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THE PLACE OF LAND LAW PRINCIPLES IN UKRAINIAN LAND LAW SYSTEM

Liliya MAK,
postgraduate student at the Department of Labour,
Agricultural and Ecological Law Ivan Franko National University of Lviv

SUMMARY

This article analyzes different doctrinal approaches to the place of legal principles in the system of Ukrainian law and the distinction of land law norms and land law principles taken into account their basic features. The content of the notion "land law principle" is covered by the notion "land law prescription". The application of the term "norm-and-principle" during studying land law principles is unreasonable. Therefore, land law principles are proved to be higher categories in comparison with land law norms. Actually, they are super norms on which legal norms, legal institutions and a separate branch of law are based. The classification of land law principles is made and the main regulatory features of the Ukraine's land law principles are defined.

Key words: land law, norm of land law, principle of land law, land law prescription, legal norm-and-principle.

АННОТАЦИЯ

В статье проанализированы различные доктринальные подходы к месту принципов права в системе права Украины, а также проведено разграничение норм права и принципов права с учетом их основных признаков. Доказано, что содержание понятия принципа земельного права охватывается понятием нормативно-правового предписания земельного права. Установлена необоснованность применения термина «норма-принцип» при исследовании принципов земельного права. При этом определено, что принципы земельного права являются высшими категориями по сравнению с нормами земельного права. Фактически, они являются теми сверхурочными нормами, на которых основываются нормы земельного права, институты земельного права и земельное право как самостоятельная отрасль права. Осуществлена классификация принципов земельного права и определены регулятивные признаки принципов земельного права Украины.

Ключевые слова: земельное право, норма земельного права, принцип земельного права, нормативно-правовое предписание земельного права, норма-принцип.

Introduction. Land law as an independent branch of law besides its subject-matter and methods of legal regulation inherits the principles of land law. However, among the scholars there isn'tan unanimous approach, concerning the place of the principles in the land law system. Some scholars identify land law norms with land law principles and other scholars endure the principles beyond legal norms and object any identity with legal norms both in terms of structure and in terms of determinant impact on the formation of the whole system of land law.

The degree of problem's research. The principles of land law were a subject-matter of separate analysis of V.V. Knush, V.I. Fedorovuch, A.M. Miroshnuchenko, A.I. Ripenko, M.V. Shulha and of many other scholars. However, the notion and the types of land law principles aren't analyzed in these researches. But a legal nature of land law principles and their place in the system of land law haven't been analyzed.

The aim of the article is a definition of the place of land law principles in Ukrainian land law system.

Main body. In order to disclose the content of land law principles we should define, what is the norm of land law and what are the differences between land law norm and land law principle. The norm of land law is an elementary part of the whole system of land law. In legal doctrine, a legal norm is often identified with a legal prescription, which, in fact, is broader and generic term, and legal norm is a specific type of it.

Among the main features of legal prescription it should be defined the following: a) it is an authoritative prescription of general nature; b) it is a legislative execution of requirements as the content of official law sources; c) it is provided by the measures of state enforcement[1, p. 4]. Thus, the positions dealing with the possibility of identifying the content of legal prescription with the content of the legal norm are wrong. In addition, it is unreasonable to confirm that the article of law, essentially, is the legal prescription. In fact, the broadest notion is "legal prescription", narrower notion is "the article of law", and the narrowest notion is "legal norm".

The notion "legal prescription" covers legal declarations, legal principles and legal definitions, that are the part of land law branch [1, p. 4–10]. In this aspect the positions of M.V. Tsvik and O.V. Petrushn are very interesting. In their opinions, the norms-and-principles along with the norms-bases, the constituent norms, the norms-definitions, the norms-presumptions, the norms-constructions, the norms-fictions, should be referred as specialized legal norms. Thus, they constitute the following peculiarities of specialized legal norms: a) they perform subsidiary (additional) function in the legal regulation; b) they are deprived of the traditional logical structure that is characteristic for legal norm; c) they act as a model and a standard of conduct, the content of which is determined by the performed function [2, p. 285–287].

We cannot agree with this point of view due to the necessity of including the norms-and-principles to the specialized legal norms, since the term "norm-and-principle" combines two distinct legal concepts: "norm" and "principle", which should indicate the combination of the features of legal norm and legal principle. On referring to the features of the specialized legal norms, including the norms-and-principles, the scholars pay attention to their performance of the subsidiary function in the legal regulation, deprived of the structure typical for the legal norm, i.e. exclude any similarity of legal norm with legal norm-and-principle. The mentioned position directly contradicts the term "norm-and-principle", which should combine features of legal norm and legal principle.

It is necessary to pay attention to the fact that M.V. Tsvik and O.V. Petrushn are not unambiguous in their interpretation of the specialized legal norms and in the definition of their main functions. For example, they define the norms– and-principles as a pattern of behavior and at the same time, they indicate their subsidiary function. Actually, when we consider the specific phenomenon as a standard, a leading idea, a priori, we mean that it performs major (important) functions.

The land law principles are the basis for creation of land law norm, land law institution and the whole branch of land law. The above mentioned is proved by H. Kelsen, who claims the existence of the fundamental rules (Grundnorm): *"Die vorausgesetzte Grundnorm gibt vor. wie die Normen einer Rechtsordnung erzeugt werden sollen. Das Recht ist nämlich von einer Eigentümlichkeit geprägt: Das Recht regelt seine eigene Erzeugung und zwar in der Weise, dass die eine Rechtsnorm das Verfahren, in dem eine andere Rechtsnorm erzeugt wird, regelt"* [3].

Legal principles, in fact, are the fundamental rules, on which the legal system is based. However, we cannot affirm that they are legal norms in their "pure" meaning because the definition of the legal principles is different from the legal norms and their basic features do not match.

P.M. Rabinovuch indicates that the principles are a variety of social norms, which in very abstract expression formulate some basic requirements for the physical activity of the subjects [4, p. 104]. In this definition, the focus is made on the fundamental nature of the legal principles that they are the guiding ideas and determine the content and direction of the formation and development of the law.

On investigating this issue, it is actual position of Professor P.D. Pulupenko, who delineates the concept of the principles of law and legal principles [5, p. 154]. In his opinion, the principles of law are primary in relation to legal norm, because they determine its essence and content. Moreover, legal principles are secondary in relation to legal norm, because they exist and act within a certain branch of law.

The proposed approach can be applied to the principles of land law. Because the principles of land law arise within a general social law, regardless of the existence of specific law, in which they can be fixed. Instead, legal principles of land law arise and act within law. In fact, they are the norms-and-principles, which are fixed in the certain provisions of legislative acts.

The proponent for this approach is A.M. Kolodiy, who believes that these principles of law as general and social principles are a prerequisite for consolidating them into legal norms-and-principles and a proof of their urgency and necessity for the society [6, p. 42]. The principles of law can exist and act as general and social basis irrespective of their objectification in the relevant legislative act. However, in the case of their formal definition in the legislative act, they acquire the features of legal norms and shall be treated as legal principles. However, it is no sense to reduce the content of legal principles by identifying them with legal norms.

From A.I. Ripenko's point of view, the principles of land law are fundamental mandatory, obligatory provisions and ideas that reflect the essence of their legal norms. In contrast to land law norms, land law principles do not require their legislative consolidation. The principles of land law are higher categories in relation to the legal norms. Therefore it is reasonable to agree with the statement of A.I. Ripenko that to some extent they are "supernorm" [7, p. 17].

In our opinion, the place of the principles among the structural elements of the land law is special. They cannot be clearly attributed to any particular structural element of the branch of law: either land law norm or land law institution.

Analyzing the norms and principles of law, O.F. Skakyn renders their major differences, which are the following: 1) the principles of law are resolved in law, and the legal norms are the rules of conduct, imbued with the principles of law; 2) the principles are the core of the whole law system, and the norms are a system of structural elements with their own structure; 3) in contradiction to the norms the principles of law are abstract and unspecified; 4) the principles of law are general measure of behavior, that do not specify the rights and obligations, and the norms specify the rights and obligations; 5) the principles of law are higher and are above the norm of law; 6) in contradiction to the principles of law the norms of law inherent methods of regulation (permissions, obligations and prohibitions); 7) the principles of law are the starting points during solving certain legal cases, and legal norms are a legal basis within the principles of law in certain legal cases [8]. Thus, the principles of law are a superstructure above the law and used as the basis in the formation of legal norms and legal institutions, including land law.

On studying this issue the position of O.S. Ioffe is relevant. In his opinion: "The notion of legal norm does not overlap the notion of legal principle because legal norm is correlated with legal institution as a small subsection of the system of law, and its fixed principles can spread their effect over the number of institutions or obtain general branch character" [9, p. 46, 51]. For instance, the principle of rational use and land protection will be the basis for the institutions of tenancy, of permanent use, of land ownership, of land protection etc.

Moreover, the principles may be general and legal by their nature and may be the basis for creation a number of branches of law. For example, the principle "the rule of law" should be included to the principles which have had an impact on the formation of the land law as a branch of law. This is reflected with the inclusion of the principle of equality of citizens', legal entities', local communities' and state's land ownership rights to land law principles of Ukraine, as well as the abrogation of the monopoly of state ownership. Thus, human rights have been given a priority in the formation of norms and institutions of land law that demonstrates the sociality of land law as a branch of Ukrainian law.

It is worth noting that there is no unity among the representatives of the European legal doctrine as to the determination of the place of legal principles among other structural elements of the law. As it is mentioned legal principles, legal values, and legal norms are essential parts of the same notion. The definition of a legal principle is very difficult, since sometimes the principles are considered as legal norms, to be general legal norms and to be standards upon which legal rules should be based [10].

As it follows, the principle of law can be considered on two levels: legal norms and basic provisions (standards), based on which legal norms, institutions and the whole legal system are formed. The largest number of legal principles is contained in the Constitution of Ukraine, which is the basis in the formation of the norms of other Ukraine's law branches. The basic Law of Ukraine proclaims the following legal principles, which are by their nature general and legal principles and play a crucial role in the regulation of relations in all spheres of public life, including in land sphere: the principle of the rule of law, the principle of legality, the principle of democratic governance, the principle of presumption of innocence, the principle of public access to environmental information and so on.

The term "principle" usually is interpreted as a rule or theory on which something is based [11]. Having given this definition, we can conclude that the principle is a higher category than legal norm, since legal norm cannot be created by ignoring the principles of law.

Klaus Gunther is a proponent for the position that legal principles are just legal norms, but different from legal

rules, the principles are the norms of general application that do not take into account specific legal facts [12]. Thus, the representatives of the European legal doctrine are proponents for the availability of the principles and norms of law both common and distinctive features. However, none of them proves the identity of these two concepts.

It should be mentioned that land law principles have a regulatory impact on the formation of land law norms. P.D. Pulupenko considers that the system of valid law must exactly conform to the principles of law due to its semantic content. Therefore, if these or other principles of law cease to exist, legal norms, legal institutions and the whole branch of law lose their regulatory impact [5, p. 154].

The normative and regulatory nature of the principles of law are investigated by A.M. Kolodiy, who believes that the principles enshrined in the law become general rules of conduct that they are compulsory and have authoritative character. However, he distinguishes two ways of consolidation of the principles in law: textual and meaningful. Textual method is a direct consolidation them in law, and meaningful-the outputting of the principles of law from the content of legal norms [6, p. 17]. Meaningful method also has a place in land law with the outputting of the principle of the priority of agricultural land use and the principle of purpose-oriented land use from the content of land law norms.

Moreover, the regulatory characteristics of the principles of law are distinguished from the characteristics of legal norms. The mentioned position confirms that it is difficult to regulate certain social relations using only the principles of law. Unlike legal norms, the principles of law regulate social relations from higher positions [6, p. 17]. A.M. Kolodiy is a proponent for a normative and regulatory nature of legal principles. In his opinion, these principles takes the features of legal norms. Thus both norms-and-principles and principles of law are derived from legal norms.

Firstly, the principles exist as general social basic provisions, but with the development of society and the legal consciousness it is necessary to consolidate them into the relevant source of law. Then such social principles are transformed into general legal principles. Legal principles have all features of law: they are legal, regulatory, universal, compulsory, objectively determined, historical, ideological and political categories, their social function is the regulation and protection of social relations; they are separate legal categories that have features that distinguish them from other categories [6, p. 27]. Therefore, the identification of the principles of law with legal norms is inadmissible, because they are two different legal categories. The principles of law are the foundation of the formation of legal norms and of an integral branch of law.

V.V. Knush in his dissertation "On The principles of the Ukrainian land law" drew attention to the regulatory features of the principles of law. He singles out their regulatory features along with their status, philosophical and doctrinal principles' features [13]. Status features of land law principles lie in their basic and fundamental character, which are compulsory and are the basis for the functioning of land law. The principles of land law arise according to the general legal principles of law, but in the process of their creation acquire special features of branch law.

Regulatory features of the Ukraine's land law principles characterize a place of the principles in the system of land law as a regulator of land relations, stipulating the peculiarities of their impact on the legislative process in land law, implementation process (including, the application) of land law norms and law enforcement in the sphere of land relations [13]. However, the principles of land law shouldn't be considered as regulators of social relations. It is correct to assert about their regulatory impact on social relations. Because if we consider the principles of land law as independent regulators of land relations, it will lead to the identification of the contents of the legal principles and legal norms that is unacceptable due to the theory of law.

However, V.V. Knush is not unambiguous in his positions, as he claims that normative and regulatory natures of land law principles are manifested on the one hand, in the regulation of land relations from the higher position than legal norms, on the other hand, the means of this regulation are similar to land law norms' means. Actually, on the one hand, he treats the principles of law as basis, guidelines that are above legal norms, and on the other hand he identifies the content of the principles of law with legal norms on the ground that both land law norms and land law principles are the means of social relations' regulation.

Therefore, the content of the land law principles cannot be reduced to the content of the land law norms. Thus if we speak about the norms-and-principles we must remember that they are not legal norms in their literal sense, as they combine the characteristics of legal norms and of legal principles.

The principles of land legislation are enshrined in Article 5 of the Land Code of Ukraine. Although the name of Article 5 of the Land Code of Ukraine does not correspond to its content, since the fixed principles are the principles of land law, so it is wrong to name them as principles of land legislation. There is non-conformity between the title of the article and its content, as the name of Article 5 of the Land Code of Ukraine "The principles of land legislation" is narrower than its content, namely, the principles of land law on which land law of Ukraine should be established and developed.

However, we cannot assert that some guideline or basis become the principle of law only after their consolidation in the relevant legislation. These principles are social, created by people, because of their social activities. A.M. Miroshnuchenko also affirms that the principle of law cannot be created only by proclamation of certain provisions as guidelines in law [14]. As it had been mentioned, a feature of legal principles, unlike legal norms, is that they exist and operate independently of their objective fixation.

Thus, Article 5 of the Land Code of Ukraine stipulates that the land legislation of Ukraine is based on the following principles: a combination of characteristics of land use as a territorial basis, a natural resource and a basic mean of production; equality of citizens', legal entities', territorial communities' and state' ownership rights to land; state non-interference in the implementation of citizens', legal entities' and territorial communities' rights of possession, use and dispossession of land, except as provided by law; ensuring of rational use and protection of land; ensuring of land law guarantees; priority of ecological safety [15].

This list of land law principles is not exhaustive. Thus V.I. Fedorovuch adds the following principles: 1) civil circulation of lands; 2) payment for land use; 3) state regulation of land relations; 4) priority of agricultural land use; 5) purpose-oriented use of land; 6) stability of land use [16]. With the development of land law and land law principles in particular, these principles have been successfully approved. Land law principles, enshrined in Article 5 of the Land Code of Ukraine, are far from perfect, but their importance for the formation of the whole system of land law is determinant.

According to V.V. Knush, land law principles should be set out in Article 5 of the Land Code of Ukraine in the following succession: a) a combination of characteristics of land use as a territorial basis, a natural resource and a basic mean of production; b) priority of ecological safety; c) ensuring of rational use and protection of land; d) ensuring the equality of the subjects of land relations; d) ensuring of land law guarantees; d) a combination of public and private law principles in land law [13]. In our opinion the formation of land law principles in such order, taking into account the priority value of land as a

basic natural resource and means of production for each person and the whole society.

The approach concerning the formulation of the principle of combination of characteristics of land use as a territorial basis, a natural resource and a basic mean of production is quite interesting. He puts in the forefront the land as a natural resource, that is determined by the priority character of land functions: firstly-ecological function, and secondly-economic and social functions.

In our opinion the fixed land law principles can be classified into two types: the first-there are the principles aimed at protecting human rights as a subject-matter of land relations: a) equality of citizens', legal entities', territorial communities' and state' ownership rights to land; b) state non-interference in the implementation of citizens', legal entities' and territorial communities' rights of possession, use and dispossession of land, except as provided by law; c) ensuring of land law guarantees. The second group of land law principles is constituted from the principles aimed at protecting the land as the main national wealth of Ukraine: a) a combination of characteristics of land use as a territorial basis, a natural resource and a basic mean of production; c) ensuring of rational use and protection of land; d) priority of ecological safety [17, p. 220–223].

A.M. Miroshnuchenko reasonably considers the principles fixed in Article 5 of the Land Code of Ukraine as branch legal principles and interprets each of these principles by its legal nature as the principle of law. In his opinion, among the principles enshrined in Article 5 of the Land Code of Ukraine, there are only two land law principles: the principle of priority of ecological safety and the principle of rational use of land.

We agree with this approach because the principle of a combination of characteristics of land use as a territorial basis, a natural resource and basic means of production is more characteristic for civil law, because the land (territorial basis, basic means of production) is interpreted as real estate, and the principle of use of land as a natural resource is a purely land law principle. The principle of equality of citizens', legal entities', territorial communities' and state' ownership rights to land definitely cannot be attributed to land law principles, because it repeats the constitutional principle of equality. The principle of state non-interference in the implementation of citizens', legal entities' and territorial communities' rights of possession, use and dispossession of land, is the principle of administrative law, since it defines the powers of state authorities in the sphere of land relations and it is a public principle by its nature. A principle of ensuring of land law guarantees is unfortunate, since it combines two terms "ensuring" and "guarantee" which are identical.

The combination of features of other branches of law in land law principles is caused by the fact that the land law was established based on private law (civil law) and public law (administrative law). Therefore, it is not surprising that some of land law principles were taken from other branches of law. Besides, the principle of environmental safety and the principle of rational land use and land protection are the most tangent to the land law of Ukraine. However, it is wrong to assert their only land legal nature, since the principle of ecological safety combines the principles of environmental and land law, which is caused by environmental impact on the land law.

Some of the principles enshrined in Article 5 of the Land Code of Ukraine duplicate the principles of other branches of law. Therefore A.M. Miroshnuchenko stresses that land law principles enshrined in Article 5 of the Land Code of Ukraine, are covered only by the principle of priority of ecological safety, and the principle of rational land use [17, p. 220–223].

There is a debate about the replacement of the principle of purpose-oriented and rational use with the principle of planning and zoning [7, p. 18]. The principle of purpose-oriented and rational use of land is not directly enshrined in Article 5 of the Land Code of Ukraine. It is enshrined as a principle of rational use and land protection. And the content of the principle of purpose-oriented land use derives from the Chapter 4 of the Land Code of Ukraine, which foresees the division of lands into categories according to their purpose.

However, there is the question whether the principle of purpose-oriented land use is distinguished as a separate principle of land law or is covered by the principle of planning and zoning. It is advisable to emphasize that in the future with the rejection of the criterion of division of Ukrainian lands into categories due to their main purpose, the principle of zoning and planning of areas may become the main principle, which basis is not a particular category of land, but the location of land, taking into account all existing rules and restrictions. The same position is proved by the representatives of the land doctrine, who believe that planning tools such as zoning is an alternative to the principle of establishment of the purpose of land [18, p. 18].

Despite all legal debates, this principle holds its place among other land law principles, because there is a necessity to ensure the rational use of land. Purpose-oriented land law use is a prerequisite for their rational use.

A social purpose of land law is clearly reflected in the first group of the principles, aimed at protecting the interests of people as a part of society. The sociality of land law lies in the priority of human rights and interests during legal regulation. However, the last group of principles does not contradict a social purpose of land law. They are also created to protect the individual and for the individual but they function indirect. Thus, with the protection of land as an object of land law, they protect the interests of people (owners, tenants of land) from irrational, harmful and negative influence. This is implemented in the principles of rational use and protection of land and the priority of ecological safety, since their aim is to ensure the most favorable environment for humans.

Conclusions. Summing all it up, the principles of land law should be stressed to be considered and interpreted as one of the types of legal prescription that can exist and act along with another type of legal prescription – legal norm. The identification of the land law principles and norms is forbidden because of the lack of three-element structure characteristic for legal norm and because of their abstract and unspecified character, their fundamental nature (supernorms) and their regulatory impact on the formation of legal norms and because there is no necessity to fix all the principles in the normative instruments.

A key criterion for distinguishing of land law from other branches of law is branch principles, namely the principle of diversity of land ownership and equality of their subjects; the principle of civil circulation of lands; the principle of payment for land use; the principle of state land management; the principle of protection of legal rights and interests of the subjects of land relations; the principle of priority of agricultural land use, the principle of purpose-oriented and rational use of land; the principle of land use stability.

The system of land law principles consists of the principles of textual fixation in the law (Article 5 of Land Code of Ukraine) and the principles which are output from the content of land law norms (the principle of priority of agricultural land use and the principle of purpose-oriented use of land).

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