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APPLICATION OF LAW IN JUDICIAL AND NOTARIAL PRACTICE: METHODOLOGY, THEORY, PRACTICE

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Abstract: *The purpose of this study was to cover application of law as a process alternative to the process of excessive rule-making, in particular, to study the grounds and limits of applying legal analogy in the activities of a notary as a subject of application of law. The study involved systematic and historical methods of scientific cognition, which allowed perceiving law as a dynamic system formation of social order. The interpretive method made it possible to base the research on the assumption of the existence of the content and meaning (semantics) of a legal norm. The axiomatics of the modelling method and borrowing of individual ideas and provisions of the topology allowed perceiving a legal norm as a model of the situation, which should be in mutual and unambiguous accordance with the particular situation to which this provision is applied. As a result of the study, the authors justified the perception of application of law as an alternative to continuous improvement/ change of legislation and a fuse for the process of excessive rule-making. Using specific examples of notarial and judicial practice, application of law is presented as a process wherein it is possible to perform actions that are not explicitly defined in the legislation as permitted, but also are not prohibited, in order to prevent possible violations of the rights and interests of legal entities. It was concluded on the necessity of establishing the existence of discretionary powers in the subject of application of law in connection with the implementation of such a subject's interpretative choice in the process of application of law. A proposal was made to compensate for the imperfection of legislation and the a priori inability to govern all possible relations for all cases by law by improving the effectiveness of application of law activities. To avoid cases of abuse of the right to appeal against the actions of a notary as a subject of application of law, on the formal basis of the notary's lack of the right to use the analogy of statute and the inference from general principles of law, a legislative consolidation of the provision was proposed, which makes provision for the possibility of using the analogy of statute and the inference from general principles of law by a notary.*

Keywords: analogy of statute, homeomorphism of legal norms, discretionary powers, topology, judge, notary.

The essence of law as a specific and dynamic system is revealed through a complex of elements in the form of certain interconnected subsystems. The state of the interrelation depends on the place of the law in time. Law is a flexible system that can quickly and timely respond to changes in society, considering the needs of society's development. Therewith, the law retains the qualitative features of a stable regulatory system of public regulation, which has an appropriate programme and a kind of action plan in case of possible gaps. Under such conditions, constant change, adaptation, integration, and other processes aimed at transforming the current state of law are the normal life cycle of the system¹. Conversely, the absence of such transformations will

¹ A. Vilks, A. Kipāne, “Sustainable development of society in the context of the transformation of the legal framework”, in *European Journal of Sustainable Development*, 2020, vol. 9, no. 4, p. 181-190; T.G. Popovych, O.V. Bezukh, H.I. Trofanchuk, T.B. Pozhodzhuk, “Economic law and

indicate stagnation of the system, necrosis of its individual elements². At the same time, the constant transformation of legislation does not allow developing stable relations for the exercise of this law. In particular, property legal relations are “in good shape”, which is because of their constant development and improvement resulting in periodic emergence of new types of civil law relations³. Under such circumstances, the legislators, despite all their attempts, are obviously incapable of and, apparently, should not cover all the diversity of public relations and govern all possible behaviours of their participants in the sphere of private law. In the presence of these problems, application of law cannot expect a centralised legislative settlement and requires their immediate solution. Increasing the amount of regulatory material does not help simplify legal regulation, but only complicates the practical implementation of current legislation⁴. Therewith, after the creation of a new provision, it becomes necessary to integrate it into the existing regulatory array, without creating new contradictions, which is not always possible for the Ukrainian legislator. Problems also arise when the development of public relations took place differently than the legislators could have predicted, and therefore the solution formally consolidated in the legislation does not work in practice⁵.

Key attention in this study was devoted to the development of practical opinions on the application of effective methods for solving problematic application of law situations here and now, that is, without appropriate legal norms in the process of application of law. The authors stated that the search and application of such methods is assigned to the subject of application of law, who chooses the way to solve and settle the problem situation. As is known, the analogy of statute is the leading way to overcome gaps in law, which has been studied in many scientific papers. However, the institution of analogy of statute requires additional scientific attention and research in modern conditions to address issues of statutory regulation, the limits of

standardization: A basis for avoiding risks in business”, in *International Journal of Criminology and Sociology*, vol. 10, p. 440-449.

² S.S. Alekseyev, *Theory of law*, BEK, Moscow, 1995; E.O. Haritonov, N.A. Saniahmetova, *Civil law of Ukraine*, Odissey, Kharkiv, 2004; D. Lo, “Objects and spaces. Sociology of things”, in *Sociological Review*, 2006, vol. 5, no. 1, p. 30-42.

³ V.I. Borisova, I.V. Borisov, F.S. Karagussov, “The legal form of financial institutions as a way to protect the rights of financial market participants”, in *Global Journal of Comparative Law*, 2021, vol. 10, no. 1-2, p. 29-46.

⁴ M.A. Akimbekova, S.A. Akimbekova, Z.M. Nusenov, F.A. Tlegenova, “Matters on compensation of moral damage: Practical aspects”, in *International Journal of Environmental and Science Education*, 2016, vol. 11, no. 17, p. 9733-9740.

⁵ B.C. Nersesyants, *General theory of law and state*, Legal Publishing House Norma, Moscow, 1999; S. Sylkina, A. Zhatkanbayeva, N. Tuyakbayeva, A. Jangabulova, G. Alibayeva, “Natural tendencies of development of legal regulation of the relations in the sphere of power safety in the modern world”, in *Journal of Legal, Ethical and Regulatory Issues*, 2018, vol. 21, no. 1, p. 1-6.

application of inference from general principles of law, the circle of authorised subjects of application of law, etc. This problem is compounded by the lack of interconnection and interdependence of modern theoretical doctrine and practice of application of law. The result is, among other things, the realities of civil proceedings. At present, courts and judges face not only and not so much the problems of practical application of law, but also the solution of theoretical problems that directly affect and determine the essence and content of application of law activities⁶.

The situation worsens when the legislator has developed more or less unambiguous rules, which in practical application of law acquire such a distinctive appearance and meaning that they negate all the plans of the legislator⁷. The authors note the possibility of the existence of a simulated situation, based on both the general decline in the quality of the legislative array and the level of competence of the subjects of application of law. It is the application of law officer who emphasises the gap between the theory of law-making, legislative activity, and the practice of applying the legislators' instructions. Of importance in the application of law mechanism is not only the figure of the judge, but also the notary, who is also the subject of application of law. A judge is conventionally perceived as an officer of application of law, whose duties include overcoming gaps, resolving conflicts upon dispute settlement⁸. In turn, the legal status of a notary in application of law, the limits and content of the legal essence of their powers are considered in the doctrine from different angles and raises many additional issues. One of these key issues is the possibility for a notary to use inference from general principles of law in his or her activities as a way that the subject of application of law should use. This study covered certain aspects of application of law in the activities of a judge and notary to determine the causes of the current problem situation and develop ways to solve them.

⁶ L.H. Lichman, "Regarding the relevance of the study of judicial enforcement. Actual problems of legal science", in *Proceedings of the International Scientific Conference "Eight Autumn Legal Readings"* (pp. 468-470), Khmelnytsky University of Management and Law Press, Khmelnytskyi, 2009; A. Dryshliuk, "Analogy of law and analogy of law: Dynamics of scientific research (Soviet period)", in *South Ukrainian Legal Journal*, 2012, no. 2, p. 265-268; A. Dryshliuk, "Analogy of law and analogy of law: Dynamics of scientific research (pre-revolutionary period)", in *South Ukrainian Legal Journal*, 2011, vol. 4, p. 295-298; A. Dryshliuk, "Analogy of law and analogy of law: Dynamics of scientific research (modern period)", in *Law. Scientific Bulletin of Uzhhorod National University*, 2011, vol. 17, p. 9-14.

⁷ E.B. Abdrasulov, M.G. Gubaidullin, "Legal contracts and legal customs in the history of the law of the kazakh society", in *Journal of Advanced Research in Law and Economics*, 2019, vol. 10, no. 7, p. 1951-1955.

⁸ M. Suleimenov, A. Duisenova, K. Ilyassova, Y. Ossipov, G. Kaziyeva, "Recognition and enforcement of arbitration awards in Kazakhstan", in *Journal of Social Sciences Research*, 2018, vol. 2018, no. Special Issue 5, p. 358-367.

Materials and methods

Predominantly, the practice of application of law is inevitably associated with the legal norm to be applied, and in its absence – with the principles of law underlying it. It is axiomatic that any legal norm is designed for a certain life situation or class of such life situations. The study suggested using the metaphor of the legal norm as a model of the situation, which obliges to apply the axiomatics of the modelling method and, accordingly, provides that there can be no unambiguous equivalence between the object (the situation itself) and its model, but there is a certain degree of correspondence. At the same time, it is worth remembering that this approach certainly raises the question of the principles of building such models and other issues that can considerably advance the methodology of rule-making activities. Moreover, there is no doubt that one particular legal norm is ultimately designed for more than one particular life situation with a roll-call list of subjects, objects, and other conditions and circumstances. Legal norm as a situation model is designed for a class of life situations, which means that such a model has a special property, namely contingency – the ability to be different⁹. Contingency, not as an accident, but as an opportunity to be different, nevertheless leaves this legal norm itself without losing the features that constitute this model (legal norm). In other circumstances, this simply refers to different legal norms.

The model, which is always a cast from an object, will depend on the “language” in which this model is described in terms of its qualitative and quantitative features. By the language of description, the authors understand the specific language of a particular science and discipline, which is inherent in it, with its specific vocabulary. It is the “language” of description that provides the appropriate descriptive and explanatory tools. The study of the idea of a legal norm as a model of a situation with a certain degree of correspondence with the situation (which is modelled and contingent without losing the features that constitute this legal norm) in the process of application of law, leads to the need for subsequent gnoseological borrowing¹⁰. The effectiveness of the application of legal norms depends on many factors – the level of development of law-making, legal awareness, professional and personal qualities of subjects of the application of law, their ability to evaluate the legal nature of factual circumstances. The effectiveness of the application of law is

⁹ T.G. Popovych, V.I. Polyukhovych, T.B. Pozhodzhuk, O.R. Kovalyshyn, “Economy, law, community: Sustainable development and a new paradigm”, in *Asia Life Sciences*, 2020, no. 1, p. 39-56; N. Kambarova, S. Akimbekova, K. Kalmagambetov, M. Akimbekova, “Writ proceedings and irrefutability of writ”, in *Life Science Journal*, 2014, vol. 11, no. 6 SPEC. ISSUE, p. 456-458.

¹⁰ V. Vakhshayn, M. Erofeeva, *Epistemic intervention: In search of new models of cross-disciplinary interactions*, 2014. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531289.

no less determined by the level of theoretical and practical knowledge about the methods, ways, rules, means, and techniques of performing this activity¹¹. The practical need to establish correspondences between a particular legal norm as a model of the situation and the situation itself necessitate the determination of whether there is a similarity between the model and the particular situation to which this model is applied. The variability of life situations necessarily requires the legal norm to take this variability into account as effectively as possible, which is ensured by the internal contingency of this legal norm without losing the features that constitute this provision (the core of stable relations)¹².

The issue of similarity of objects with each other, the preservation of their properties despite certain changes, is studied in such a section of mathematics as topology. The doctrine knows examples of topology intervening in socio-humanitarian sciences, philosophy, and theory of law¹³. Therefore, the topology tools may well be borrowed and used not on material objects, but on significant ones, such as a legal norm. Such approach allows analysing a legal norm or a system of legal norms as a model of the situation and the situation itself as two objects. Their correspondence to each other, mutual and unambiguous, should be established by the subject of application of law before “binding” the legal norm to a particular situation. That is, the process of application of law as an activity of certain subjects is supplemented in a meaningful way by the corresponding stage of establishing such compliance. Moreover, according to the results of application of law (according to its legal consequences), it can be argued that such legal consequences are different from those that are included in the provision as a tool for regulating relations between subjects. Recent legal consequences convince that there is a mutation of the norm, a break in the core of its stable relations, and such a legal norm ceases to be identical with itself¹⁴. Thus, the

¹¹ I.V. Kolesnik, *Theoretical model of law enforcement technology*: thesis of the Candidate of Juridical Sciences, Ministry of Internal Affairs of the Russian Federation, Moscow, 2014; A. Vilks, D. Bergmanis, “Global organized crime in Latvia and the Baltics”, in *Global Organized Crime and International Security*, 2018, p. 63-70.

¹² D. Lo, “Objects and spaces. Sociology of things”, in *Sociological Review*, 2006, vol. 5, no. 1, p. 30-42; V.S. Vahsteyn, “City rebelling: between language and space”, in *Sociology of Power*, 2014, vol. 2, p. 9-38; M.K. Suleimenov, F.S. Karagoussov, “The legal basis for the securities market in the Republic of Kazakhstan”, in *Review of Central and East European Law*, 1998, vol. 24, no. 5, p. 451-468.

¹³ V. Vakhsteyn, (Ed.), *Sociology of things*, Publishing House “Territoriya buduschego”, Moscow, 2006; S. Müller-Mall, *Legal spaces. Towards a topological thinking of law*, Springer, Heidelberg, 2013.

¹⁴ Y. Harust, V. Melnyk, Y. Kiiashko, V. Halunko, “Economic crimes: Innovative mechanisms of counteraction by law enforcement agencies”, in *Asia Life Sciences*, 2019, no. 2, p. 247-263; A. Klochko, D. Kaznacheyeva, O. Muzychuk, E. Kiselova, “Legal responsibility of police officers in conducting pre-trial investigations of crimes”, in *Asia Life Sciences*, 2019, no. 2, p. 165-175.

subject of application of law becomes the ultimate guarantor of the homeomorphism of the already applied legal norm.

This raises the question of criteria for the auto-similarity of a legal norm and the similarity between a legal norm and a particular situation. Their presence will allow the subject of application of law to apply a particular legal norm to a particular situation, even if such a provision is applied by analogy of statute or is derived by the subject of application of law from the general foundations and principles of law – analogy of law. But violation of the criteria of auto-similarity of the legal norm in application of law and the similarity between the legal norm and the situation, under such conditions, will lead to non-homomorphic (the legal norm relating to itself in the process of application of law) and non-homeomorphic (the legal norm relating to the situation) transformation. This study illustrated exclusively the criteria for auto-similarity of the legal norm in application of law and noted that the problem of similarity criteria between the legal norm and the situation to which it is applied is a matter of separate thorough research and will be covered in further studies.

The study also used a systematic approach in combination with the historical one, which allowed perceiving the legislation of a particular state as 1) an integral entity; 2) an entity that has a certain set of elements of different levels (subordination and coordination), which must be in a certain interconnection and interconsistency; 3) a dynamic integral entity that has a certain temporality and variability. The objective inability of the legislator to create the necessary provision, which is not enough “here-and-now”, for each particular life case, obliges the law, as one of the regulators of social relations, to respond adequately to such a situation. The legislative mechanism is too slow and complex, which sometimes leads to too rapid loss of relevance of certain legislation. It is quite natural in this process to see the need to reform, improve, and change the existing regulatory material. But from the moment there is a need to reform, improve legislation, and the moment of direct implementation of such improved provisions in practice, it is impossible to simply stop the process of emergence, change, and termination of such legal relations.

For example, since the entry into force of the Civil Code of Ukraine¹⁵ (January 01, 2004, hereinafter referred to as the CCU), Article 1118 was actually blocked until amendments were introduced to the CCU on February 12, 2015 concerning the possibility of concluding a commercial concession agreement by civil subjects. The blocking was conditioned by the obligation to perform state registration of the specified contract by a body that, according to Ukrainian legislation, simply did not have the corresponding authority. This situation led to the fact that in practice a franchise agreement was concluded,

¹⁵ Civil Code of Ukraine, 2003. Available at <http://zakon2.rada.gov.ua/laws/show/435-15/conv/page>.

which is the same commercial concession agreement, but the different name of the contractual structure allowed neglecting the obligation of state registration of such an agreement. Thus, the regulatory solution to the legal issue that was implemented in 2015 took 11 years. This problem had more than one solution. If, from the standpoint of the legislators and developers of the CCU, such registration of an agreement was really necessary, it could have been properly stipulated, or the relevant judicial practice could have been formed. Notably, even in judicial practice, not everything is so smooth, and the actual process of forming a practice can similarly stretch over time¹⁶. In particular, for a long time after the adoption of the CCU and in fact before the adoption of a special law in 2010, the issue of applying Part 4, Article 334 of the CCU in terms of determining the type of state registration, and the conditionality of the emergence of property rights by such registration, remained debatable. Unfortunately, the judicial practice of that period was not described by consistency.

In turn, the most prompt and rapid response to the variability of the corresponding legal order is seen as the activity of the subjects of application of law. Thus, the imperfection of current legislation is overcome not by adopting a new regulation or introducing changes to it, but by correctly applying the regulations at hand. However, this does not mean that application of law activities are the solution to all such problematic legal situations. application of law may not lead to a direct violation of the content of the law prohibiting certain actions or inaction. Otherwise, it would lead to the levelling of formally established provisions and the establishment of the primacy of the will of the subject of application of law, which, from the standpoint of the authors, contradicts Article 19 of the Constitution of Ukraine. These conclusions lead to the need for regulatory consolidation of the presence of discretionary powers in the subject of application of law, which will form the basis for avoiding abuse of the right to appeal against the actions of a notary as a subject of application of law on the formal basis of the notary's lack of the right to use the analogy of statute and the analogy of law. On the one hand, consolidating such powers for the subject of application of law appears to be quite a consistent step, since otherwise it becomes difficult for such a subject to make decisions. At the same time, the authors emphasised that such powers impose extraordinary responsibility on the notary and oblige him or her to ensure a high level of qualifications and the quality of application of law. The authors share the opinion of some researchers, who insist that decisions made

¹⁶ M. Kolesnikova, E. Kiselyova, O. Vasylychenko, L. Svyrydova, B. Kharkiv, D. Kibets, "Judicial practice as a pre-condition for preventing contradictory judicial decisions", in *Journal of Legal, Ethical and Regulatory Issues*, 2020, vol. 23, no. 5, p. 1-7.

by the subject of application of law should foremost be based on such values as justice¹⁷.

Results and discussion

Application of law concept: activity, its subject composition, and results of activity

Application of law as a phenomenon of legal reality and as a process (activity) is consolidated in various legal orders and has been studied by many scientists from different countries of the world both from the standpoint of law and from the standpoint of sociology and philosophy. The concept of application of law was developed depending on the aspect of the view on application of law. Some authors even classify different types of application of law according to the subject criterion: application of law by judicial and non-judicial bodies¹⁸. Paying tribute to the various concepts in this study, the authors noted that they do not position application of law as a legislative process or a rule-making process. In no case is it a question of granting the function of rule-making or quasi-rule-making to the subject of application of law. This issue is constantly the subject of scientific discussions, since it primarily raises the problem of combining the judiciary and legislative power, which can jeopardise the separation of powers¹⁹. At the same time, there are scientific approaches wherein in some cases the *judge must create the applicable norm*, for example, the application of restitution rules for unjust enrichment²⁰. The classical understanding of the process of applying law laid in the activity of competent subjects to bring particular life relations under abstract legal norms by identifying the similarity of the legal norm with a particular life situation and a logical conclusion (syllogism), wherein the role of the larger premise was played by law, and the smaller – by a particular life incident²¹.

¹⁷ W. Dziejciak, “Axiological basis for the application of law – a perspective of the equitable law”, in *Studia Iuridica Lublinensia*, 2015, vol. 24, no. 2, article number 49; G.M. Onlanbekova, E.B. Abdrasulov, “Improvement of organizational forms of interaction of the court and the public prosecution office as a condition of effective solution of general tasks of the court and the public prosecution office”, in *European Research Studies Journal*, 2015, vol. 18, no. 4, p. 105-112.

¹⁸ L. Leszczyński, “Types of application of law and the decision making model”, in *Studia Iuridica Lublinensia*, 2015, vol. XXIV, no. 2, p. 27-47.

¹⁹ M.J. Golecki, B. Wojciechowski, “Conceptualising judicial application of law in the Polish theory of legal interpretation”, in *Review of Central and East European Law*, 2020, vol. 45, no. 2, p. 229-247.

²⁰ A. Dryshliuk, “Analogy of law and analogy of law: Dynamics of scientific research (modern period)”, in *Law. Scientific Bulletin of Uzhhorod National University*, 2011, vol. 17, p. 9-14.

²¹ I.V. Chekhovska, O.M. Balyńska, R.I. Blahuta, V.V. Sereda, S.O. Mosondz, “Euthanasia or palliative care: legal principles of the implementation in the context of the realization of human rights to life”, in *Wiadomości lekarskie (Warsaw, Poland : 1960)*, 2019, vol. 72, no. 4, p. 677-681.

Consequently, in application of law, a particular (accidental) situation is resolved, and an appropriate decision is made, which makes provision for the occurrence of legal consequences (the emergence of rights and obligations) for appropriately defined persons²². Application of law is a complex legal process that involves the presence of integral components, the totality of which reveals the features of application of law. Moreover, one of the difficulties is precisely the stage preceding the direct application of the norm to a particular situation. This stage is associated with the fact that the subject of application of law must, using the criteria which determine the similarity between the legal norm and the situation, establish whether a particular legal norm is subject to application in a particular life situation. Each branch of law, considering the specific features of the subject and method of regulation, has its implementation features from the standpoint of the application of law mechanism²³. For example, the application of law of civil law norms is described by a specific purpose: to promote the process of direct implementation of civil law, which is carried out by participants in particular civil legal relations; to state the presence or absence of subjects' rights and obligations; to individualise the scope of subjective civil rights and legal obligations, as well as measures of civil liability relating to a particular life situation²⁴.

These subjects of application of law activity, when applying civil law norms, are not addressees of the norms applied by them. By implementing a particular norm in the form of application of law, the competent authorities, as a rule, only contribute to its implementation in the activities of subjects involved in particular civil legal relations that are not allocated by the authorities in the event of objective or subjective grounds for its transformation. In terms of its content, application of law in the mechanism of implementation of civil law norms is an activity for the adoption of individually specific legal prescriptions aimed at specific legal relations and the legal status of the subject of these legal relations. Usually, this status is the legal status of a participant in a civil tort or contractual relations who failed to perform or improperly performed an obligation, but there are other cases of non-tort and

²² I.V. Boiko, Y.V. Mekh, O.M. Soloviova, V.A. Somina, O.B. Cherviakova, "Universal human rights and state sovereignty", in *International Journal of Criminology and Sociology*, 2020, vol. 9, p. 3014-3022; M. Akimbekova, S. Akimbekova, S. Moroz, "Recognition and enforcement of decisions of foreign courts and arbitrations in the Republic of Kazakhstan: Current status and problems", in *Journal of Legal, Ethical and Regulatory Issues*, 2021, vol. 24, no. SpecialIssue-1, p. 1-7.

²³ O. Balynska, R. Blahuta, V. Sereda, N. Shelukhin, I. Kharaberiush, "Neurolaw: Branch or section of new sciences, a complex branch of law or a way to justify criminals (review)", in *Georgian medical news*, 2019, no. 289, p. 162-168.

²⁴ E.B. Abdrasulov, M.G. Gubaidullin, "Influence of public consciousness in traditional kazakh society on collective and individual legal consciousness", in *Journal of Advanced Research in Law and Economics*, 2019, vol. 10, no. 5, p. 1370-1374.

non-binding legal relations. A relevant example of such legal relations would be inheritance legal relations, within the framework of which, without judicial procedure, at the signed request of the heir, which is certified by a notary and submitted to a notary, an heir who has missed the deadline for accepting the inheritance can be called to inherit (Part 2, Article 1272 of the CCU). Consequently, application of law has an individual, regulatory nature and thanks to it, power-based, individual legal regulation of civil relations is exercised.

The specific feature of application of law is the creative, organising activities of competent authorities and their officials²⁵. Agreeing with this statement, the authors note that the list of subjects of application of law is also a separate, complex issue within different legal orders. Subjects of application of law, as one of the defining elements of application of law, are special persons (bodies, officials) endowed by the state with the appropriate range of powers to resolve a particular life situation upon applying legal norms and making an appropriate decision on such a situation. Undoubtedly, the subject of application of law has high professional requirements, namely knowledge of theory, practical skills, the ability to independently and comprehensively evaluate the situation in general and the particular circumstances of the case, the level of legal awareness, legal culture, etc. Given that most controversial situations are multifaceted, the subject of application of law should have not only professional skills, but also knowledge from other spheres of life²⁶. There are different classifications of the subjects of application of law²⁷. According to the general classification of the subjects of application of law, they are divided into a) state bodies and their officials; b) public bodies and their officials; c) non-state institutions, organisations, and officials of non-state structures; d) specially authorised persons²⁸.

A. Kazanchan referred to the subjects of application of law as state and public bodies, organisations or officials vested with application of law powers²⁹. According to the scope of powers, they are divided into 1) entities that directly perform the functions of public administration of society, whose decision is of national importance and concerns a wide range of persons; 2)

²⁵ I.Ya. Dyuryagin, *Application of the norms of Soviet law. Theoretical issues*, Central Ural Book Publishing House, Sverdlovsk, 1973.

²⁶ M. Romanov, "Concept, essence and significance of the activity of the units of knowledge", in *Scientific Journal of the National Academy of Internal Affairs*, 2021, vol. 119, no. 2, p. 102-106.

²⁷ Y. Orlov, "Thermodynamic processes in the social system as a factor of legal liberalization", in *Scientific Journal of the National Academy of Internal Affairs*, 2021, vol. 118, no. 1, p. 50-57.

²⁸ E.B. Abdrasulov, S.R. Shalabaev, A.I. Mugauova, "The concept of the triad of branches of state power and issues of its modernisation", in *European Research Studies Journal*, 2015, vol. 18, no. 4, p. 75-82.

²⁹ A.A. Kazanchan, *Law enforcement of local self-government of Ukraine: Questions of the theory and practice*. Institute of Legislation of the Verkhovna Rada of Ukraine, Kyiv, 2005.

entities that, by virtue of their official position, can apply the law, but in cases clearly established by law, concerning a certain and limited circle of persons (for example, non-state institutions, organisations, employers). By the nature of their powers: a) state bodies and officials of general competence (Cabinet of Ministers of Ukraine, President of Ukraine) and b) special competence (Ministry of Justice, notary)³⁰. The expansion of the list of subjects of application of law is explained by the rapid development of public relations, the multifaceted process of life, the emergence of new spheres of professional activity, the emergence of new branches and sub-sectors of law, legal institutions, etc. In almost any country in the world, continental system of law or general system of law, where the term "application of law" is used in legal sources, a judge is recognised as a subject of application of law. Granting other subjects this status already depends on the specifics of a particular legal order and is decided ad hoc³¹.

The analysis of the legal systems of the EU countries indicates the existence of different approaches to securing the status of the subjects of application of law for non-judicial authorities. There are options for securing the ability to implement application of law not only by the judicial authorities at the legislative level (§ 5 of the Estonian PILA of 2002; Article 12(6) CC of Spain); the lack of a well-established legislative concept that makes it possible to implement application of law to someone other than the judicial authorities (Austria, Czech Republic, Cyprus, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, which still has separate rules regarding the possibility of applying foreign law by a notary, Scandinavian countries, Slovakia, Slovenia, the Netherlands, etc.); national legislation of other EU countries have isolated cases of regulating the possibility of participation of out-of-court bodies in the application of law. C. Esplugues Mota, J.L. Iglesias Buhigues and G. Palao Moreno pay special attention to the definition of the term "quasi-judicial bodies of application of law"³². Proceeding from the legislation of the EU countries in question, quasi-judicial bodies of application of law include notaries, civil status registrars, land registrars, business registrars, migration officers, guardianship and custodianship authorities, state child rights protection bodies, social security agencies, employment or migration tribunals, and other entities³³.

³⁰ A.M. Perepeliuk, *Mechanism of application of law: Structure and criteria of efficiency (general aoretical aspect)*. V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Kyiv, 2016.

³¹ C. Esplugues Mota, J.L. Iglesias Buhigues, G. Palao Moreno, *Application of foreign law*. Köln: Verlag Dr. Otto Schmidt, 2011.

³² *Ibidem*.

³³ D. Chyzhov, "The system of organs of state power for securing the rights of the people in the sphere of national security", in *Law Journal of the National Academy of Internal Affairs*, 2021, vol. 11, no. 2, p. 18-23.

The legislation of Ukraine does not have direct instructions regarding the list of the subjects of application of law from among quasi-judicial bodies, in particular a notary, but it can be attributed to such a subject based on the analysis of the current legislation of Ukraine. Article 3 of the Law of Ukraine “On Notary” defines a notary as an individual authorised by the state to engage in notarial activities in a state notary office, state notary archive, or independent professional notarial activities, namely to certify rights, as well as facts of legal significance, and perform other notarial actions stipulated by law, in order to give them legal reliability³⁴. A notary is endowed by the state with a certain list of powers to perform relevant actions and resolve particular situations, that is, a notary is a subject of application of law, which, including the specific features of a particular situation, is authorised to resolve relevant issues that fall within the scope of his or her competence. The law grants the notary the right to perform additional actions to obtain information, documents, etc. necessary for performing a notarial action. In other words, in the process of performing notarial actions (certification of a will, contract, etc.), a notary is endowed with the appropriate competence to request the necessary materials and information to establish the circumstances of a particular case regarding which he or she was approached. In this case, there is certain freedom of the notary in performing a particular action.

Examining the activity of a notary through the lens of forms of exercise of the right, the authors of this study noted that the legislator gives the notary a wider scope of powers than just compliance and application of the law. In the performance of their duties, the notaries not only formally verify the necessary documents and the desire of persons to create certain legal consequences for themselves upon concluding a transaction, that is, they use their professional theoretical skills, but also apply their experience, evaluating the circumstances of a particular situation and its potential consequences, which may or may not occur, which manifests the level of their legal awareness, legal culture, etc. As part of the assessment of the situation and its potential consequences, the notary concludes on the legal norms to be applied in this situation. In the absence of such legal norms, the notary conducts a mental experiment, the result of which is a conclusion on the degree of similarity of this situation with models of situations that have become the basis for legal norms regulating similar relations. That is, the activity of a notary contains the features of application of law, and therefore it is fully possible to say that the notary is a subject of application of law.

Application of law, like any process in its philosophical sense, has its purpose and objectives. Achieving the purpose of application of law occurs during the stages of such application, within which the relevant tasks are

³⁴ Law of Ukraine “On notary”, 2020. Available at <https://zakon.rada.gov.ua/laws/show/775-20#n119>.

performed, the actual content of legal relations is established, the method and procedure for resolving the problem situation is decided, etc. The result of application of law is the adoption of an appropriate decision – a law enforcement act, which is not always objectified in the form of a document, but is implemented in the form of an act in the sense of an action. A law enforcement act is the settlement of a particular life situation by an authorised subject, which has an individual effect and is intended for effective and proper achievement of the purpose of application of law. A particularly valuable feature of the law enforcement act as a legal phenomenon is its ability to eliminate obstacles and shortcomings of legislation upon application of law, as a result of which the most effective achievement of the tasks set by the subject of application of law is ensured.

Analogy as a tool of the subject of application of law

A key element of the application of law is a legal norm or set of applicable norms. It is quite logical to question the existence of this key element in the case when a gap in legislation is established in the application of law. In this case, the basis of the application of law mechanism is the practice of enforcement of those legal norms that govern such legal relations, which in turn is based on the principles of law (for example, the principles of civil legislation). The diversity of legal relations, the array of legislative framework, the rapid development of public relations and processes in their totality indicate that it is impossible to achieve such a state of application of law, wherein everything will be settled and there will be no conflicts and gaps. Currently, the civil legislation of Ukraine cannot and should not fully cover all the diversity of civil relations existing in society. Every day, every hour, new relationships appear, subjects and objects, forms change, and all this, at first glance, requires legislative regulation. A narrow approach considers a gap in law as a case or situation in which social relations enshrined in the general rule of law have not found their settlement by a special, specific norm. A gap in law is actually a gap in legislation in the sense of the absence of a specific norm for solving certain cases that are in the sphere of influence of law³⁵.

In a fairly thorough study of M. Koszowski highlights various kinds of *legal gaps*: a *statutory gap*; a *technical gap* – a type of legal gap that lies not just in the absence of one norm, but in the absence of a set of norms (for example, before 2004, such a type of contractual structure as an inheritance agreement was not in the legislation of Ukraine at all); *inconsistency or evolutionary gap*– the complete absence of a legal norm that could be applied to a particular situation and gaps related to changes in social conditions and actual circumstances in an

³⁵ V.I. Akimov, “The concept of a gap in the right”, in *Jurisprudence*, 1969, vol. 3, p. 110-113; P.E. Nedbaylo, *Application of Soviet legal norms*, Gosyurizdat, Moscow, 1960.

area that was not provided for by the legislator at the stage of creating the norm); *constructional gap*– a gap associated with the lack of a regulated mechanism for implementing another legal norm³⁶. An example of a constructive gap is the situation with the amendments to the Law of Ukraine “On Notary”, which came into force in July 2020³⁷, which returned the status of notarial action to the lifting of the ban on alienation of property. Therewith, the legislator did not make provision for appropriate changes to the procedure for performing notarial actions by notaries of Ukraine and the rules for conducting notarial records management. This has led to the fact that the mechanism for implementing the new rule of law and the certifying inscription on lifting the ban on alienation of property are virtually absent³⁸. The irony is that the law on lifting the ban on alienation of property was returned to the status of notarial act is called “On Amendments to the Law of Ukraine “On Notary” on eliminating legislative conflicts and gaps”. Thus, the Law aimed at eliminating one gap gave rise to another. Overcoming or, more precisely, *filling in* a constructive gap is possible by searching for legal norms that govern similar mechanisms for implementing legal norms or serve similar purposes³⁹.

As the author noted, gaps in law, in classical theory, arise where there is no particular law (the norm of written law) that can be applied to a particular situation that is socially desirable for this particular case (incident). Proponents of a broad approach define a gap in law as the complete or partial absence of normative attitudes, the need for which is conditioned by the development of public relations and the needs of practical solutions to cases, basic principles, policies, common sense and content of current legislation, as well as other manifestations of class will, aimed at regulating life facts in the sphere of legal influence⁴⁰. The presence of gaps in law is a prerequisite for the emergence and use of special tools and methods to fill them, eliminate them and overcome them in the process of implementing the law. Consequently, establishing the existence of gaps in law is one of the main conditions for the admissibility of applying a legal analogy. Ways to overcome gaps are legal instruments that allow simultaneously solving an incident that is in the sphere of legal

³⁶ O. Pankevych, M. Havryltsiv, “The constitutional court of Ukraine: Some discussion questions about its place in the modern state mechanism”, in *Social and Legal Studies*, 2021, no. 4, p. 12-19.

³⁷ Law of Ukraine “On notary”, 2020. Available at <https://zakon.rada.gov.ua/laws/show/775-20#n119>.

³⁸ V. Kopcha, Modern Rule of Law and Basic Approaches to Understanding, in *Law Journal of the National Academy of Internal Affairs*, 2021, vol. 11, no. 2, p. 7-12.

³⁹ M. Koszowski, “Analogical reasoning in statutory law”, in *Journal of Forensic Research*, 2017, vol. 8, article number 1000372.

⁴⁰ V. Bondarenko, N. Pustova, “Legal influence in the system of social influence”, in *Social and Legal Studies*, 2021, no. 2, p. 12-18.

regulation, if the legal norms do not directly provide for it⁴¹. One way to bridge the gap is by analogy. Analogy of statute *analogia legis* or *statutory analogy* is widespread in the countries of the continental legal system like Argentina, France, Germany, Sweden, Finland, Poland, and Italy, but the analogy of statute has not found its distribution in the United States and the United Kingdom, where the analogy of judicial precedent is used (*case analogy*).

Analogy, as a philosophical category, is a method of cognition of corresponding phenomena, things, and objects that are in the plane of research. From the standpoint of legal science, analogy means extending any legal norm or a certain set of norms to cases that are not provided for in this norm or set of norms, but which, at the same time, are very similar to them. Analogy is essentially an important tool for overcoming gaps in law, the need to apply which arises in connection with the imperfection of legislation, the reasons for which are both objective and subjective. In modern conditions, the need to apply the analogy is explained by the inability of the legislator, for various reasons, to timely respond to the emergence of new and changes in existing social relations, which leads to the existence of relations that are not regulated by the norms of civil legislation. In such situations, the analogy of statute and the analogy of law are tools that eliminate the lack of regulation of new, not yet regulated relations. Admittedly, this cannot mean that the very fact of applying a legal norm by analogy of statute or an analogy of law generates a new legal norm that will become mandatory for such unsettled relations.

The institution of analogy has a strictly defined function, which lies in the legal assessment of actions that are not directly regulated by legal norms, in the casual overcoming of gaps in law. Its purpose and goal is to ensure a correspondence between law as a dynamic system and the development of public relations and the tasks of legal regulation⁴². The analogy of law is the application of law, wherein the relevant body extends specific legal norms to these relations, which govern such relations⁴³. The analogy of law is the application of the general principles of law to relations that are not regulated by legislation (current positive law). The application of the analogy of law is possible only in the absence of a norm regulating such relations, which makes

⁴¹ M.M. Filippenko, *Analogy as a means of knowledge*, Mysl, Moscow, 1975; G.M. Onlanbekova, E.B. Abdrasulov, "Principles of interaction of judicial power and prosecution agencies as reflection of objective regularities of their business cooperation", in *European Research Studies Journal*, 2015, vol. 18, no. 4, p. 121-128.

⁴² V.I. Leushin, *Dynamics of Soviet law and replenishment of gaps in legislation*, Sverdlovsk Law Institute, Sverdlovsk, 1971.

⁴³ Family Code of Ukraine, 2002. Available at <http://zakon5.rada.gov.ua/laws/show/2947-14>.

it impossible to use the analogy of statute⁴⁴. The analogy of law (“*analogia iuris*”) is a more mysterious and complex tool than the analogy of statute (“*analogia legis*”) and should be based on the principles, ideas, and values of law, the fundamental ideas of the legislator, or even the spirit of the law⁴⁵. The positions of the analogy of law are so ambiguous in the plane of certain legal orders that sometimes its use is perceived as creating a new norm for the situation in the process of using discretionary powers – “*As has been noted earlier, the court also has the right to use so-called free discretion in gap cases, where it is not a question of interpretation or of gap-filling through analogy, but rather of the free creation of law*”⁴⁶.

Analogy in the absence of statutory regulation is a kind of universal means of solving a particular problem situation “here and now”. The regulatory framework for applying the institution of analogy is contained in the provisions of the CCU, Article 8 of which contains a direct indication of the application of the analogy of statute and the analogy of law. Thus, in accordance with the provisions of this Article, if civil relations are not regulated by the CCU, other acts of civil legislation or an agreement, they shall be governed by those legal norms of this code, other acts of civil legislation that govern similar civil relations in meaning (analogy of statute). If it is impossible to use the analogy of statute to regulate civil relations, they are governed in accordance with the general principles of civil legislation (analogy of law)⁴⁷. In addition, the mechanism for applying the analogy is provided for by the norms of the Family Code of Ukraine (Article 10)⁴⁸. This is what applies to the analogy in its material sense. Therewith, the analogy within the meaning of procedural law also did not remain over the “legislative board” and found its consolidation at the level of national procedural codes: the Economic Procedural Code of Ukraine (Article 11), the Civil Procedural Code of Ukraine (Article 10), the Code of Administrative Judicial Procedure of Ukraine (Article 7). The application of the analogy of statute is possible, provided that the relations of the parties are within the scope of civil law, that is, they are civil relations (Article 1 of the CCU); these civil relations are not governed by the CCU, other acts of civil legislation or agreement; there are norms governing

⁴⁴ G. Damele, “*Analogia legis* and *analogia iuris*: An overview from a rhetorical perspective”, in H. Ribeiro (Ed.), *Systematic Approaches to Argumentby Analogy. Argumentation Library*. Springer, Cham, 2014.

⁴⁵ V. Kachur, “Legal values as determinants of sustainable development of society”, in *Law. Human. Environment*, 2012, vol. 12, no. 3, p. 15-23.

⁴⁶ A. Aarnio, “Statutory interpretation in Finland”, in D.N. MacCormick, R.S. Summers (Eds), *Interpreting statutes: A comparative study* (pp. 142-161), Routledge, London, 1991.

⁴⁷ Civil Code of Ukraine, 2003. Available at <http://zakon2.rada.gov.ua/laws/show/435-15/conv/page>.

⁴⁸ V.I. Leushin, *Dynamics of Soviet law and replenishment of gaps in legislation*, Sverdlovsk Law Institute, Sverdlovsk, 1971.

similar civil relations⁴⁹. The analogy of law is applied when it is not possible to apply the analogy of statute to the circumstances of a particular situation. Therewith, as E. Haritonov wrote, in the case when the use of the analogy of statute to regulate civil relations is impossible, the analogy of law is applied, that is, the general principles of civil legislation established by Article 3 of the CCU are used⁵⁰.

The institution of analogy is a swift means of overcoming gaps in law. Its main purpose is to respond in a timely manner to changes and the emergence of new social relations that require legal assessment and resolution. It occupies an important place in the mechanism of legal regulation, being a means that allows law to be a stable and flexible tool for regulating public relations at the same time. The topic of subjects of applying analogy has been repeatedly addressed in the legal literature. Therewith, there is no consensus or clearly defined position regarding the subjects who have the right to apply an analogy in their activities. The question arises whether a notary, if appropriate circumstances arise, can apply an analogy in their activity. Notably, from the standpoint of the authors, if a notary is assigned the status of a subject of law enforcement, then they will inevitably have to apply an analogy in response to existing gaps and unpredictability in the development of social relations. The scientific literature contains different opinions on subjects that can apply the analogy. In particular, some researchers believe that only judicial authorities have such competence⁵¹. However, other scientists do not share such categorical opinions, considering that the scope of subjects competent to apply the institution of analogy is wider. The analogy of law can be used by subjects of civil law, choosing for themselves when concluding an agreement that is not stipulated by law, guidelines for the content (conditions) of the latter. Furthermore, the analogy of law can be used by any body or person that has civil jurisdiction (the right to resolve civil disputes and apply civil law norms): courts of all levels, prosecutors, notaries, etc.⁵²

In this regard, it is appropriate to recall the opinion of A. Dovhert, who noted that by introducing norms on legal analogy to the “material” CCU (Article 8 of the CCU), the developers sought to make them the addressee not only of the courts, but of all subjects of law enforcement⁵³. The key to the

⁴⁹ S.I. Klim, *Analogy of the law in civil law of Ukraine*, International Humanities University, Odesa, 2012.

⁵⁰ E.O. Haritonov, N.A. Saniahmetova, *Civil law of Ukraine*, Odissey, Kharkiv, 2004.

⁵¹ F.R. Uranskiy, *Spaces in the right and methods of their reinforcement in law enforcement*, Lomonosov Moscow State University, Moscow, 2005.

⁵² A.A. Butyrsky, L.N. Nikolenko, N.V. Ivanyuta, I.A. Butyrskaya, Y.V. Kabenok, “Economic Disputes Resolving Models by Courts in the Post-soviet Countries”, in *Journal of Legal, Ethical and Regulatory Issues*, 2021, vol. 24, no. 2, p. 1-9.

⁵³ A. Dovhert, “Legal analogy in the Civil Code and the judicial practice of Ukraine”, in *Private Law*, 2013, vol. 1, p. 159-165.

adequate application of the analogy by such a wide scope of people should be not only a correct understanding of the short text of the article itself, but also the context of the entire civil law codification and private law in general. The above is a vivid example of the influence of the development of public relations on the development of law, in connection with which it is transformed and adapted to new forms of legal relations. A notary is a subject of application of law, to which the law sets appropriate requirements and which is given the appropriate amount of authority. As mentioned above, application of law does not always have perfect conditions and sometimes faces problems and obstacles in the form of the lack of a mechanism for resolving a disputed situation⁵⁴. The notary, as a subject of application of law, also faces imperfections of the legal mechanism in his or her activities, which sets them the task of finding the optimal way to overcome them. Admittedly, such circumstances, as a rule, arise when solving extraordinary situations due to life circumstances.

Thus, the relations wherein law and the practice of its application are located can be compared with the relations where the model and reality are modelled. No such model (legal norm) can fully correspond to the reality that it has modelled (practice of applying law) and vice versa. Nowhere and never can it be that reality (the practice of applying law) fully corresponds to its model (legal norm). Their equivalence is a priori impossible, since a model is always a certain impression of either an existing, past, or future object. In studying the mechanism of implementing the law, it is necessary to overcome two extremes. The first is excessive “legitimation” of behaviour in the field of legal regulation, that is, it is impossible to underestimate the importance of socio-economic, psychological, moral, and other regulators of behaviour, reducing everything to the legal settlement of all types of relations. The second is an underestimation of the specifics of legal means of influence that require special legal implementation activities, especially in relation to implementation and law enforcement. When exercising its powers, the subject of law enforcement is guided by the norms of current regulations and performs its actions in accordance with the algorithm clearly defined by law. Therewith, any process cannot be perfectly governed by law, given the versatility of life situations that the subject of application of law has to work with. A judge and notary often deal with situations that are not governed by a law containing a gap in the legislation. At first glance, these are such isolated situations that do not attract much attention, since they are narrow in nature. Such situations solve a life case (incident), which from the standpoint of practice is insignificant and the absolute repetition of which under the same conditions is

⁵⁴ F. Karagussov, “The legal framework for mediation in Kazakhstan: Current state, expectations of public recognition and perspectives for development”, in *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, 2015, p. 393-431.

unlikely. At the same time, a likelihood ratio can be established between such incidents, which allows applying a particular legal norm not to one situation, but to a class of situations.

Conclusions

This study establishes that there is a difference between the legal norm and its application. The difference is explained by the fact that any legal norm is, among other things, a model of a situation and activity (action or inaction) that contains boundary conditions for acceptable behaviour (interaction scenarios). It was proven that constant changes in legislation after several “wrong” decisions are not a panacea. Additional actions performed by an experienced and theoretically trained law enforcement officer who analyses the situation, rather than mechanically “imposing” the law, can compensate for the imperfection of the legislation. Therefore, it is advisable to encourage real application of law, and not try settling everything with the new norm in any way. The process of application of law is a complex, statutorily governed process of activity of competent entities, the essence of which is to resolve a particular dispute situation and make an appropriate decision, which makes provision for the occurrence of legal consequences (the emergence of rights and obligations) for appropriately defined persons. A judge and notary often deal with situations that are not governed by a law containing a gap in the legislation. Such circumstances require the subject of application of law to perform prompt and effective actions aimed at resolving the situation regarding which it was applied, without violating the provisions of the law. A notary, being a subject of law enforcement, is no exception, because there are many cases when it is necessary to resolve situations by certifying agreements that are not directly stipulated by law, but are also not prohibited and are important and essential for the parties.

Thus, the authors concluded that the legislation makes provision for a mechanism for refusing a notary to perform a notarial act (Article 49 of the Law of Ukraine “On Notary”), which always reserves the right for a notary not to go into details and formally refuse the person who applied to him or her. However, the process of application of law has nothing to do with formalism. The subject of law enforcement, which is endowed by law with the appropriate range of powers by taking into account mandatory prohibitions, should resolve situations, first of all, from the point of view of their essence, and not formally. A notary, without allowing total formalism, can apply the analogy of legislation in their activities, but the limits of applying the analogy should not exceed the powers granted to him or her and not narrow the scope of rights of participants in disputed legal relations.