]

Mandatory signs of a legislative gap enable the distinction between the gap and other close or related legal phenomena, defects of the legislative system that also complicate law enforcement, which is critical for choosing an effective way to overcome these phenomena. In the legal literature, there is a fairly wide range of classifications of legislative gaps, which are carried out according to certain signs. One of the most extensive and detailed classifications was performed by V.V. Lazarev depending on six criteria (Table 1).[55]

In part, this opinion is shared by numerous other researchers, for example, A.F. Cherdantsev also divides gaps into primitive and derived ones (which he also defined as evolutionary gaps).[56] In a similar fashion, prominent researchers S.S. Alekseev,[57]O.S. Ioffe, and M.D. Shargorodsky[58] believe that an important criterion for separating gaps is the time of their occurrence. According to the time of the occurrence of gaps, these authors classify them as "primary" and "secondary". Primary gaps are referred to when they exist upon the issuance of a regulation. They constitute a consequence of the fact that the legislator either did not know about the existence of circumstances requiring legal regulation, or did not realize the need to regulate the public relations known to it, or, knowing about them and realizing the need to consolidate them in the law, did not do so upon issuing the act. Secondary gaps arise after the issuance of a regulation. They are caused by: the emergence of completely new social relations, circumstances that require legal mediation; the need to regulate phenomena that previously did not concern the law.[59]

Such a need may arise in connection with changes in opinions and judgements, the emergence of new public relations, as well as where the regulation of some relations fell within the

[50] T V Shevchenko 'Gaps in the legislation, ways to eliminate and overcome' (2013) J Law and Soc 1, 23–26.
[51] Y A Tikhomirov 'Legal conflicts: power and law and order' (1994) State and Law 1, 3–4.
[52] T O Kovalenko 'Legal defects in the legal regulation of land relations: concepts and types' (2011) Bull Acadamy Advoc Ukraine 2(21), 237–240.
[53] Ibid (see n 34).
[54] E V Vaskovsky *Guide to the interpretation and application of laws* (GORODETS Moscow 1997) 128.
[55] Ibid (see n 32).
[56] A F Cherdantsev *The theory of state and law* (Norma Moscow 2000) 432.
[57] Ibid (see n 36).
[58] O S Ioffe, M D Shargorodsky *Questions of the theory of law* (Gosyurizdat Moscow 1961) 381.
[59] Ibid (see n 32).

Table 1: Classifications of legislative gaps

No.	Criteria	Legislative gaps		
1	According to the exhaustiveness of legal regulation	Complete absence of provisions	Incompleteness of the provisions in effect	–
2	According to the legislator's will	The will to settle relations is established ("valid")	The will of the legislator is not established ("invalid")	–
3	According to the sources of identifying gaps	From the legal system itself ("immanent")	From external sources ("transcendent")	–
4	According to the time of occurrence	"Primary"	"Derivatives"	–
5	According to the subjective side of the manifestation of the legislator's will	"Excusable"	"Unforgivable"	"Intentional"
6	According to the possibility of overcoming upon the exercise of the right	"Surmountable"	"Insurmountable"	–

competence of the law enforcement body. If the legislator did not know and could not have known about the existence of relations that require or may require legal regulation, then this refers to "excusable" gaps. In cases where the legislator could have known about certain relations or their occurrence in the future, could have identified the need for their legal regulation, and even more so when it knew about the need to consolidate certain relations in a regulation, but did not do so due to negligence, such gaps should be considered "inexcusable".[60]

O.V. Petrishin also covers a wide range of features that can be used to qualify gaps.[61] He notes that there are different types of legislative gaps: depending on the time of their occurrence, there are initial gaps, that is, those that exist at the time of entry into force of regulations, and subsequent gaps—those that appear due to the further development of public relations, which should be governed by law; depending on the possibility of overcoming gaps during law enforcement, there are surmountable and insurmountable gaps; depending on whether the existence of gaps is covered by the intention of the legislator, intentional and unintentional gaps; depending on the degree of absence of legislative regulation of a certain group of public relations—complete or partial gaps.

The opinion on the division of gaps into full and incomplete is also shared by some other researchers. S.I. Vilnyansky noted that "gaps in the law are not limited to the complete lack of statutory regulation of certain relations.[62] They can be found both where the current provisions are incomplete, that is, they do not fully consider the necessary features of this case, and where there are several mutually contradicting provisions".

As for full and incomplete gaps, L.A. Luts expressed the opinion that a regulatory gap is understood as a partial absence of regulatory requirements within the scope of legal regulation, due to the state of development of public relations and the lag of law-making behind it.[63]

[60] Ibid (see n 32).
[61] O V Petrishin *The theory of state and law* (Pravo Kharkiv 2012).
[62] S I Vilnyansky 'Interpretation and application of civil law' (1948) Method Mat VYUZI 2, 42–61.
[63] L A Luts *General theory of state and law* (Attica Kyiv 2007) 412.

Complete absence of regulatory requirements for public relations that require legal regulation and can be regulated by law, L.A. Luts calls "a legal vacuum". Similarly, objective and subjective gaps are specified by T.O. Kovalenko, namely the fact that depending on the factors that led to the occurrence of gaps, one can distinguish: objective gaps; subjective gaps.

Objective gaps exist at the time of the emergence of certain public relations that require legal regulation. Subjective gaps may arise in the process of applying law by judicial bodies, when an illegal regulation is cancelled, which leads to the occurrence of a gap in the legal regulation of certain public relations.[64]

V. S. Nersesyants believes that legal gaps may be the result of the inevitable lag of legislation from dynamic public relations or the result of mistakes of the legislator, etc.,[65] while A.B. Vengerov, supporting this opinion, points out that legal gaps are objective and subjective in nature. Objective gaps are gaps in the emergence of new social relations—a legal vacuum; subjective gaps are gaps in the imperfection of legislation, legal technology, etc.[66] E.A. Kharitonov distinguishes between real and formal gaps. Thus, real gaps infer the actual absence of legal regulation of public relations that fall within the legal scope, and formal gaps reflect such a state of affairs when a particular issue is not directly governed by legislation, but the answer to it can be found through analysis and various methods of interpretation of legal provisions.[67]

A special type of gaps is "technical". They reflect the level of legislative techniques and the degree of their use. Legislative technique is understood as a system of rules for the most rational and correct presentation of legal institutions, provisions, articles in regulations to achieve perfection of forms of their expression.[68] Notably, European legal practices distinguish the so-called wording gaps that occur when the literal text of the law does not fully regulate behaviour in a particular situation, and value gaps that occur when only the literal meaning of the words that formulate a particular legal provision indicates the need for its application, but the obvious injustice that would occur as a result of its application requires this provision to be adjusted.[69] The authors of this study believe that considering the modern approaches to interpreting law, to solving the problem of the letter and spirit of law,[70] it should be agreed that in the latter case it is actually a legislative gap that takes place: the impossibility of applying a clearly unsatisfactory legislative requirement has the same consequences as the immediate absence of a corresponding legislative provision.[71]

All these options for classifying and/or distinguishing legislative gaps have their positive aspects and their identification and research provides more opportunities and tools for studying the legal nature of gaps and contributes to the development of ways to overcome them.

CONCLUSIONS

Considering the examined fundamental concepts of legal understanding, it can be concluded that Ukrainian legal thought is mainly described by a positivist approach to legal understanding in such variety that allows for the existence of gaps directly in the "body" of the law. A legal gap is the complete or partial absence of provisions of specific content in the sources of law, which is necessary for the governing the facts falling within the scope of legal regulation. Signs of a legal gap are a set of properties of a particular situation when the legal relations in question fall within the scope of legal regulation. The conducted study suggests that in modern conditions

[64] T O Kovalenko 'Types of gaps in land law' (2011) Jurid Sci 87, 25–28.
[65] Ibid (see n 6).
[66] A B Vengerov *Theory of state and law* (Jurisprudence Moscow 2000) 528.
[67] E A Kharitonov *Civil law of Ukraine: Elementary course* (Sumy VTD University Book 2006) 214.
[68] Ibid (see n 32).
[69] R Tsippelius *Legal methodology* (Referat Kyiv 2004) 184.
[70] S Shevchuk *Judicial law-making: world experience and prospects in Ukraine* (Referat Kyiv 2007) 316.
[71] N Vysotska. 'Historical and Legal Analysis of Criminal Law Counteraction Domestic Violence in Ukraine' (2021) Law J of the Nat Acad of Inter Affairs 11(1), 24-31.

one of the properties of law is its inevitable "gapness", the analogy of statute and the analogy of law in the legal system of Ukraine should be considered not as exceptional and temporary phenomena, but as a natural institution conditioned by the properties of law itself.

The analysis of literature sources suggests that in legal thought, in the context of legal gaps, from the standpoint of modern institutional legal understanding, the law appears as a phenomenon that is gapless, ideal, and as such that it should aspire to become. The latter, in turn, can contain gaps, is an imperfect sphere and should be improved with the help of law. In further research in this subject area, it is appropriate to investigate the possibility of using other criteria to classify gaps in civil procedural law.