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## Tracing the Idea of the Social Function in Several Countries

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### Abstract

The idea and regulation of the social function are contained in Law No. 5 of 1960 on Basic Regulations on Agrarian Principles (Basic Agrarian Law–BAL) in order to realize welfare for the people. The concept of the social function was developed by Leon Duguit. The concept of the social function is not an idea that has only developed in Indonesia; it has been applied in several countries, including Brazil, the United States, Colombia, Chile, and Mexico. Based on this, it is interesting to examine the development of the idea of social functions in several countries so that it can then be used as a lesson learned for the development of the idea of social functions by using legal research methods, in the form of normative juridical methods. One of the findings in this article is that the regulation of social functions of the land in Brazil, Colombia Chile, and Mexico is regulated in the constitution, and then further regulated in the Civil Code, which is equivalent to a law. In contrast, when tracing the regulation of social functions in the United States, the term used is social obligation, and the regulation of social obligations is enshrined in jurisprudence. The method of approach used is normative juridical and comparative approach.

**Keywords:** Land Rights; Social Function; Regulations.

### Introduction

In the context of national land law, as fundamentally provided for in Law No. 5 of 1960 on Basic Regulations on Agrarian Principles (Basic Agrarian Law–BAL), the efforts to realize welfare for the people are regulated in Article 6 of the BAL, which contains ideas about the social function of land. The social element tries to prevent accumulation of land by a few people and monopoly over land.<sup>1</sup> Allowing a person unrestricted freedom to obtain land will influence the monopolistic power that can be wielded by individuals and corporations,

<sup>1</sup> Gamal Abdul Nasir and Ade Saptomo, 'Customary Land Tenure Values in Nagari Kayu Tanam, West Sumatra' (2022) 14 *Cosmopolitan Civil Societies*.

leading to social inequality.<sup>2</sup> According to Maria S.W. Sumardjono, “the proper benchmark in making a fair land policy is to provide justice based on needs, not capabilities”.<sup>3</sup>

Duguit suggests that the social function of property rights is known as the social function of property.<sup>4</sup> He contends that property, or the ownership of land rights, should be viewed not as an entitlement but as a societal role. The owner has responsibilities concerning these social roles, meaning he cannot act solely according to his own desires regarding his property; for example, the owner has an obligation to use the land he owns as productive land and to provide services to the community through economic activities. The social function of property has the ultimate goal of social justice is built through the process of managing and allocating physical and human resources to realize equal distribution and economic efficiency.<sup>5</sup> Social function that must be able to maintain a balance between individual interests, social interests, and the interests of the state (to protect the rights of all parties<sup>6</sup>).<sup>7</sup> Land owners need to understand the importance of the social function of land rights.<sup>8</sup>

That social function is also related to social solidarity.<sup>9</sup> According to this

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<sup>2</sup> Bahmid, Junindra Martua and Irda Pratiwi, ‘Restrictions on Land Ownership For Citizens by States Adhering to Pancasila Ideology, Islamism and Communism’ [2023] KnE Social Sciences.

<sup>3</sup> Muh Mahfud and Suteki Suteki, ‘Agrarian Injustice and the Absence of a Maximum Limit of Land Ownership for Legal Entities’ (2023).

<sup>4</sup> Triana Rejekiningsih, ‘Asas Fungsi Sosial Hak Atas Tanah Pada Negara Hukum (Suatu Tinjauan Dari Teori, Yuridis Dan Penerapannya Di Indonesia)’ (2016) 5 Yustisia Jurnal Hukum.

<sup>5</sup> Omar M Farahat, ‘A Devotional Theory of Law: Epistemology and Moral Purpose in Early Islamic Jurisprudence’ (2016) 31 Journal of Law and Religion.

<sup>6</sup> Try Widiyono and Md Zubair Kasem Khan, ‘Legal Certainty in Land Rights Acquisition in Indonesia’s National Land Law’ (2023) 19 Law Reform.[128]. <<https://ejournal.undip.ac.id/index.php/lawreform/article/view/48393>>.

<sup>7</sup> Ryan Rainhard Marchello, Evita Isretno Israhadi and Suparno Suparno, ‘Analysis of Land Disputes Arising from Land Procurement Activities in the Development of Public Facilities And Infrastructure (Review of Law Number 2 of 2012 Concerning Land Acquisition)’ (2023) 2 Edunity : Kajian Ilmu Sosial dan Pendidikan.

<sup>8</sup> Nur Adhim, Sukirno and Muh Afif Mahfud, ‘Actualization of Land Social Function in Resolving Land Conflict in an Urban Area (Land Case Study of Buildings in Ujungberung, Bandung City)’ (2019) 9 International Journal of Innovation, Creativity and Change.

<sup>9</sup> See also: Ruxandra Mălina Petrescu-Mag, Dacina Crina Petrescu and Kinga Olga Reti, ‘My Land Is My Food: Exploring Social Function of Large Land Deals Using Food Security–Land Deals Relation in Five Eastern European Countries’ (2019) 82 Land Use Policy.

interpretation, social functions are seen as tools for ensuring people's welfare.<sup>10</sup> This is corroborated by the claim made in another source that property acquisition is the first step toward enhancing community welfare in development initiatives, since it demonstrates the social purpose of land rights.<sup>11</sup> Contrary to the social function of property, orthodox property theory prioritizes individual rights and the accumulation of wealth, and uses property to the exclusion of the needs of general human social welfare.<sup>12</sup>

The concept of the social function is also known in the ideas of sustainable development. As stated in one source:<sup>13</sup> To balance the various dimensions of sustainable development, LUFs (Land Use Functions) generally are divided into three subcategories including economic function, social function, and ecological function.<sup>14</sup> Adrian Sutedi argues that "the most crucial issue that is most debated is interpreting the meaning of the public interest". The concept of public interest is considered to have weaknesses and has actually experienced a setback compared to previous thinking, for example regarding the idea of compensation and deliberation which, in terms of norms and practice, is considered to be biased.<sup>15</sup> Based on the above description, the idea of social function states that the public interest is considered more important than the individual interests of landowners. However, such thinking is not justified because it contradicts the idea of balance between the public interest and the interests of landowners outlined in the BAL.

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<sup>10</sup> Zalfa Dhea Fairuz Shofi, Rahayu Subekti and Purwono Sungkowo Raharjo, 'Aspek Hukum Ganti Rugi dalam Pengadaan Tanah Untuk Kepentingan Umum' (2022) 5 Jurnal Komunitas Yustisia.

<sup>11</sup> I Gusti Ayu Kade Harry Adhisukmawati, I Gusti Ayu Ketut Rachmi Handayani and Lego Karjoko, 'Validity of Assessment Policy on Land Acquisition for Development in The Public Interest' [2023] International Journal of Educational Research & Social Sciences.

<sup>12</sup> Anthony W Persaud, 'Deepening Counter Institutions: Property, Lands, Relations, and the Economic Future of the Tsilhqot'in' (2022) 40 Environment and Planning D: Society and Space.

<sup>13</sup> Yingnan Zhang and others, 'Spatial Identification of Land Use Functions and Their Tradeoffs/Synergies in China: Implications for Sustainable Land Management' (2019) 107 Ecological Indicators.

<sup>14</sup> De Zhou, Jianchun Xu and Zhulu Lin, 'Conflict or Coordination? Assessing Land Use Multi-Functionalization Using Production-Living-Ecology Analysis' (2017) 577 Science of The Total Environment. [136]. <<https://linkinghub.elsevier.com/retrieve/pii/S004896971632335X>>.

<sup>15</sup> Dewi Kemala Sari, 'Implementation of Land Procurement for Public Interest: Study Construction Bridge in Palu City' [2023] Hang Tuah Law Journal 45 <<https://law-journal.hangtuah.ac.id/index.php/jurnal/article/view/147>>.

In addition, the idea of social functions has also caused debates, including the interpretation of the meaning of the public interest itself, which is considered to have fundamental weaknesses.

The meaning of the state's rights to land is limited by the 'social function of land', where this limitation is a signpost for realizing the constitutional mandate to realize the greatest prosperity of the people.<sup>16</sup> In addition to giving everyone an equal chance to rule the nation, HMN must make sure that those in disadvantaged situations receive different treatment than those in higher social and economic standing. Communities governed by customary law, landless poor people, and cultivators are a few examples of groups who require specific state attention and protection. Their land rights and a fairly equal negotiating stance with capital owners and rulers must be guaranteed by the state.<sup>17</sup>

In another source, a statement is found that supports the above thinking: Instead of viewing the state as a supposedly neutral arbiter of private property relations through land titling, registration, and market regulation, the Social Function Doctrine suggests a much broader role for state action in affirmatively using land policy to promote social change.<sup>18</sup> The concept of social function is not a matter of thought that only develops in Indonesian national law; the concept of social function has been applied in several countries. Although it may be thought that social functions are only applied in non-liberal countries, the concept of social functions is also implicitly applied in the United States, which is known as a country that adheres to liberal ideas. Based on this description, it is interesting to examine the development of the idea of social function in several countries to then be used as a lesson learned for the development of the idea of social function in national land law in the future.

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<sup>16</sup> Article 33 par. (3) of the 1945 Constitution of the Republic of Indonesia.

<sup>17</sup> Arvid Syahbuddin Januar and others, 'Social Function of Land in The Development and Acquisition of Land for Public Interest' (2022) 11 Legal Brief.

<sup>18</sup> Thomas T Ankersen and Thomas Ruppert, 'Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America', *Leon Duguit and the Social Obligation Norm of Property: A Translation and Global Exploration* (2019).

Previous articles discussing the social function of land include those written by King Faisal Sulaiman who found that ignoring the principles of social function in land acquisition creates a crisis of justice for marginalized groups who are victims of development.<sup>19</sup> Then the dissertation written by Lieke Lianadevi Tukgali, she tried to find answers to the social function in land acquisition for the public interest, namely a balance between individual interests, community interests and general interests.<sup>20</sup> Then the article written by Triana Rejekiningsih, the article explores the essence of the principle of the social function of land both in theoretical, juridical and its application in Indonesia.<sup>21</sup>

Considering the findings in previous research above, contribution of the principle of social function to the development of legal science is that this article provides new insight into the principle of social function in other countries, in particular showing that social function thinking has even developed in liberal countries which are known to be freer and uphold individual freedom for personal freedom. The preparation of this article is basically a research activity with legal research methods, in the form of normative juridical methods. Normative legal research is legal research doctrinal/library research or document study because this research was carried out or aimed only at regulations written or other legal materials.<sup>22</sup> Apart from that, this article was also prepared using a comparative approach/comparative legal study which was carried out by finding aspects of similarities (commonalities) between various different legal traditions which can be seen as a research activity aimed at finding the common core of various legal variations because of which better law can be created in such a way in society itself.<sup>23</sup>

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<sup>19</sup> King Faisal Sulaiman, *Polemic of Land Social Function and State Control Rights Post Law Number 12 Year 2012 and Constitutional Court Decision Number 50/PUU-X/2012* (March 2021), Jurnal Konstitusi, Vol. 18, No. 1. DOI: <https://doi.org/10.31078/jk1815>.

<sup>20</sup> Lieke Lianadevi Tukgali, *Social functions on land rights in respect to land procurement for public interest purposes* (FH UI 2010).

<sup>21</sup> Triana Rejekiningsih, *Asas Fungsi Sosial Hak Atas Tanah pada Negara Hukum (Suatu Tinjauan dari Teori, Yuridis dan Penerapannya di Indonesia)*, (2016), Yustisia, Vol. 5, No. 2.

<sup>22</sup> Soerjono Soekanto, dan Sri Mamudji, *Penelitian Hukum Normatif* (PT. Raja Grafindo Persada 2004).[14].

<sup>23</sup> Esin Öricü, *The Enigma of Comparative Law* Variations on a Theme for the Twenty-first Century, (Springer-Science+Business Media, B.V., 2004.

The normative juridical method is studies of the literature that look at secondary data, such as laws and regulations or other legal documents, as well as research findings, study results, and other references that address or connect to the idea of the social function of land rights, are how the normative juridical method is implemented. Comparative study is used to explore thoughts and regulations regarding the social function of land, especially in several countries as follows Brazil, United States of America, Colombia, and Mexico. Secondary data in the form of national regulations on social functions is needed to outline the concept of social functions in Indonesia, which will then be compared with the concept of social function thinking in various countries to identify opportunities for developing social function ideas that accommodate the concepts of liberalist/capitalistic thinking as well as socialism. The selection of these countries was based on Brazil, Colombia, Chile, and Mexico because they are developing nations with similarities to Indonesia. The United States was included as an example of a liberal capitalist nation that has laws addressing the social role of land, whereas Brazil exemplifies a socialist country.

### **Comparison of Basic Concepts of Social Functioning in Several Countries**

#### **Brazil**

In one literature source, it is stated that the concept of social functioning was influenced by the thoughts of Pietro Cogliolo and Enrico Cimbali. Cogliolo and Cimbali constructed social function as a reference for imposing external limits on the exercise of rights.<sup>24</sup> This means that without a social function as a limitation, the unrestricted implementation of rights will actually reduce the legal protection of the rights themselves. This is in contrast to Leon Duguit's idea that social functions are a source of internal limitations. The description of social

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<sup>24</sup> Orlando Alves dos Santos and others, 'Public Property and Social Function: The Destination of Union Lands in the Porto Maravilha Urban Operation' (2020) 12 Urbe.

functions in the perspective of Brazilian law is as follows:<sup>25</sup> a long history of democratic access to land in Brazil through a long process. The focus of democratization began on the rural sector and the issue of agrarian reform, but then also included patterns of development in urban areas that were considered chaotic and unfair. The fundamental tenet of the social function of property is that the duty to use land for the good of society as a whole is a part of private property rights. The owner is obliged to avoid using the property to the detriment of other people. In addition, ownership of property also creates obligations, such as the obligation to cultivate fertile agricultural land or that owners of empty land in urban areas or abandoned buildings can use for housing.

The 1988 Brazilian Constitution contains explicit provisions regarding social functions and ownership rights to housing and land. Fulfillment of social functions in urban areas is realized by approval of the city master plan which is regulated in the City Statute. This City Statute also strengthens the authority of the city government to regulate, encourage and/or counteract urban land market trends, particularly those driven by speculation, in accordance with the criteria of social inclusion and environmental sustainability. In addition, the fulfillment of social functions is demonstrated by the obligation to distribute land or develop empty, underused or unused urban properties, and increase property taxes over time.

In 2002, the Civil Code contained regulations regarding the implementation of the owner's rights – to utilize, enjoy, and transfer property, as well as to reclaim property from those considered to lack rightful claim. These regulations define and restrict the owner's personal rights to the property. This Code stipulates that owners who own a plot of land continuously, in good faith, for more than five years, can have their land rights taken away with compensation paid. However, it is not clear whether compensation will still be paid even if the social function of the property has been neglected.

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<sup>25</sup> Gabriel Ondetti, 'The Social Function of Property, Land Rights and Social Welfare in Brazil' (2016) 50 Land Use Policy.

### United States of America

The description of social functions in the perspective of United States of America's law is outlined as follows:<sup>26</sup> although the idea of the social function of property is not explicitly mentioned in any law in the United States, the most radical manifestation of that social function is demonstrated in the imposition of impact fees under the jurisdiction of cities or localities. Impact fees are compensation for commercial activities that have an impact on the environment, for example. By implementing impact fees, environmental protection and the social dimensions of infrastructure development can be optimized. Impact fees were initiated by local governments as an effort by local governments to maintain the health, safety and welfare of the community. Apart from that, it is also known to exist development taxes were implemented by local government.

In other references it was found that the application of impact fees and development taxes is evidence that the United States is also aware of the impacts of land ownership. This is in line with Léon Duguit's idea of the social function of property to limit the expansion of the owner's subjectivity or individuality. The concepts and practices regarding impact fees and the application of development taxes that must be paid by property owners take into account the impacts resulting from ownership of the property.

### Colombia

The description of social functions in the perspective of Colombian law is outlined as follows:<sup>27</sup> Daniel Bonilla argues that after the 1936 constitutional reform was influenced by Duguit thought. The Colombian Constitution recognizes the social function of property as evidenced by the existence of norms stating that court decisions can invalidate ownership of property obtained through unfair processes

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<sup>26</sup> Wellington Migliari, 'Social Dimensions and Social Function Born in Latin America: Property Limits in the U.S. and the European Union Legal Systems' (2017) 2 *Journal of Comparative Urban and Policy*.

<sup>27</sup> Daniel Bonilla, 'Liberalism and Property in Colombia: Property as a Right and Property as a Social Function' (2019) 80 *Fordham Law Review*.

and detrimental to state finances or social morality. It is also stipulated that when public needs or social interests conflict with individual rights, then private interests must give way to public interests.

The Constitutional Court's case law acknowledges that the Constitution treats property rights as relative, prioritizing collective interests and imposing restrictions on the owner's freedom. If an owner fails to meet their social responsibilities, they risk losing legal protection. The Court has stated that ownership can also be constrained by laws enacted for the public good, including reasons related to health, urban planning, environmental protection, and safety.

The state mandates that private developers allocate portions of their land without charge to city governments for designated purposes, including roads, public spaces, and social services. The court acknowledged that urban reform is aimed at achieving social objectives, such as the redistribution of property. In cases where foreclosed properties are converted into family housing, full cash compensation must be provided to prevent homelessness and enable affected individuals to secure alternative housing. According to the Social Function Doctrine outlined in the Colombian Constitution, property owners are required to manage their property in a manner that not only avoids causing harm but also benefits society.

## Chile

The description of social functions in the Chilean legal perspective is as follows:<sup>28</sup> Property rights to carry out economic activities include rights that can be limited to prevent environmental pollution. Article 19 No. 24 states: Only law can regulate how to obtain property, how to use, enjoy and dispose of it, as well as the limitations and obligations arising from its social function. This social function includes public utility and health and the preservation of the environment. The social function of private property allows governments to expropriate. On the other hand, according to the Chilean constitution, apart from being closely related to

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<sup>28</sup> Michael Blumm Lewis and Matthew Hebert, 'Constitutionalizing the Public Trust Doctrine in Chile' (2022) 52 Environmental Law.

expropriation, social functions are also closely related to restrictions. Expropriation allows the state to take property from a person for public use with payment of compensation, while social function allows the government to impose restrictions and obligations on that property without compensation. Interestingly, the social function doctrine is only defensive and does not impose a firm obligation on the government to carry out regulations.

### **Mexico**

The discussion of social functions in the Mexican legal system is as follows:<sup>29</sup> The 1917 Constitution of Mexico and Germany's Weimar Constitution introduced several social rights that became essential components of individuals' social and economic lives. The constitution restricts property rights by setting limits on the maximum allowable size of property depending on ownership type and crop, as well as outlining the permitted methods of use and establishing specific regulations for different land categories.

In urban environments, all kinds of land are subject to regulations for the benefit of the public. Nevertheless, the Constitution defines a dual ownership system in settlement practices, which includes both individual private ownership and social ownership (*ejidos* and *nucleos agrarios*), resulting in a fragmentation of territorial control and administration. Although the Mexican Constitution does not explicitly refer to the term social function, this concept is clearly suggested and has been elaborated upon in Supreme Court rulings. In relation to civil law, the Federal Civil Code enacted in 2000 incorporates the constitutional idea of the social function of property. Property owners are permitted to utilize their property within the boundaries and conditions outlined by law. The Civil Code restricts the exercise of ownership rights and prohibits the misuse of such rights.

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<sup>29</sup> MC Mirrow, 'The Mexican Civil Code of 1928 and the Social Function of Property in Mexico and Latin America' (2023) 23 Florida International University Legal Studies Research Paper.

### **Concept of the Social Function Principle: Lessons Learned for Indonesia**

The principle of social function in national land law is regulated in Article 6 of the BAL. This Article stipulates that, Every right to land has a social function. In addition, the Elucidation of Article 6 states that Not only property rights but all land rights have a social function. This has been described in the General Elucidation (II point 4). Further, in the Elucidation of Article 20, it is explained that This article mentions the characteristics of right of ownership that distinguish it from other rights. Right of ownership is ‘the strongest and the most extensive’ form of land rights available in Indonesia. The granting of this characteristic does not mean that the right is an absolute, unlimited and inviolable right as an *eigendom* right in its original sense. Such a characterization would clearly contradict the customary-law nature and social function of each right. The words the strongest and the most extensive are intended to distinguish it from right to cultivate, right to build, right of use, and others, i.e., to show that among the land rights that people can have, right of ownership is the strongest and the most extensive form of land rights. The principle of social function has become a fundamental basis for the realization of land that is beneficial for the greatest prosperity of the people in a welfare state. Based on these explanations, it should be noted that: firstly, in the BAL arrangement, social functions are attached to all types of land rights, not just right of ownership; and secondly, the embedding of the strongest and the most extensive nature of land rights does not mean that social functions are not attached to land rights.

In the literature, it is found that the definition of social function has been expanded, which is described as follows: The MPR (Decision of People’s Consultative Assembly) Decree No. IX/MPR/2001 on Agrarian Reform and Management of Natural Resources, which revitalizes the social function and ecology of right over land, broadens the notion of the social function of land. According to this concept, a land use function seeks to strike a balance between the community’s interests and the landowner’s, as well as between the demands of land conservation

and land production objectives.<sup>30</sup> According to this definition, the social function is not only intended to create a balance between the interests of the landowner and the community, but more broadly, to create a balance between the achievement of production and the interests of soil conservation. This last point regarding creating a balance between the achievement of production and soil conservation is referred to as the extension of the definition of social function contained in the BAL. Regulation of this social function is important because land use is currently more attractive if used as an investment instrument. Based on the regulation as stated in this opinion, Extending possession in this way makes sense: property becomes much more useful in terms of investment.<sup>31</sup>

The Elucidation II point (4) of the BAL states that: “This means that whatever land rights a person has, it is not justifiable for him to use his land (or not use it) solely for his personal interests, especially if this causes harm to the community. The use of land must be adapted to its circumstances and the nature of the right, so that it benefits both the welfare and happiness of the owner and benefits the community and the State. However, this provision does not mean that the interests of the individual will be completely suppressed by the interests of the public (the community). The Basic Agrarian Law (BAL) also pays attention to the interests of individuals. The interests of the community and the interests of individuals must balance each other, so that in the end the main objectives will be achieved: prosperity, justice and happiness for the people as a whole (Article 2 par. 3). Then, with regard to its social function, it is reasonable that the land should be well cared for, so that its fertility increases and damage is prevented. The obligation to take care of the land is not only imposed on the owner or holder of the relevant right, but also on every person, legal entity, or institution that has a legal relationship with the land (Article 15). In implementing this provision, the interests of the weaker parties

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<sup>30</sup> Lusia Savitri Diah Candrasari and Lego Karjoko, ‘The Principle of Social Function of Land Cultivation Right in Agritourism Accommodation in Indonesia’ (2018) 5 International Journal of Multicultural and Multireligious Understanding.

<sup>31</sup> Boudewijn RA Bouckaert, *Economic Analysis of Property Law Cases* (2020).

shall be taken into account”. Thus, there are several essential issues regarding the elements of the principle of social function, namely: First, land must be used or not used solely for private interests and the use or non-use of the land shall not cause harm to the community. Second, the use of land must be in accordance with the circumstances and nature of the right. Third, land use must balance individual interests and community interests. Fourth, there is an obligation for right holders and other parties who have a legal relationship with the land to maintain soil fertility and prevent damage.

Furthermore, in Government Regulation No. 20 of 2021 on the Control of Abandoned Areas and Land, Article 4 par. (1) and (2) stipulates that, “Every right holder, Management Right Holder, and Holder of Basic Land Tenure must cultivate, use, utilize, and/or maintain the land owned or controlled” and “The cultivation, use, utilization, and/or maintenance of land as referred to in par. (1) must function socially”. Further, Article 7 par. (1) and (2) letter c stipulates that, “The object of resorting order of Neglected Land as referred to in Article 5 par. (1) includes land under ownership rights, building use rights, business use rights, use rights, Management Rights, and land obtained based on Basic Land Tenure Holder” and “Land under ownership right becomes an object of restoring order of Neglected Land if it is deliberately not used, not utilized, and/or not maintained so that: (a) it is controlled by the community and becomes a village area; (b) it is controlled by other parties continuously for 20 (twenty) years without any legal relationship with the Right Holder; or (c) the social function of the Land Rights is not fulfilled, whether the Right Holder still exists or no longer exists”.

Further, in the Elucidation of Article 4 par. (2) it is elaborated that, “What is meant by ‘social function’ is that every person, legal entity, or agency that has a legal relationship with the land is obliged to use the land by maintaining the land, increasing its fertility, and preventing its destruction so that it is more effective and effective and beneficial for the welfare of the community and the environment”. In addition, the Elucidation of Article 5 par. (1) elaborates that, “What is meant by ‘not maintained’ is the non-implementation of social functions as stipulated in the BAL.

Some of the actions of not maintaining land are as follows: (a) no concern from the (*de facto*) Right Holder, Management Right Holder, or Basic Land Tenure Holder to manage or maintain the land so that the land is neglected; (b) no concern or warning from the *de facto* Right Holder, Management Right Holder, or Basic Land Tenure Holder so that the land is controlled by another party; or (c) no concern from the *de facto* Right Holder, Management Right Holder, or Basic Land Tenure Holder to manage or maintain the land so that it results in environmental damage and/or disasters (landslides, floods, and so on)".

From the description above, the main concerns regarding social functions are: Firstly, there is a narrowing of the scope of attachment of social functions, which in the BAL means that social functions are attached to all types of land rights, while in the Government Regulation, social functions are attached to freehold land. Secondly, there is a shift whereby in the BAL, social functions are attached to land rights, but in the Government Regulation, social functions are attached to freehold land. Thirdly, the meaning of social function is narrowed down to maintaining the land, increasing its fertility, and preventing its destruction.

Regulation regarding the principle of social function is also regulated in Regulation of the Minister of Agrarian Affairs and Spatial Planning No. 18 of 2021 on Procedures for Determining Management Rights and Land Rights, namely in the Appendix: Format of the Decision on Granting Property Rights for Individuals and Legal Entities which is the authority of the Head of the Land Office, the Head of the Regional Office, and the Minister, which states, in the Eleventh Dictum, If the right holder intentionally fails to use, utilize and/or maintain the land as of the signing of this Decree, resulting in the land: (a) being controlled by the community and becoming a village area; (b) being controlled by other parties continuously for 20 (twenty) years without any legal relationship with the right holder; or (c) the social function of land rights is not fulfilled, whether the right holder still exists or does not exist, then the Right of Ownership shall be subject to the provisions on restoring order of abandoned areas and land. In addition, the provision also shows a narrowing of the scope of social functions only in the mechanism of granting land

right of ownerships to individuals or legal entities, and that social functions do not seem to be attached to other types of land rights, such as management rights.

Furthermore, there are several provisions related to the social function, such as in Regulation of the Minister of Agrarian Affairs and Spatial Planning No. 20 of 2021 on Procedures for the Control and Utilization of Abandoned Areas and Land, namely in Article 10 par. (1), (2) letter c, and (3) which stipulates that, “The Objects of Neglected Land Control include: (a) land with the right of ownership; (b) land with the use right to build; (c) land with the right to cultivate; (d) land with the right to use; (e) land with Management Rights; and f. land obtained based on the Basis Land Tenure Holder”; “Land under the ownership right subject to the provision of the Article 10 par. 1 letter a becomes an object of restoring order of Abandoned Land if it is deliberately not used, not utilized, and/or not maintained so that it is controlled by other parties continuously for 20 (twenty) years without any legal relationship with the Right Holder and becomes a village area: (a) is controlled by the community and becomes a village area; (b) is controlled by another party continuously for 20 (twenty) years without any legal relationship with the Right Holder; or (c) the social function of the Land Rights is not fulfilled, whether the Right Holder still exists or no longer exists”, and “The social function of Land Rights as referred to in Article 10 par. (2) letter c requires every person, legal entity, or agency that has a legal relationship with the land to use the land by maintaining the land, increasing its fertility, and preventing its destruction, so that it is more efficient and effective, beneficial for the welfare of the community and the environment, and does not disturb public order, public interest, and public convenience”. Based on the regulation as stated in this Ministerial Regulation, there is a constriction of the scope of social functions only on land right of ownerships.

From the description above, shows several points that are significant, namely: First, that the regulation of social functions over property in Brazil, Colombia Chile, and Mexico is regulated in the constitution and is then further regulated in the Civil Code, which is equivalent to a Law. This is different when tracing the regulation of

social functions in the United States; there, the term used is social obligation, and the regulation of social obligations is enshrined in jurisprudence.

In addition, the concept of social function is embodied in the form of application of the impact fee and development taxes. Regulations regarding the impact fee and development taxes were also initiated by the local government. Carrying out these two procedures is to prevent the consequences of land ownership which may have an impact on the environment and social conditions of the community. Based on this, it can be seen that the idea of the impact of land ownership on the public interest/social function concept is known in the United States, but what is different is that this concept is realized simply in these two fiscal instruments.

In the case of Indonesia, social functions are regulated in the Law, while in the Constitution, the regulation of social functions is not explicitly regulated, but implicitly in Article 33 par. (3) of the 1945 Constitution of the Republic of Indonesia which states that, "The land and water and the natural resources contained therein shall be under the control of the state and shall be used for the greatest prosperity of the people". This shows that in the utilization of the earth, water and natural resources contained therein, while it may be utilized for the benefit of individuals based on certain grounds of authority, whether rights, permits or contracts, the utilization of the earth, water and natural resources contained therein is still sought to be able to contribute to increasing the prosperity of the people in general. In the Indonesian context, this implicit social function arrangement is not easy to apply in the preparation of laws and regulations as a follow-up to the arrangements in the constitution. This is because even though Article 3 par. (1) of Law No. 12 of 2011 on the Formation of Legislation stipulates that, "The 1945 Constitution of the Republic of Indonesia is the basic law in the Legislation".<sup>32</sup> Therefore, this implicit arrangement has the consequence that the term social function is not a common term to be used in the preparation of laws, regulations, and so on that regulate the earth, water, and natural resources contained therein. The term social

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<sup>32</sup> Article 3 par. (1) of Law No. 12 of 2011 on Legislation.

function becomes exclusive to be used only in the realm of land regulation, so that other sectoral arrangements do not recognize this term or adopt the term and idea of social function in their regulatory regime.

Second, on the meaning of social function. In Brazil, the United States, Colombia, Chile and Mexico, the social function is about imposing positive obligations on landowners to ensure that the use of land contributes to the collective good. In addition, the social function also concerns the restriction of property rights to land by the application of laws and regulations necessary to maintain social order. On the other hand, the social function also relates to the obligation for the owner to avoid using the land to the detriment of others, including abusing rights for matters that may cause harm to other parties and society in general. In the Indonesian context, the social function is elaborated in the Elucidation of the Law quite concretely, namely: Firstly, the land must be used or not used solely for private interests and the use or non-use of the land shall not cause any harm to the community. Secondly, the use of land must be in accordance with the circumstances and nature of the right. Thirdly, land use must maintain a balance between individual interests and the interests of the community. Fourthly, there is an obligation for right holders and other parties who have a legal relationship with the land to maintain soil fertility and prevent damage. This elucidation of the BAL is worthy to be the basis of reference in elaborating more clearly what is meant by social function. This is based on the Annex of Law No. 12 of 2011 on Legislation that, "The Elucidation serves as the official interpretation of the legislators on certain norms in the body. Therefore, the elucidation only contains a description of words, phrases, sentences or the equivalent word or foreign terminologies in the norm which may be accompanied by examples. Elucidation as a means to clarify the norms in the body must not result in the obscurity of the norms in question". By looking at the Elucidation II of the BAL, there are elements of the meaning of Indonesia's social function that are similar to those of several countries, especially regarding the idea that the use of land must not cause harm to the community. In terms of restrictions on property rights to land, this is constitutionally enshrined in

Article 28J par. (2) of the 1945 Constitution of the Republic of Indonesia, which stipulates that “In exercising his rights and freedoms, every person shall be subject to restrictions established by law for the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society”.

Furthermore, the exercise of property rights is limited by law with the sole intention of ensuring recognition and respect for the rights and freedoms of others. This shows that implicitly, restrictions on property rights are actually regulated in the Constitution, even if in the more technical implementing regulations, these restrictions are not explicitly stipulated. Further, regarding the imposition of positive obligations, in the Indonesian context, it can be seen from the element that the social function means using the land in accordance with the conditions and nature of the right, in addition to the obligation to maintain and improve the fertility of the land for the owner and other parties who have a legal relationship with the land.

Third, the forms of implementation of social functions in some countries that are new ideas that have not been part of the explanation of social functions in Indonesia are as follows: (a) the obligation of the property owner to contribute, through taxation, to the provision of public services such as law enforcement, schools, and firefighting; and (b) in the event that the owner fails to fulfill its obligation to social functions, the owner loses its right to legal protection. Regarding this taxation contribution, in general, the tax applied to land is in the form of Land and Building Tax (*Pajak Bumi dan Bangunan*, PBB). For now, PBB is part of the Locally Generated Revenue.<sup>33</sup> The use of Locally Generated Revenue will be used to organize government in the region, namely to organize public services.<sup>34</sup> Furthermore, in the case that the owner neglects

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<sup>33</sup> Article 2 par. (2) of Law No. 28 of 2009 on Regional Taxes and Levies. See also Article 1 point 20 of Law No. 1 of 2022 on Financial Relations between the Central and Regional Governments, which states: “Locally Generated Revenue is Regional revenue obtained from regional taxes, regional levies, the results of managing separated regional assets, and other legitimate Locally Generated Revenues in accordance with statutory regulations”.

<sup>34</sup> Article 31 par. (2) of Law No. 23 of 2014 on Local Government.

to fulfill his obligations towards social functions, then his ownership loses legal protection; in essence, this matter has also been applied with the policy on controlling abandoned land as regulated in Government Regulation No. 20 of 2021, whereby any land that no longer fulfills its social functions will be designated as abandoned land and is affirmed as land directly controlled by the State.

### **Conclusion**

To sum up, there are several key points discussed in this paper regarding to social functions in several countries, from both theoretical and practical perspectives, as follows: First, that the regulation of social functions over property in Brazil, Colombia, Chile, and Mexico is regulated in the Constitution and then further regulated in the Civil Code, which is equivalent to a Law. This is different when tracing the regulation of social functions in the United States, where the term used is social obligation, and the regulation of social obligation is contained in jurisprudence. Moreover, in the United States impact fee and the development taxes are understood as arrangements that embody the idea of social function in a radical way. Second, regarding the meaning of the social function itself. It is in Brazil, America, Colombia, Chile, and Mexico that social functioning is about imposing a positive obligation on landowners to ensure that land use contributes to the collective good. In addition, social functions also involve limiting property rights to land through the application of laws and regulations necessary to maintain social order. On the other hand, social functions are also related to the obligation for owners to avoid using land in ways that harm others, including misusing rights for things that can cause harm to other parties and society in general. Third, there are forms of implementation of social functions in several countries that are new ideas that have not been part of the explanation of social functions in Indonesia, namely: (a) the obligation of property owners to contribute, through taxation, to the provision of public services such as law enforcement, schools, and firefighting; and (b) in the event that the owner is negligent in fulfilling his obligations to social functions, then his ownership loses legal protection.

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