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PURPOSES OF LAND LAW OF UKRAINE

Abstract. *Purposes of land law as a separate branch of legal system of Ukraine are researched. Purpose is an obligatory part of any social mechanism. So legal regulation of land relations must be oriented on achievement of some legal purposes. It was stated in legal literature that purpose of law (legal purpose) is regarded as form of future in temporary times. It is a kind of proper status of social relations in current legislation. That is why purpose in law plays a role of legal instrument which serves to lawmakers as a mode of organization of all system of legal regulation of social relations.*

It was also stated in the legal literature that the most significant peculiarities of any purpose in law is its normativeness, because most of legal purposes are not only desired result but is obligatory way of activity. That is why legal purpose serves as a regulator of social relations in any society. Besides, legal purpose is regarded as some model of social order which is guaranteed by state. So legal purpose is an official orient for legal practice.

It is proved in the article that modern land law of Ukraine has two legal purposes. The first purpose of land law of Ukraine is protection of land, but second its purpose consists in promotion of realization of rights and legal interests of participants of land legal relations. However, the purposes of land law of Ukraine are not equal by its legal force. The purpose of protection of land should be regarded as the main purpose of land law of Ukraine. It means that the second purpose of land law of Ukraine might be achieved only in case of achievement of the first its purpose. Bu other words, modern land law of Ukraine has to be based on principle provision "no land – no right to land". The author of the article proves that if society are not able to protect land it also is unable to secure any rights to the land. Finally, to streamline activity of all participants of land legal relations at achievement of the main purpose of land law of Ukraine it is necessary to adopt legal normative (requirements) of quality status of all types of land in Ukraine.

Key words: *purpose in law, land law of Ukraine, purposes of land law of Ukraine, protection of land as the purpose of land law of Ukraine.*

In Ukraine, land reform, started 28 years ago, whose main task is to ensure the transition of legal regulation of land relations from the principles of command-administrative economy to the principles of market economy, is being finished. Such a transition was accompanied by "tectonic" changes in the content of legal norms and the system of land law, the breakdown of the old Soviet ones, and the formation of new land-legal institutions and norms. At the same time, quite often changes to the land legislation were made spontaneously – as a reaction to the aggravation of a certain problem during a period of land reform. Unfortunately, this did not contribute to the formation of an internally agreed system of land legislation of Ukraine, aimed at ensuring the achievement of clear socially significant legal purposes in the development of land relations in our country.

At the same time, the legal regulation of land relations should be oriented towards the achievement of certain purposes defined by land law as one of the systemic formations of the domestic legal system. After all, as noted in the literature, purpose is a necessary attribute of any mechanism and the reason for its creation[1]. Therefore, the definition of the purposes of land law is a methodological problem of the science of land law.

Accordingly, in legal doctrine, purposes in law are considered as concrete transformations of opportunity into reality. According to D.A. Kerimov, the purpose of law is a peculiar form of the future in the present, a prototype of that state of social relations to which the legislator seeks[2]. Accordingly, the purpose of the legislation is to act as such a factor in the organization and development of social relations, by which the objective ability is transformed into an ideal reality, which, if such a purpose is achieved, becomes a reality. Thus, the purpose in law expresses the desire of the legislator to the occurrence of a particular state of social relations governed by law.

In literature, another important feature of the purpose in law is noted – its normativity. As A.A. Sevastyanov notes, normativity is an essential sign of a legal purpose, since the absolute majority of purposes in law are an indication not only of the desired result, but of the obligatory direction of behavior. Therefore, in his view, the purpose in law is not simply aspiration, but imperative set aspiration, which makes it an effective regulator of social relations[3].

In addition, the purpose in law is also considered as a state-guaranteed model of a particular social condition or process that they are trying to achieve through a system of legal measures. Therefore, the purpose in law is the official, set at the normative level, legal practice framework, because ideally for the subjects of

[1] Голиченков А.К. Экологический контроль: теория, практика правового регулирования / Голиченков А.К. М., 1992. 136 с. С. 73.

[2] Керимов Д.А. Методология права (предмет, функции, проблемы философии права) / Керимов.[2-е изд.] М., 2001. 560 с. С. 298–299.

[3] Севастьянов А.А. Соотношение цели в праве и иных правовых категорій//Інтернет-ресурс. Режим доступу: http://www.tisbi.org/assets/Site/Science/Documents/430-SEVOSTYANOV.pdf

law-making and law-enforcement activities, the purposes of the law coincide[1].

Thus, a clear definition of the purpose of legal regulation of social relations as a normative principle makes it possible not only to formulate a certain system of theoretical provisions about the desired legal "image" of the future in the legal regulation of social relations, but also to build an appropriate system of legal principles, rules and other legal measures for the consistent achievement of the relevant purpose as a concrete result – the state of relevant social relations. Therefore, the purposes of the activities of legal relations subjects are getting the legal content because they are in accordance with the spirit of law and are achieved through legal measures.

Legal purposes studying as a measure of legal cognition of the processes of life of modern society, in our opinion, has great scientific potential. After all, purposes in law play different functions. In particular, it is mentioned in literature that in the legal system, the legal purpose performs communicative, meaning-forming (motivational), evaluative, prognostic, stimulating and regulatory functions[2]. In addition, S. O. Poghribnyi proposes to identify a hierarchy of purposes of legal regulation, for which the achievement of one purpose is the basis for the achievement of another[3]. Finally, the theory of law studies (classifies) the purposes as closest, perspective and final; general and specific; functional and substantive; true and false[4] and so on.

In the legal literature of today, the most widespread are interpretations of the legal purpose as one of the foundations of building a system of law in general, as criteria while assessing the effectiveness of legal norms[5], a means of detecting legal gaps and resolving legal conflicts[6]. In addition, G. L. Znamenskyi expressed the opinion that not only the subject and method, but also the purpose are the system-making factors of the field of law[7].

Usually in the legal doctrine two methods of legal regulation of social relations are singled out – dispositive and

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1 Мызникова Е. А. Цели в праве: теоретико-правовой анализ. Автореф. дисс. … канд. юрид. наук. Специальность 2.00.01 – теория и история права и государства; история учений о праве и государстве. Краснодар, 2011. 27 с. С. 10.

2 Мызникова Е. А. Цели в праве: теоретико-правовой анализ. Автореф. дисс. … канд. юрид. наук. Специальность 2.00.01 – теория и история права и государства; история учений о праве и государстве. Краснодар, 2011. 27 с. С. 10.

3 Погребной С. А. О понимании и понятии гражданско-правового регулирования общественных отношений//Альманах цивилистики: Сборник статей. Вып. 1 / Под ред. Р. А. Майданика. К., 2008. 312 с. С. 68.

4 Керимов Д. А. Методология права (предмет, функции, проблемы философии права) / Керимов.[2-е изд.] М., 2001. 560 с. С. 299–302.

5 Эффективность правовых норм / В. Н. Кудрявцев, В. И. Никитинский, И. С. Самощенко, В. В. Глазырин. – М., 1980. 280 с. С. 150–156.

6 Насырова Т. Я. Телеологическое (целевое) толкование советского законодательства. Теория и практика / Насырова Т. Я. Казань, 1988. 144 с. С. 90.

7 Знаменский Г. Л. Совершенствование хозяйственного законодательства: цель и средства / Знаменский Г. Л. К., 1980. 187 с. С. 57.

imperative, as well as their combination (mixed method). That is why the method of legal regulation of social relations is a key feature of independence only in those fields of law where one of these methods is dominant (for example, the imperative method in criminal and administrative law, the dispositive method in civil law). The vast majority of other fields of law use a mixed method of legal regulation of social relations, which combines elements of imperative and dispositive methods. Moreover, in such spheres of law, the ratio of dispositive and imperative methods is dynamic and not quantifiable, which significantly reduces the identification potential of the method as an indicator of the independence of the field of law.

With regard to the matter of the field of law, it is, in our opinion, the main identifier of the field of law in the vast majority, but not of all of them. Due to the peculiarities of the legislative process in Ukraine, a number of spheres of law have been formed in the legal system of the country, the subjects of legal regulation in which partially coincide. Such fields of law are, in our opinion, civil and land law, land and environmental law, land and forest law, etc., in the matters of which land relations occupy at least a certain place.

In addition, it is noted in literature that the matter and method are external features that characterize the degree of difference of the branches of law. However, each branch of law is also characterized by intrinsic (internal) features[1]. It is quite clear that for those branches of law, the matters of which are partially identical, an additional identifier of their sectoral autonomy is required, which would reflect the in-depth properties of the sphere of law. In this regard, it has been suggested in the literature that one of the features of an independent branch of law, in addition to its matter and method, should be its functions, which are regarded as additional features of a particular branch of law[2]. In our view, the purpose (s) may be the identifier of those fields of law in which the matter and method are not sufficient identifiers of their independence, as they are objective in nature. As V. V. Laptev and V. P. Shakhmatov mentioned, the purposes of legal regulation, as a subjective category, are defined by objectively existing social relations, are formed on a scientific basis as tasks for the management of social development and are reproduced in the law as purposes that reflect existing social relations[3].

Based on the above, we believe that since land relations are regulated not only by land law, and the method of land law combines elements of dispositive and imperative methods, the ratio of which changes while regulating land relations which are covered by different institutions of land law, it seems appropriate to single out and to use one more identifying feature of the land law industry – its purpose (s).

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[1] Макушин А. А. Система российского национального права//Государство и право. 2014. №1. с. 120–124. С. 120

[2] Радько Т. Н. Теория государства и права [Текст] : учебник/ Т. Н. Радько. 2-е изд. М., 2009. 752 с. С. 403.

[3] Лаптев В. В., Шахматов В. П. Цели правового регулирования и система права// Правоведение. 1976. №4. С. 26–35. С. 29.

In the environmental and land law literature, attempts have been made to identify the purposes of the relevant fields of law. Thus, according to M. M. Brynchuk, the purpose of environmental law is to preserve (maintain) and to renew the favorable state of the environment (nature). He believes that the purpose of legal regulation related to the saving of a favorable state of the environment should not be focused solely on ensuring the constitutional right of everyone to a favorable environment, but should focus on the broader tasks of nature saving, including in particular the task of biological diversity saving[1]. Thus, M. M. Brynchuk believes that the purpose of environmental law should be not only and not so much in ensuring the realization of environmental rights of citizens, but also focus on environment saving. In fact, the scientist proves that the main purpose of environmental law is realized in the achievement of not a certain legal status of the subject, but of a certain legal state of the object of environmental relations.

I. O. Krasnova mentions the same point of view. It argues that the purpose of land law is to design a model of human behavior that will support the effective use of land to satisfy economic and non-economic needs, taking into account the conservation of land as an integral part of the Earth's single ecosystem and the condition for the further development of society[2].

At the same time, as it was stated above, the purpose in law is a form of the future in the present, a prototype of that state of social relations to which the legislator seeks. It expresses the desire of society for the onset of a particular state of law-governed social relations. And the purpose in law is not simply aspiration, but imperative set aspiration, which makes it an effective regulator of social relations. In other words, the purpose in law must reflect not the process, not the direction of such activity or the content of public relations subjects conduct, but the result of such activity or conduct. Therefore, the definitions of the legal regulation of environmental and land relations proposed in the literature need clarification.

In our view, modern land law in Ukraine is based on the achievement of two main purposes, each of which has its own legal basis. The first of these purposes is aimed at the realization of land rights and legitimate land interests of the subjects of land relations. The essence of the second purpose is that it has as its main orientation the state of the object of land relations – land. It is still that understanding of the purposes of land law that follows from the analysis of the tasks of legal regulation of land relations, defined in Art. 4 of the Land Code of Ukraine. It states that the task

[1] Бринчук М. М. Эколого-правовой механизм: понятие и сущность//Экологическое право. 2013. № 3. с. 12–19. С. 14.

[2] Краснова И. О. Земельное право. Элементарный курс / И. О. Краснова. М., 2001. 240 с. С. 16.

of land legislation is to regulate land relations in order to secure the right to land of citizens, legal entities, territorial communities and the state, rational use and protection of land. Unfortunately, both the stated norm of the land law and the practice of legal regulation of land relations serve the purpose of ensuring the rights and legitimate interests of participants in land relations on the first place, while the main purpose of land law – to ensure the protection and rational use of land – is the second one. After all, land law can ensure the purpose of realizing the rights and legitimate interests of participants in land relations on land only if the environmental, economic and other properties of land as the object of such relations are preserved. Land law is characterized by the saying "no object – no right to it".

Unfortunately, due to a lack of understanding of the purposes of legal regulation of civil and land relations, there are controversial statements in the literature regarding the functional purpose of the rules of civil and land law as a regulator of land relations. Thus, A. M. Miroshnichenko, exploring the differences between Art. 152 of the Land Code of Ukraine and Art. 16 of the Civil Code of Ukraine on the methods of protection of rights to land, states that the legislator in Art. 152 of the Land Code of Ukraine "…mechanically duplicated traditional ways of protecting civil rights (Article 6 of the Civil Code of the USSR, Article 16 of the Civil Code of Ukraine), which, in fact, would be an unjustified increasing of the legal mass, and distorted them. For example, such a way of protecting rights as renewing a situation that existed before a violation, is known to civil law for more than two thousand years (from Latin *in intergrum*), in Art. 152 of the Land Code of Ukraine was reproduced as a "renewing of the status of a land plot that existed before the violation of rights", which is, of course, much narrower"[1]. In our view, such a conclusion is logical, taking into account that the purposes of the legal regulation of land relations, which are declared in the civil and land legislation of Ukraine, are identical. However, if we take into account the existence of significant differences in purposes of public relations regulation in the fields of civil and land law, it is difficult to admit A. M. Miroshnichenko's as methodologically correct.

So, since we believe that the main purpose of legal regulation of public relations by the rules of civil law is protection the rights and legitimate interests of participants in civil relations, and the main of the purpose of legal regulation of public relations by the rules of land law is protection and ensuring the rational use of land, then the existence of the Article 16 in the Civil Code Ukraine, and in the Land Code of Ukraine – Article 152 does not in all cases cause duplication of legal regulation of relations on the protection of right to land. After all, based on the main purpose of civil law of Ukraine, the renewing of the situation

[1] Мірошниченко А. М. Колізії між приписами земельного та цивільного законодавства: перспективи усунення та рекомендації до вирішення//Право України. 2009. № 3. с. 126–131. С. 128.

that existed before the violation as a way of protecting civil rights, in accordance with Art. 16 of the Civil Code of Ukraine, means renewing of financial state of the person whose right is violated. Such restoration is provided by a certain amount of material goods or means of the offender, which must go to the person whose right is violated, in order to fully compensate for the material losses of the latter. Instead, the renewing of the condition of the land, which existed before the violation, as a way of protecting the right to land, enshrined in Art. 152 of the Land Code of Ukraine, provides that in violation of the right to land of a certain person, which is manifested in the reduction of certain qualitative characteristics of the land plot, the offender must personally or through involvement of other persons take action on the land plot to renew the lost due to violation of its characteristics. Undoubtedly, the renewing of the condition of the land plot may not lead to the complete restoration of the financial state of the person whose right to the land has been violated. For example, if the offender has restored the previous state of the land for several years, during that time the owner or user of the land did not receive income from it, for example, rent. In that case, one can protect one's violated right to land not only by applying the requirements of Art. 152 of the Land Code of Ukraine (renewing of the state of land), but also by applying the requirements of Art. 16 of the Civil Code of Ukraine (restoration of person's status), which will be fair enough. Instead, in such cases only Art. 16 of the Civil Code of Ukraine may cause the owner or user of the land whose right is violated will receive material compensation from the offender in full, including lost profits, but the land plot which quality characteristics are impaired or lost as a result of violation of the right to land will remain unrecovered. Although both sides will be considered as fully resolving the property dispute that has arisen between them, another one more side of land relations – society – will suffer. After all, according to Art. 14 of the Constitution of Ukraine, land is under special protection of the state, which gives land legal public-private character in the interests of society, since the main purpose of land law of Ukraine is first and foremost to ensure the protection and rational use of land as a key social need of the present, and only in the second turn – to protect the rights and legitimate interests of participants of land relations. We believe that the existence in the structure of the legal system of Ukraine of land law as a separate field of law creates better conditions for the achievement of the main purpose of civil law, since only maintaining the qualitative characteristics of land can ensure the proper implementation and civil rights to land plots.

Since the main object of land legal relations is land, the formation of the purpose of land law as a field of the legal system of Ukraine should, in our opinion, focus on modeling a certain state of lands, which should be provided by the rules of this sphere of law. In general, land law is aimed at providing three main results that characterize the state of the object of land relations: conservation of

land, that is, such usage, in which the properties of the earth's surface are not degraded; restoration of the properties of the lands that were lost during its use; improving land, that is, providing land with new or more beneficial properties for nature and humans. However, these results cannot be considered as a completed purpose as a "form of the future in the present" because of their lack of specificity and lack of quantitative measurement. In fact, the lack of specificity of the purpose makes it impossible to give it a normative character and makes it dysfunctional in the legal mechanism of regulating land relations.

The main purpose of land law – protection of land – can be achieved through the formation of targeted, localized legal support for the development of various land relations. In turn, such targeting (localization) can be ensured by dividing the country's lands into such types, which require special "sets" of legal means of influencing the participants of the relevant land relations. It should be noted that in the development of the current Land Code of Ukraine the legislator included in it a number of rules aimed at specifying and ensuring the normativity of land protection as the main purpose of land law of Ukraine.

First, the Code not only retained but also increased the number of land categories as part of the land fund of the country for which a special legal regime is established. The basis for the formation of their legal regimes is the specificity of the object – features of land of different types. That is why the basic basis of the land law of Ukraine is the division of land into separate types, which require special, adequate to their nature legal regulation. These types of land are their categories.

Secondly, the Land Code of Ukraine provides for the possibility to establish the peculiarities of the legal regulation of land relations within the administrative-territorial units (regions, districts), which makes it possible to take more fully into account in the rules of the law of the peculiarities of land of different natural and climatic zones – Polesie, Steppe, Forest-steppe, etc.

Third, the Land Code of Ukraine introduced a system of standards of land status for the needs of more effective legal regulation of land relations (Articles 165 and 167). Yes, Part 2 of Art. 165 of the Code set the standards: a) optimal ratio of land; b) the quality of the soil; c) maximum permissible soil contamination; d) indicators of land and soil degradation. And Article 167 of the Land Code of Ukraine provides for the application of maximum permissible concentrations standards of dangerous substances in soils. The standards contain requirements for the quality of land, the permissible anthropogenic load on soils and certain territories, the permissible agricultural development of land, etc. Therefore, the application of these standards makes it possible to ensure the control of the state of land and, accordingly, to make a purposeful legal regulation of land relations. Unfortunately, the Cabinet of Ministers of Ukraine has not yet approved any of these standards, which significantly reduces the ability to ensure the achievement of the basic pur-

poses of land law of Ukraine. As a result, during the period of land reform, the quality of land in Ukraine has significantly deteriorated[1].

Thus, the main purpose of the land law of Ukraine is to protect the land fund of the country as ensuring the preservation, renewing and improvement of lands in accordance with their natural-climatic and categorical characteristics, the criteria of which should be the legal standards of qualitative and quantitative state of land. The second purpose of land law of Ukraine is to ensure the rights and legal interests of land owners and users and other subjects of land relations in the sphere of land usage of the country. Moreover, the achievement of the second purpose must be made dependent on the achievement of the first purpose. It means that the land law of Ukraine ensures the realization of the rights and legitimate interests of the participants of land relations, provided that their activity on land usage ensures the preservation, renewing and improvement of land in accordance with established legal standards.

[1] Пирожок О. Повна деградація. Хто псує український чорнозем//https:// Інтернет-ресурс. Режим доступу: www.epravda.com.ua/publications/2018/06/4/637294/

References

1. Holichenkov A. K. Ecologicheskiy kontrol: teoriya, practika pravovogo regulirovania / Holichenkov A. K. M., 1992. 136 s. S. 73. (rus)
2. Kerimov D. A. Metodologiya prava (predmet, funkcii, problem philosofii prava) / Kerimov D.A.[2-e izd.] M., 2001. 560 s. S. 298–299. (rus)
3. Sevastianov A.A. Sootnosheniye tseli v pravie i inuh пpravovih kategoriy available at: http://www.tisbi.org/assets/Site/Science/Documents/430-SEVOSTYANOV.pdf (rus)
4. Myznikova E. A. Tseli v pravie: teoretiko-pravovoq analiz. Avtoref.diss. …kand. yurid. nauk. Spetsiaknost 2.00.01 – teoriya i istoriya prava i gosudarstva; istoriya ucheniy o prave i gosudarstve. Krasnodar, 2011. 27 s. S. 10. (rus)
5. Myznikova E. A. Tseli v pravie: teoretiko-pravovoq analiz. Avtoref.diss. …kand. yurid. nauk. Spetsiaknost 2.00.01 – teoriya i istoriya prava i gosudarstva; istoriya ucheniy o prave i gosudarstve. Krasnodar, 2011. 27 s. S. 10. (rus)
6. Pogrebnoy S.A. O ponimanii i ponyatii grazhdansko-pravovogo regulirovaniya obshchestvennyh otnosheniy//Almanakh tsivilistiki: Sbornik statey. Vyp. 1 / Pod red. R. A. Maydanika. K., 2008. 312 s. S. 68. (rus)
7. Kerimov D. A. Metodologiya prava (predmet, funkcii, problem philosofii prava) / Kerimov D.A.[2-e izd.] M., 2001. 560 s. S. 299–302. (rus)
8. Effektivnost pravovykh norm / V. N. Kudryavtsev, V. I. Nikitinskiy, I. S. Samoshchenko, V. V. Glazyrin. M., 1980. 280 s. S. 150–156. (rus)
9. Nasyrova T. Ya. Teleologicheskoye (tselevoye) tolkovaniye sovetskogo zakonodatelstva. Teoriya i praktika / Nasyrova T. Ya. Kazan, 1988. 144 s. S. 90. (rus)

10. Znamenskiy G.L. Sovershenstvovaniye hozyaystvennogo zakonodatelstva: tsel i sredstva / Znamenskiy G.L. К., 1980. 187 s. S. 57. (rus)
11. Makushin A.A. Sistema rosiyskogo natsionalnogo prava//Gsudarstvo I pravo. 2014. №1. s. 120–124. S. 120. (rus)
12. Radko T.N. Teoriya gosudarstva i prava [Текст] : uchebnik/ Radko T.N.. 2-e izd. M., 2009. 752 s. S. 403. (rus)
13. Laptyev V.V., Shakhmatov V.P. Tseli pravovogo regulirovaniya i sistema prava// Pravovedyeniye. 1976. №4. s. 26–35. S. 29. (rus)
14. 14. Brinchuk M.M. Ekologo-pravovoy mekhanizm: ponyatiye i sushchnost//Ekologicheskoye pravo. 2013. №3. s. 12–19. S. 14. (rus)
15. 15. Krasnova I.O. Zemelnoye pravo. Elementarniy kurs / I.O. Krasnova. M., 2001. 240 s. S. 16. (rus)
16. 16. Miroshnichenko A.M. Kolizii mizh prypysamy zemelnogo ta tsivilnogo zakonodavstva: perspektivy usunennya ta rekomendatcii do vyrishennya//Pravo Ukrainy. 2009. №3. s. 126–131. S. 128. (ukr)
17. 17. Pyrozhok O. Povna degradatciya. Khto psuye ukrainskiy chernozem, available at: https:www.epravda.com.ua/publications/2018/06/4/637294/ (ukr)

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