International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
Received: 05-09-2020; Accepted: 20-09-2020; Published: 06-10-2020
www.lawjournals.org
Volume 6; Issue 5; 2020; Page No. 311-315

The principle of social function in ownership land rights in Indonesia

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Abstract
This study aims to examine the form of social function of ownership of land rights based on Article 6 of the Basic Agrarian Law and the legal consequences if land ownership / control is not utilized according to the principle of social function based on the Basic Agrarian Law. The research method used in this research uses the normative juridical method, through the statute approach (statute approach) and the case approach (case approach). Based on the research results, it is known that theoretically, the principle of social function of land rights contains recognition of individual interests, social interests and public interests in land. The principle of social function of land rights also gives rights to owners of rights to exercise ownership of land within the boundaries determined by law, taking into account the interests of the community and the state. Ownership of land is not only a right but more than that of a social function. This condition raises the consequences of rights and obligations of land rights holders in utilizing the land, as stated in Article 6 of the Basic Agrarian Law and General Explanation II Number 4 Paragraph 4 of the Basic Agrarian Law. The consequences of neglecting Article 6 of the Basic Agrarian Law by land owners / owners are threatened with sanctions in the form of loss of rights / relinquishment of land rights (rechtsverwerking) as stated in Article 27 Letter a number (2) of the Basic Agrarian Law, Article 34 letter e of the Basic Agrarian Law, and Article 40 letter e of the Basic Agrarian Law.

Keywords: social function, ownership, control, land

1. Introduction
Indonesia is a constitutional state, this provision is guaranteed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). As a constitutional state, Indonesia has an obligation to protect all Indonesian people, including regulating the benefits of all aspects of life so that they are able to provide prosperity for all Indonesian people. The rule of law in Indonesia is based on the concept of a welfare state, which aims for the greatest possible prosperity of the people. This is a constitutional mandate in Article 33 paragraph (3) which states that, "the earth, water and natural resources contained therein are controlled by the state for the greatest prosperity of the people". The aim of the welfare state is to guarantee the rights of citizens in today's modern era, depending on the availability of natural resources. The condition of the availability of natural resources is a determining factor in fulfilling the basic rights of citizens [1].

One of the natural resources that is very important in ensuring prosperity in the Indonesian rule of law in the current era of globalization is land. The existence of land is an important natural resource for the Indonesian state, which is regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA), in Article 1 paragraph (1) states that, "all land within the territory of the State of Indonesia is common land of all Indonesian people". Furthermore, Article 6 UUPA states that, "All rights to land have a social function". This article is then stated as one of the principles of land law which is termed by legal experts as "the principle of social function of land rights". The existence of the principle of social function of land rights in land law is a fundamental basis for the realization of land that is beneficial for the greatest possible benefit of the people in the welfare state [2].

The relationship between the social functions of land rights is firmly established in the provisions of the national land law, law number 5 of 1960 concerning the basic regulations of agrarian principles, namely:

Article 6: All land rights have a social function.

Article 18: For the public interest, including the interests of the nation and the state as well as the common interest of the people, land rights can be revoked, by providing appropriate compensation and according to a manner regulated by law.

The social function of land rights as referred to in Article 6 of the UUPA contains several principles of virtue, among others [3]

1. It is an important statement regarding land rights which briefly formulates the collective or social nature of land rights according to the principles of the National Land Law. The concept of the National Land Law has a religious communalistic nature, which states that all earth, water and space, including the natural resources contained therein in the territory of the Republic of Indonesia, as a gift from God Almighty, are earth, water

[1] Triana Rejekiningsih, Asas Fungsi Sosial Hak Atas Tanah Pada Negara Hukum (Suatu Tinjauan Dari Teori, Yuridis Dan Penerapannya di Indonesia), *Yustisia*. Vol. 5 No. 2 Mei - Agustus 2016. hlm 299

[2] *Ibid*., hlm 300

[3] Perlindungan, A.P, "*Komentar Atas Undang-Undang Pokok Agraria, CET ke.VIII*, Bandung: Mandar Maju, 1998, hlm. 67-68, lihat juga dalam Penjelasan Umum II Angka (4) Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria

and space, the nation. Indonesia and is a national treasure;
2. Land which someone has rights to does not only have a function for those who have rights but also for the whole Indonesian nation. As a consequence, in using the land concerned, it is not only the interests of the individual that are used as guidelines, but also the interests of the community must be remembered and taken into account. It must be endeavored to have a balance between personal and community interests;
3. The social function of land rights obliges those who have the right to use the land concerned according to its circumstances, meaning the condition of the land, its nature and the purpose of granting the right. This is intended so that the land must be properly maintained and the quality of fertility and soil condition is maintained so that the benefits of the land are enjoyed not only by the owner of the land rights but also by other communities. Therefore, the obligation to maintain the land is not only borne by the owner or right holder concerned, but also becomes a burden on any person, legal entity or institution that has a legal relationship with the land.

Based on the substance of Article 6 of the UUPA above, Boli Sabon said that the conception of human relations with land is a form of implementation of the social function of land, namely [4] a. Principles of maintaining land, b. Principles of utilizing land, and c. The principle of doing it yourself. The application related to the social function of land rights in Indonesia for the public interest, as the substance of Article 18 of the UUPA is accommodated in:

1. Law Number 2 of 2012 concerning Land Acquisition for Development for Public Interest;
2. Presidential Regulation Number 71 of 2012 concerning Implementation of Land Acquisition for Development for Public Interest;
3. Regulation of the Head of the National Land Agency Number 5 of 2012 concerning Technical Guidelines for Land Acquisition.

Law Number 2 of 2012 concerning Land Acquisition for Development for Public Interest, provides an understanding that land acquisition is the activity of providing land by providing appropriate and fair compensation to entitled parties. In this law, land acquisition is for the public interest, which means providing land for the implementation of development in order to improve the welfare and prosperity of the nation, state and society while still ensuring the legal interests of the entitled parties. Land procurement for public purposes is carried out by the government. The entitled party is obliged to release their land during the implementation of land acquisition for the public interest after the provision of appropriate and fair compensation or based on a court decision that has obtained permanent legal force. Land which is then built for public interest will become the property of the Government / Regional Government or belong to BUMN if it is used for its interests [5]. As for the implementation of land acquisition for interests based on the provisions of Presidential Regulation Number 71 of 2012 concerning Implementation of Land Acquisition for Development for Interest.

With regard to land ownership and binding social functions as regulated in Article 6 of the UUPA, which states that, "All rights to land have a social function". Also the formulation of the Article is elucidated in the General Elucidation II Number 4 of the UUPA, which is that "any land rights that a person has cannot be justified, that his land will be used or not used solely for his personal interests, especially if it causes harm to the community. The use of land must be adapted to its circumstances and the nature of its rights, so that it benefits both the welfare and happiness that has it as well as benefits the community and the State ".

As it is often found that the facts in the community show that quite a lot of land ownership in Indonesia is not in accordance with Article 6 of the UUPA along with General Explanation II Number 4 of the LoGA above, in this case the author will give an example of several cases that have been decided in court, including: First, the verdict Case Number: 336PK / Pdt / 2015 in the decision of the dispute between the heirs of the late Haji Andi Pakki (the Plaintiffs) and PT. Telekomunikasi Indonesia Tbk (PT. Telkom), Provincial Government of South Sulawesi, Government of Gowa Regency (Defendants) and Head of Makassar City Land Office (Co-Defendant) [6].

The court in resolving land cases related to the rechtsverwerking institution, in which the Defendants have controlled the land object of the case accompanied by proof of rights in the form of Building Use Rights Certificate Number 3505 / Mangasa dated February 15, 1993 covering an area of 184,651 M² in the name of PT. Telkom Tbk, based on the Decree of the Granting of Building Use Rights by the Head of the National Land Agency Number 281 / HGB / BPN / 1992 dated May 4, 1992 with a right length of 20 (twenty) years, which according to the Defendant was obtained based on the Treatise of Land Price Appraisal conducted by The Regional Government of Gowa Regency which had been compensated in 1957, and the handover of land by the Governor of Sulawesi Andi Pangerang Pettarani on 7 April 1960 in connection with the land acquisition of PT. Telkom Tbk, which is located on Jalan Kakatua for the Mattoanging Stadium in Makassar [7].

While on the other hand, the Plaintiffs believe that it is their party who has the right to the land object of the case, because as heir to the late Haji Andi Pakki, who during his lifetime controlled the land which was obtained from the gift of King Gowa to XXXII, namely Andi Idjo Daeng Mattawang Karaeng Lalolang Sultan Muhammad Abdul Kadir Aididin because of the emotional closeness evidenced by the existence of a Certificate of Raja Gowa Ke XXXII dated 5 January 1965 and Girik Tanah (Simana Boetaja) Persil 2a SIII, Kohir 273 CI Mappala Village Number 9 on behalf of Pakki with a total area of 3.95 Ha, but in 1974 1,736 were released. M² by the Panakukkang Plan Authority Land Acquisition Committee for Jalan Panakukkang III to 2.45 Ha. The defendant won the case at the review level.

Second, Decision Number 268 PK / Pdt / 2011, between Muslimin, Wati, and Norma (hereinafter referred to as the Defendant) against Mappe (hereinafter referred to as the Plaintiff) regarding the ownership of 1 (one) parcel of dry

[4] Boli Sabon, *Fungsi Sosial Hak Milik,* Jakarta: Universitas Katolik Indonesia Atma Jaya, 2018. hlm 217

[5] Lihat dalam ketentuan pasal 1dan 11 Undang-Undang Nomor 2 Tahun 2012 Tentang Pengadaan Tanah Untuk Pembanguan Bagi Kepentingan Umum

[6] Lihat dalam Putusan Perkara Nomor: 336PK/Pdt/2015

[7] *Ibid.*

land / housing which has been made into 4 (four) plots rice fields with an area of approximately 1 ha, located in the village / hamlet / village of Awo, Kecamatan Cina, Kabupaten Bone, Province of South Sulawesi. The land dispute won by the plaintiff started from the control of the land for approximately 40 (forty) years by the Defendant, which was previously neglected land owned by the Plaintiff [8]. *Third*, Decision Number 75 / Pdt.G / 2018 / PN Bil, between Abd. Syukur and Nikmatul Izah (Plaintiff) as evidenced by Letter C, against the Pasuruan Regency Government, the Pasuruan Regency Education Office (Defendant), on the dispute won by the defendant regarding the establishment of an elementary school on land owned by the plaintiff, the judge considered good faith in control of land through the rechtsverwerking method of the plaintiffs based on field facts that show no objections from the plaintiff's parents regarding the SDN Semare school building including during rehab and the addition of 3 (three) classrooms [9].

Reflecting on the three decisions that the author describes above shows that the substance and root of the problem is related to the abandonment of a plot of land by the original owner for decades, so that it can be categorized as inconsistent with the principle of land ownership as well as having a social function as regulated in Article 6 of the UUPA. and General explanation II of Number (4) UUPA. Therefore, this study aims to examine what is the form of social function for ownership of land rights based on Article 6 of the Basic Agrarian Law? and What are the implications that arise if freehold land is not utilized according to the principle of social function based on the Basic Agrarian Law?

2. Research Methods

The type of research in this research is normative juridical, namely the process of finding a rule of law, legal principles, and legal doctrines in order to answer the legal issues faced [10]. With regard to the normative legal research method, the technique of collecting legal materials used is document study or literature study. The approach used in this study is a statutory approach and a case approach [11]. namely by studying the meaning of Article 6 of the Basic Agrarian Law and several judges' decisions related to this research, including: a. Decision Number 268 PK / Pdt / 2011, b. Decision Number 75 / Pdt.G / 2018 / PN, and c. Decision on Case Number: 336PK / Pdt / 2015.

3. Discussion

1. Social Function of Land Ownership in Indonesia.

Theoretically, the principle of social function of land rights comes from the theory of the social function of land rights put forward by the French jurist Leon Duguit. Initially this theory emerged as a result of an attempt to oppose the classical liberal concept that was developing at that time. Classical liberal concepts dominate modern political and legal concepts. According to Sheila R. Foster and Daniel Bonilla in their article at the Symposium The Social Function of Property: A Comparative Law Perspective held by Fordham University Scholl of Law in New York [12], states that, the classical liberal conception of ownership of property or land ownership dominates modern legal and political thought. The idea that developed from this concept is that ownership of land rights is a subjective and absolute right. In general, citizens, politicians and academics think that ownership of land rights is an individual right that is limited only by the rights of others and public interests.

Therefore, right holders can use, obtain benefits and use these assets in an appropriate manner, in accordance with the legal framework and not violating the public interest. Moreover, this right is very important for the exercise of autonomy or individual freedom. Ownership of land or property rights is possible and reflects decisions made by individuals regarding their life plans. Land is a physical vehicle that enables people to establish their identity and express their moral commitment. Between individual rights and land have a relationship that is related to one another. As a result, the classical liberal concept of land rights imposes obligations between the state and the individual [13].

This classical liberal concept has been criticized by various theoretical perspectives such as egalitarian liberalism, socialism, and communism. That the classical liberal conception is incomplete or unfair. Critics show, for example, that the classical liberal concept of property ownership obscures the obligations and relations between the subject as owner and society, or that they emphasize the negative consequence that this right is categorized as part of wealth. At the normative level, the opposite of the classical liberal concept of land rights offers a variety of alternatives, from the abolition of private ownership of the means of production through strong government intervention in property rights with the aim of achieving land redistribution [14].

This idea then gave rise to the alternative concept which gave the most confidence and influence in the twentieth century, namely the social function of land rights or known as the social function of property in various literatures found by researchers. The social function of land rights is based on a theory developed by Leon Duguit in 1922. Duguit argues that property, known as ownership of land rights, is not a right but more than a social function. The owner has an obligation with respect to his social function so that he cannot just do what he wants with his property.

He explained again that the owner is obliged to make the land he owns productive and put it for the sake of serving the community through economic activities. The idea of the social function of property or better known as the social function of land rights based on the description of social reality recognizes solidarity as one of its main foundations. Consequently, the state must protect land only if it fulfills its social function. When owners do not act in a manner consistent with their obligations, the state must intervene to encourage or punish them [15]. The social function itself according to the theory is a right in the sense that the power a person has is limited by the interests of his community. In the concept of social functions there are no subjective rights

[8] Lihat dalam Putusan Nomor 268 PK/Pdt/2011
[9] Lihat dalam Putusan Nomor 75/ Pdt.G/2018/PN
[10] Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group. 2016, hlm 59
[11] *Ibid*, hlm. 181.
[12] Sheila Foster and Daniel Bonilla, the Social Function of Property: A Comparative Law Perspective. *Fordham Law Review*, Vol. 80, November 15, 2011. hlm 101
[13] Triana Rejekiningsih, *Op.cit.* hlm 304
[14] Sheila Foster and Daniel Bonilla, *Op.cit.* hlm 102
[15] *Ibid.*, hlm 103

(subjecttief recht), but only social functions exist [16].

In line with the two concepts of social function theory mentioned above, Notonagoro emphasized that property rights which have social functions are actually based on the individual, have an individualistic basis and then attach to them a social nature, whereas if based on Pancasila our law is not based or individualistic, but bi-singular. The interests of society and individuals must balance each other to balance the duality. In other words, within the property rights are contained in the nature of the self and besides that it has a collective character. Thus, it is not the nature of individual private property that has a collective character or relinquishes its individual character [17].

Furthermore, with regard to the function of rights, Carl Wellman can refer to the opinion, which states that the function of a right is to resolve conflicts by giving legal priority to the wishes and decisions of a party over the wishes and decisions of the other party. Legal rights are the allocation of a space of freedom from control to the right owner in order to freely determine effective decisions within the designated area [18]. Carl Wellman's view can be taken to mean that, the function of rights is related to the recognition of personal or individual interests that give the authority to freedom of action. Meanwhile, the function of a legal right is to provide authority related to the ownership of something so that it can be used within the limits determined by law (authority).

Then it can also refer to the opinion of Martin Dixon which states that land is a physical asset and is a right. Land contains a specificity, namely that it must meet the needs of social life, which implies that there is a land law system that functions to ensure the benefit of the land for the common interest. This opinion was strengthened by Maria S.W. Sumardjono who emphasized the existence of land as a social asset and capital asset. As a social asset, land is a means of binding social unity among the community to live and live, while as capital asset, land is a capital factor in development and has grown as a very important economic object as well as a commercial material and an object of speculation [19]. In theory, the principle of social function of land rights contains recognition of individual interests, social interests and public interests in land. The principle of social function of land rights also gives rights to owners of rights to exercise ownership of land within the boundaries determined by law, taking into account the interests of the community and the state. Ownership of land is not only a right but more than that of a social function.

This condition raises the consequences of the rights and obligations of land rights holders in utilizing the land, as stated in Article 6 of the Basic Agrarian Law which says "All rights to land have a social function" and General Explanation II Number 4 Paragraph 4 which reads "Related to their social functions, then it is a natural thing that the land must be properly cared for, in order to increase its fertility and prevent damage. The obligation to maintain this land is borne not only by the owner or right holder concerned, but also on every person, legal entity or institution that has a legal relationship with the land".

2. Implications of land ownership that are not utilized according to the principle of social function.

Disobedience to legal norms certainly has various implications as a result of this non-compliance, as is the term often heard in the world of legal science that law is an order of the ruler (law as a command of the sovereign) accompanied by sanctions [20]. The idea that was coined by John Austin can be used to answer this second problem.

According to Austin, the order to become law must contain three elements, namely: wish, communication, and sanction. The intended will or intention is not just an ordinary intention, but a will that directs someone to behave in order to do something or not do something [21]. Communication in question is communicating the wishes of the lawmakers. Will in Austin's role can become an 'command' only if it is communicated in a language or other form of communication that can be understood by the public (the subject of the command behaves). As for the sanction according to Austin is an evil act (an evil) imposed by a person or party who has a will (sovereign) against other people / parties whose actions are against that will. It is not important whether the will is expressed in a harsh command or with a polite plea. Will can be an order if it brings a threat of harm [22].

In the context of answering the formulation of the second problem, some of the consequences of neglecting Article 6 of the Basic Agrarian Law by land owners / authorities are threatened with sanctions as stated in Article 27 Letter a number (2) of the Basic Agrarian Law, Article 34 letter e of the Basic Agrarian Law, and Article 40 letter e Basic Agrarian Law. These articles regulate the loss of the right of a person or legal entity to ownership / control over land as a result of not carrying out social functions (neglect, not caring for, and not maintaining) the land they own and control..

We can find this from several judges who decided disputes related to land abandonment which ended in the decision to release land rights (rechtsverwerking) from the previous owner, including:

1. Decision dated January 10, 1956 Number 210 / K / Sip / 1055, in which the verdict: "The lawsuit is declared unacceptable because the plaintiffs have kept their questions silent for up to 25 years, must be deemed to have nullified their rights (rechtsverwerking). The Supreme Court is of the opinion that the rice buyer now deserves protection, because it can be assumed that he was in good faith in buying the rice field from an heir of the late rice field owner".
2. Decision Number 239 / K / S ip / 1957 which ruled: "The Supreme Court can approve the opinion of judex facti, namely even though the original plaintiff, who is still a minor, is the one who has the right to the rice field, but the mother who is obliged as guardian to maintain the rights of the the original plaintiff until he became an adult, and in this case it appears that the original plaintiff's mother did not act at all so that the

[16] AP. Parlindungan. 1991. *Komentar atas Undang-Undang Pokok-Pokok Agraria*. Bandung: Mandar Maju hlm 65

[17] Bernhard Limbong. *Hukum Agraria Nasional*. Jakarta: Pustaka Margatetha. 2011. Hlm. 122-123

[18] Nickel, James. *HAM Making Sense of Human Right*. Jakarta: Gramedia Pustaka Utama, 1996. hlm. 19-21

[19] Rubaie, Achmad. *Hukum Pengadaan Tanah untuk Kepentingan Umum*. Malang: Bayumedia. 2007. hlm 1

[20] John Austin, *The Province of Jusriprudence Determined, edited by Wilfrid E. Rumble*, Cambridge: Cambridge University Press, 1995, hlm. 10

[21] John Ausn, *The Province of Jurisprudence Determined*, New York: Noonday Press, 1954, first published in 1832, hlm. 13-14

[22] *Ibid*, hlm. 14

land can be controlled by the original defendant for approximately 18 (eighteen) years, and because of that negligence the basis of the presumption of relinquishing rights (rechtsverwerking) the original plaintiff is deemed to have relinquished the rights to the disputed land".

3. Decision dated 24 September 1958 Number 329 / K / Aip / 1957, which ruled: "Whereas based on prevailing customary practices in the Padang Lawas area, rice fields left for 5 consecutive years are deemed to return to empty land, so that their control by others after it is valid for 5 years, if the land is obtained from the right to give it".
4. Supreme Court Decision dated January 29, 1976 Number 783 K / Sip / 1973. That the appellant plaintiff has occupied the land continuously for 27 years without being challenged. That it is true that the customary law that applies to both parties does not recognize the "verjaring" institution, but the customary law recognizes the "past time influence" institution. Whereas even if the defendant on appeal does not have the right to the land, the fact that the defendant has waited for so long to demand the return of the land raises a legal opinion that they have given up their rights (rechtsverwerking). That the Appellate Plaintiff who has occupied the land for a long time without interference and is acting as the honest owner must be protected by law [23].

4. Conclusion

Based on the results of this study, it is known that theoretically, the principle of social function of land rights contains the recognition of individual interests, social interests and public interests in land. The principle of social function of land rights also gives rights to owners of rights to exercise ownership of land within the boundaries determined by law, taking into account the interests of the community and the state. Ownership of land is not only a right but more than that of a social function. This condition raises the consequences of rights and obligations of land rights holders in utilizing the land, as stated in Article 6 of the Basic Agrarian Law and General Explanation II Number 4 Paragraph 4 of the Basic Agrarian Law. The consequences of neglecting Article 6 of the Basic Agrarian Law by land owners / owners are threatened with sanctions in the form of loss of rights listed in Article 27 Letter a number (2) of the Basic Agrarian Law, Article 34 letter e of the Basic Agrarian Law, and Article 40 letter e of the Basic Law. Agrarian.

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13. Putusan Nomor 268 PK/Pdt/2011
14. Putusan Nomor 75/ Pdt.G/2018/PN

[23] *Ibid*, hlm. 34