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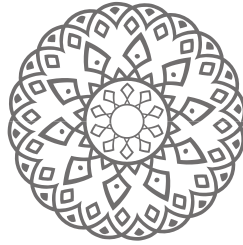
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BUILDING FLATS THROUGH WAQF LAND: LEGAL BREAKTHROUGH AND OBSTACLES

Muhammad Maksum

Abstrak: Disahkannya Undang-Undang Nomor 20 Tahun 2011 Tentang Rumah Susun telah membuat terobosan hukum terutama adanya peluang kolaborasi antara wakaf dan rumah susun. Peluang tersebut memberikan solusi hukum distintif berupa kepemilikan rumah susun yang didasarkan atas hak kepemilikan gedung (SKBG) yang terpisah dari tanah dan pembebanan jaminan utang dalam bentuk fidusia. Di sisi lain, peraturan perundangan tersebut membuka peluang permasalahan hukum terutama terkait hak dan tanggung jawab para pihak dalam kontrak sewa atau kerja sama di antara nazhir wakaf dan pengelola gedung serta tarik ulur kewenangan penyelesaian sengketa antara peradilan umum dan peradilan syariah.

Kata kunci: apartemen, wakaf, hak kepemilikan

Abstract: Legal Breakthrough and Obstacles. The ratification of Law No. 20/2011 regarding flats has led us to a legal breakthrough particularly on the merger opportunity between waqf and flats. Such opportunity offers legal distinctive solution such as owning the flats based on the Right to Ownership of Buildings Title (Sertifikat Kepemilikan Bangunan Gedung/SKBG) and the imposition of collateral in fiduciary. On the other hand, this law also brings out legal issues related to the rights and responsibilities of the parties in the lease contract or the cooperation between the waqf supervisor and the manager of the buildings and the tug-of-war concerning the dispute settlement authority between general and syariah courts.

Keywords: flats, waqf, the right to ownership

ملخص: قررت الجمهورية الإندونيسية القانون رقم ٢٠-٢٠١١ المتعلق بالشقة التي فتحت امكانية استخدام الاموال الوقفية لبناء الشقة. هذا ايجاد الحكم تعرف الحقوق الملكية المتفرقة كالملكية الشقة المنفصلة عن ملكية الارض وضمان الدين بالرهن التسجيلي. وفي ناحية أخرى هذا القانون يسبب مشكلات الحكم التي تتعلق بالحقوق والإلتزامات بين ناظر الوقف و ادارة الشقة في عقود الإجارة والمشاركة بينهما واختلاف اهلية القضاء بين المحكمة الشرعية والوضعية في حل مسائل الأوقاف.

الكلمات المفتاحية: الفندق، السكن، الوقف، حقوق الملكية

Introduction

The increasing population has eventually boosted the demand for housing as a place to live. Without a doubt, house is a primary need where all people cannot live with decent if they do not own one. Everyone has the right to physically and spiritually live in welfare, to own a house, and to have a pleasant and healthy environment, all of which is human basic needs and has a strategic role in shaping the character and personality of our nation as one of the efforts to create Indonesian as fully, self-esteemed, independent, and productive human being (the preamble of Law 20/2011). In the meantime, the state is obliged to protect its citizens and fulfill their rights such as providing healthy, safe, harmonious, and sustainable houses in all regions in Indonesia.

Unfortunately, the availability of land especially in urban areas is getting narrower and indeed more expensive. The lower middle class society is no longer able to reach the price, let alone to buy a house ready for habitation which is certainly more expensive. In other words, there has been a *dislog*, the gap between the demand for housing and the availability of land to build. Besides the unbalance between the population growth and the availability of land, the intensified competition for land for personal and public needs such as industries, offices, public roads, parks and settlements has also arisen. (Makarau, 2011)

Flats are an answer to these gaps (the unbalance and the intensified competition) as they offer land efficiency. With flats, a relatively small amount of land can accommodate a number of housing units. It is certainly different from home site, where one housing unit requires one unit of land. In addition, the idea of flats is an attempt to divert the concept of using land horizontally into optimizing its development vertically (Santoso 2014:402).

Such excitement to involve religious elements such as the utilization of waqf land is in fact stated in the Law No. 16/1985 on the Flats that Government and social or religious agencies can develop such housing to meet special needs (Article 9). Similarly, the Law No. 5/1960 has formerly given an opportunity to use land for religious purposes (Soimin 2008: 64-65). This is in line with the efforts for agrarian reform made by the government through the People's Consultative

Assembly (*Majelis Permusyawaratan Rakyat/MPR*) Decree No. IX/MPR/2001 on Agrarian Reform and Natural Resources Management in which one of its principles is to bring justice in authorization, ownership and use of land (Nurlinda 2009: 97) as affirmed by the Law No. 5/1960 regarding the Basic Regulation of Agrarian, Article 7. The article mentions the ownership and authorization of land beyond limit is banned because it harms the public interest. The ban applies to the rights of ownership and authorization such as cultivation rights title, building rights title, lease rights, and rights for profit sharing. (Supriadi 2009:204). In conclusion, the Law No. 20/2011 on Flats becomes a legal breakthrough to overcome the gaps, but it brings legal constraints at the same.

Waqf as a Legal Breakthrough

The amendment of the Law No. 16/1985 on Housing emerges due to inadequate regulations to manage the change and development of era. Here, the Law No. 20/2011 on Flats creates a new breakthrough supporting the assurance of ownership and tenancy for low-income communities (*Masyarakat Berpenghasilan Rendah/MBR*) and offering opportunities to use state property in the form of land and to utilize waqf land. Basically, the expansion of access to land and buildings is one of efforts to reform land which is mainly aimed at changing the system of authorization and use of land. The efforts for agrarian reform have long been made by Indonesia. The People's Consultative Assembly Decree No. IX/MPR/2001 on Agrarian Reform and Natural Resources Management, for instance, seeks to synergize the agrarian reform programs in various sectors. (Nurlinda, 77-78, 89). The State constitutionally controls the land, soil and its contents (Article 33 of the 1945 Constitution). Such control is considered generic, which means the State is entitled to regulate the ownership, authorization, and use of land. Additionally, according to the Criminal Code, Article 520 and 519, the State has the right to control over land and objects that are not maintained and unowned. (Muljadi and Widjaja 2004:1-2). Under the Law No. 5/1960, Article 1, the right to land in Indonesian territories is said communal, which means the people of Indonesia have the same right to own the land. (Santoso 2008:76). Further, Article 4 stipulates the flats regulations include development,

planning, construction, authorization, ownership, utilization, management, quality improvement, control, institutionalization, duties and authorities, rights and obligations, funding and financing systems, and the role of community.

Waqf Land for Flats

Both the Law No. 16/1985 and the Law No. 20/2011 state the types of land which are authorized to use to build for flats include land with the following status; Freehold Title, Building Rights Title or State-owned Land Use Title, and Right to Use Title. (Article 7 of the Law No. 6/1985 and Article 17 of the Law No. 20/2011)

As the result, the Law No. 20/2011 makes a breakthrough, the possibility of using state property such as land and utilizing waqf land to construct public or private housing flats (article 18). Such use and utilization can only be done by lease/rent or profit sharing. However, the utilization of waqf land must meet several conditions: first, in accordance with the purpose and the declaration of waqf. The management body or parties that will construct flats along with *nazir* (waqf supervisor) should ensure the construction is in line with the purpose of waqf declared by waqif (donor). If, for instance, it does not particularly stay in line with the intended purpose, but for other social purposes, the *nazir* then may make some changes to the purpose. Such changes may happen by submitting an application and written permission from the Indonesian Waqf Board/*Badan Wakaf Indonesia* (The Law No. 20/2011, article 20, paragraph 2). The Board's authority to grant permission to the changes is regulated in the Law No. 41/2004 on Waqf, article 49, letter c. Here, the changes happen due to the emergence of waqf property which can no longer be used as mentioned in the declaration of waqf. Second, the utilization of waqf land after some changes are made are only used for the construction of public housing flats, which means they are intended for lower class community. Third, a rental/lease contract or profit sharing between *nazir* and the flats construction management is based on Islamic principles (Article 20, paragraph 4). The Islamic principles here shall include a contract or agreement and the management of waqf land. Therein, the applied contract or agreement uses Islamic contracts such as *ijârah* (lease), *mudârabah* (profit sharing), *musharakah* (partnership), and other

compatible Sharia contracts. In addition, the Islamic principles must also be applied in the utilization of flats, which means they are built and used for occupancy which does not contradict to the principles.

The rental/lease contract must be made before the competent authorities and must contain some matters concerning the rights and obligations of tenants and landlords, the term of lease, the assurance of landlords to get the right of the land at the end of the lease agreement, and the assurance by the tenants which does not have physical, administrative and legal problems when the right is transferred (Article 21, paragraph 2). Additionally, the rental/lease contract on waqf land also requires a commitment clause to manage flats according to Islamic principles. At last, the rental price on the waqf land or state property is regulated by the Government in order to ensure price stability and affordability to the lower class community, and the contract must be listed in the local land office.

Fourth, The rental/lease contract between *nazīr* and the flats construction management is over sixty (60) years after a written agreement is signed.

The utilization schemes of waqf land for the construction of flats happen in the following steps; First, *nazīr* and the flats construction management make lease contract on the land or base their cooperation on Sharia contract; Second, *nazīr* proposes changes on the purpose of waqf land which is building flats in case it is not in accordance with the purpose of the lease contract. Here the change to the purpose can only be made through the Indonesian Waqf Board. If it is officially agreed, the construction can eventually start. Third, the flats construction process is likely to organize by the construction management itself or to hire another contractor; Fourth, after the construction is completed, the construction management forms governing body that can involve *nazīr* as part of the manager; Fifth, flats are leased or rented to lower class community; Sixth, the income of the lease/rent is used to finance the management including operating and maintenance costs. In the meantime, the income received by *nazīr* is intended for community empowerment. Seventh, after the lease period expires, about sixty years after the lease agreement is signed, the waqf land along with the buildings is handed over to *nazīr* in a condition where disputes and liabilities to any third parties do not arise.

In general, *nazhir* who rents or leases the waqf land for flats construction can be a part of the flats management. The management here covers the operations and maintenance. Practically, the involvement of *nazhir* in the management applies for public, private, and state housing flats (Article 56, paragraph 2). Any other types of housing flats are managed by some management with legal entities authorized by the regent/mayor or governor in Jakarta.

The operational cost management is drawn from the management fee charged to the owners and occupants. The amount of the management fee is measured by the real needs of the operational and maintenance costs. Unlike in private housing flats, the management fee in public and state housing flats is paid by the government (article 57 paragraph 3).

Types of Flats

Flats are multi-storey buildings built in an environment and are divided into sections which are functionally designed in horizontal and vertical direction. Each unit of flats can be owned and used separately, especially for occupancy. Both the Law No. 16/1985 and the Law No. 20/2011 provide the same notion regarding flats. A unit of housing flats means a unit of flats in which its main purpose is used separately from its main function as occupancy, and has a means of transport to a public road.

The laws concerning flats categorize the types of flats into public housing flats, private housing flats, state housing flats, and commercial housing flats. The public housing flats, for instance, are addressed to low-income community, while the private housing flats are organized to meet particular needs. In the meantime, flats owned by the state and serve as a residence to support the implementation of duties by state officials and/or civil servants are considered as state housing flats. Flats intended for business purposes are called commercial housing flats.

In the old law, the flats construction is carried out by state or private enterprises, cooperatives, and NGOs, while in the new law it becomes the responsibility of governments. Basically, the construction of public, private, and state housing flats is in the hand of the government, either

central or regional government. However, for public and private housing flats, non-profits organization and enterprises are allowed to manage. Here, the construction of public housing flats by private sectors will get the ease and/or assistance from the government (Article 15). As for the commercial housing flats, a company or community is welcome to organize the construction. However, according to article 16 paragraph (2), companies that build commercial housing flats are required to provide at least 20% (twenty percent) of the total floor area of the housing. Public housing flats can be built separately from the site where commercial housing flats are based as long as they are not in the same district or city.

Ownership of Flats

The completion of flats regulation also occurs in terms of ownership of flats. The old Law only recognizes one title of ownership, the ownership of flats which is embodied in Freehold Title (*Sertifikat Hak Milik/SHM*). (Supriadi, 245). The Freehold Title is issued by the local land office. In the new Law, besides the Freehold Title, the ownership of building is also regulated in term of the Ownership of Building Title (*Surat Kepemilikan Bangunan Gedung/SKBG*) issued by the local offices that have authorities and responsibilities in construction.

The Freehold Title is a proof of ownership to a unit of flats which is private and separate. Such ownership includes the right to own one-part, one-object, and one-land together, all of which is the inseparable part of the unit. In the Law No. 20/2011 Article 46, the Freehold Title can be made on a unit of flats which own the following titles; Freehold Title, Building Rights Title or State-owned Land Use Title, and Right to Use Title. Further, Article 47 states that the Freehold Title on a unit of flats loads an integral part on a copy of land record and certificate of land area measurement according to the drawing of floor plans which shows the owned unit of flats and the descriptions of part of the right.

Besides the right of ownership, the new Law makes a breakthrough in terms of the right to ownership of buildings outlined in the Right to Ownership of Buildings Title (*Sertifikat Kepemilikan Bangunan Gedung/SKBG*). Such certificate is proof of ownership to a unit of flats which can only be granted to the owner of the unit built on state property

or waqf land. It means the ownership of the building only occur on land owned by the state/region or waqf land. Here, the certificate is an integral and inseparable part consisting of the copy of building plans, a copy of the lease agreement on the land, the drawing of floor plan, and the descriptions of part of the right (Article 48).

The authorization and utilization of flats is in accordance with the ownership status. Article 45 states that the authorization of flats varies. Public housing flats, for example, can be owned and leased, but private housing flats can only happen by rent or lease. In the meantime, state public housings can be owned by lease, rent, or purchase, and commercial housing flats can be owned or leased. Hence, the flats on waqf land can only be leased or rented, not owned.

The ownership of a unit of flats with Freehold Title or Right to Ownership of Buildings Title can be transferred by inheriting or any other agreements such as selling and granting. However, public housing flats controlled by lower-class community through ownership or lease can only be transferred to another party by binding ownership after meeting a holding period for 20 (twenty) years (Article 54). Here, the flats can also be transferred due to resettling as long as a letter of resettlement from the authorities is verified. Nevertheless, such transfer as binding ownership or resettling can only be done to the flats construction management.

Potential Legal Issues

Flats Insurance

Freehold Title and Right to Ownership of Buildings Title can be both used as collateral. Only the imposition of these titles varies. Freehold Title, for example, is established in Encumbrance Right (article 47 paragraph 5) which is approved by proposing a Deed of Encumbrance Right (*Akta Pemberian Hak Tanggungan/APHT*) issued by the Land Deed Official (*Pejabat Pembuat Akta Tanah/PPAT*) and registered at the local land office. In the meantime, the imposition of Right to Ownership of Buildings Title is made under fiduciary (article 48 paragraph 4) issued by a notary and registered in the regional offices, the Ministry of Law and Human Rights. Unlike in the old Law No. 16/1985, the types of collateral in the new law are different. The old Law applies mortgage and fiduciary as the binding assurance. According

to Article 15, the imposition of fiduciary on housing is made under an authentic deed issued by a notary in accordance to the legislation in force, while the imposition of mortgage on housing and land owned by the same party is performed by the Deed Land Official. In other words, the imposition of mortgages is made to flats with Freehold Title and Building Rights Title, while the imposition of fiduciary is applied to flats with Right to Use Title (12-17). However, according to the Law, the mortgage and fiduciary as assurance are both registered at the General Land Office. (Supriadi, 247). Such registration is to provide legal certainty and legal protection, to offer the provision of information to those in need, and to serve good administration. (Parlindungan: 2009, 9)

The selection of collateral imposition in encumbrance right and fiduciary in the new Law concerning flats is in line with the provision of Law No. 5/1960 on the Basic Regulation of Agrarian. It is declared the imposition of encumbrance right is reserved for land with Freehold Title (Article 25), Land Cultivation Rights Title (Article 33), and Building Rights Title (Article 39). The law does not recognize collateral in fiduciary or in mortgage. It means encumbrance right is only applied to moving objects such as land and any other objects that bind them.

Based on the above description, the concept of encumbrance right, fiduciary, and mortgage is different character although they have some similarities. Encumbrance right, for example, is defined as a security interest that is charged on land including all objects it binds as its integral part. As regard to mortgage, this term initially comes from the Civil Code of Dutch. It is consider as right applied to unmoving objects which are made as collateral in settlement (Article 1162). In other words, mortgage only applies to objects which do not move; which means moving objects cannot be established in mortgage (Article 1167). Therefore, mortgage covers broader term as it covers all unmoving objects including a building in which its ownership is separated from the land it stands on. However, the existence of encumbrance right institution in lieu of mortgage which is considered incompatible with the development of Indonesian land law and the credit and economic progress is very helpful. (Supriadi tt: 172-173). Similarly, fiduciary can also be applied as security rights over moving

objects, tangible and intangible, and unmoving objects particularly building which cannot be established under encumbrance right. In fiduciary, the transfer of right of ownership as collateral on the basis of trust happens as long as the object remains in the control of the owner. The three security rights have the same purpose, as collateral to repay certain debt and provide top notch priority for receiving payment of debts from the security object. In addition, such security serves legal executory decision as the court order. Consequently, the insured can directly execute the security if the creditor is unable to pay his debts (Article 15, the Law No. 42/1999 on Fiduciary).

Table 1
List of Security Rights

No	Criteria	Encumbrance Right	Fiduciary	Mortgage
1	Freehold title	X		
2	Land Cultivation Rights Title	X		
3	Building Rights Title	X		
4	Right to Use Title	X		
5	Registered Ships with gross tonnage 20 (twenty) M3 or more			X
6	Aircraft			X
7	The right to land including the buildings, plants, and works that have existed or will exist as an integral part of the land, and belongs to the holders of the right	X		
8	Moving objects, both tangible and intangible		X	
9	Buildings in which their right is separated from the land		X	

The table shows the encumbrance right is used as security rights for land, buildings and objects bound by the land, while the mortgage is intended for moving objects such as ships and aircraft. As regard to fiduciary, it is aimed at moving objects in general and unmoving objects specifically buildings that cannot be established by encumbrance right.

Rights and Responsibilities of the Parties

Article 20 of the Law No. 20/2011 stipulates the utilization of waqf land for the construction of flats can apply the concept of lease or sharing profit under the following Islamic provisions and valid legislations:

The utilization of waqf land for the construction of flats using lease (*ijārah*) agreement shall meet the Islamic provisions as follow: firstly, complying with the terms and conditions of *ijārah*; the compatibility between *ijāb* (offer) and *qabūl* (acceptance), the parties who perform the agreement have the skills and feasibility to do legal actions, the objects of the lease are lease payments and benefits from using of the lease assets. According to a fatwa by the National Sharia Board (*Dewan Syariah Nasional/DSN*), the benefits of objects that become the objects of lease must be secured as they are the existing terms. (DSN-BI: 2003, 62) Secondly, the objects of lease must comply with some terms, ones of which are; they are benefits from using goods and/or services that can be assessed and implemented in the contract; such benefits are legal, can be met, and recognizable to avoid the vagueness (*jabālah*); the characteristics of the benefits can physically be identified; the number of lease objects is determined and payment is agreed; some review on the number of objects are likely to consider due to time, place, and distance. (DSN-BI, 63) Thirdly, the rights and obligations of the contracting parties are mentioned in the contract. The obligations of the lessors, for instance, include providing assets, covering the maintenance costs of the assets, and assuring the objects of the contract are free from any defects. This is what distinguishes Islamic and conventional lease. In conventional lease, the maintenance costs of assets are charged to the lessees or tenants. (Vogel and Hayes: 1998, 191). The obligations of tenants are paying lease, taking care of the lease object and using it according to the contract, paying minor maintenance cost. Here, they are not responsible for any damage to the object which is not due to deliberate and negligence. (DSN-BI, 64). If the object of the lease is damaged due to negligence or intentional misconduct, then the responsibility is theirs. (Al-Maqdisi 2004: 113).

After the lease expires, the tenant must return the object of the lease to the owner. The aforementioned lease schemes are considered more appropriate to take for waqf land considering that the object of

the waqf is safe and its ownership does not move to the tenants. In addition, the object of the waqf land will not experience such risk as lost or diminished when flats do not generate sufficient benefits for the lease payments given to *nazīr* are fixed according to the agreement at the beginning of the contract.

The flats construction contract with sharing profit technique, according to the sharia principles, can be completed through *mudārabah* or *mushārahah* agreement. In *mudārabah*, there are those who provide full capital and other parties act as managers. Both agree to share the profits according to the initial agreement. Notably, the duration of *mudārabah* and its procedures of returning is also determined in the contract. In flats, *mudārib* is responsible for the construction and management of buildings. As the providers of funds, the investors bear the risk of loss as long as the *mudārib* does not neglect or intentionally violate the agreement. If, for instance, the *mudārib* makes an error, he must be responsible. In the same way, if the fund providers do not carry out the agreement, then the *mudārib* may ask for compensation as he pays for the operational costs. (DSN-BI, 44-46) In this *mudārabah* agreement, the manager of the flats (*mudārib*) is not justified to give assurance to the capital from investors or capital in term of land. (The decision of the Majma' al-Fiqh al-Islami)

Regarding *mudārabah*, the fatwa by the National Sharia Board regulates several provisions related to its terms and conditions, capital and other provisions. The terms and conditions to be met, for example, include; the parties involved are those who are competent to take legal actions; *ijāb* (offer) and *qabūl* (acceptance) are stated clearly, which indicates their agreement on the object and the purpose of their contract is clear; the capital can be in cash or building asset as long as the amount of the capital and the number of assets are clear and the capital is not receivable; the profit is the difference between the income and the capital, and the profits should be shared to the two parties according to the agreement and does not only benefit one party; business activities such as the construction and management of flats are in accordance with the provisions of Sharia. Another provision mentions the duration of *mudārabah* can be limited; such contract should not be associated (*mu'allaq*) with the uncertain in the future; and the principle of *mudārabah* contract is trust so compensation cannot be penalized

unless due to negligent or intentional acts that violates the agreement. (DSN-BI, 48).

The flats construction contract on waqf land can also apply cooperation (*musharaka*), in which the contracting parties provide capital and work together. Unlike in *muḍārabah* where one party becomes a financier and another serves as a manager, in *mushāraka* all parties both become financiers and managers. In practice, their portions are not necessarily the same; one party can provide more capital portion and the other gives more work portion.

Generally, the terms and conditions in *muḍārabah* apply to *mushārakah*. However, there are some additional provisions as follow; it is imperative that each party provides capital and work, and becomes a representative in *mushārakah* contract; both parties mutually give authority to manage the assets of *mushārakah* and they are not allowed to invest it for their own interest; the capital is in cash or assets and both parties are not allowed to borrow, lend and donate these assets without each other's consent; the work portion for each party is mentioned and agreed in the contract; the party who gets a larger work portion can ask for extra income; the profit resulted in *mushārakah* is distributed according to the agreed portion and the loss is taken risk by each party based on their respective capital; parties who play a big role can propose the right to earn an excess of revenues if profits exceed the target; the provision for profit sharing is set in the contract; and the operating costs of *mushārakah* is charged to the joint capital. (DSN-BI, 54-56). Any collateral from the parties is not justified as it would shift *mushārakah* contracts into debt (*qardh*) contract. (Elgari: 2003, 26). This means flats investment on waqf land using *mushārakah* contract may possibly suffer losses which consequently harm the land if it is considered as the capital portion from *nazhir*. To this end, it is advisable that the utilization of waqf land for flats in *muḍārabah* and *mushārakah* contracts is reexamined as it can harm the land which may not essentially be sold, mortgaged, and inherited.

Dispute Settlement

The disputes that may occur in flats management include criminal or civil disputes. The criminal dispute settlement, for example, can automatically be filed in the district court. Similarly, the civil disputes concerning flats which are not built on *waqf* land can also be filed

in the district court. It would become a big trouble if the flats built on waqf land apply such Islamic contract as *ijārah* or *mudārabah* and disputes suddenly emerge. Which court is entitled to handle it then? Parties who are entitled to sue may come from individuals, legal entities, community, and government or related agencies. (the Law No. 20/2011, Article 106)

The authority dispute may arise due to different regulations. According to the Law No. 20/2011, the disputes settlement is filed to the general courts (Article 105-2). However, if viewed from the competence of the religious courts as mentioned in article 49, the Law No. 7/1989 regarding the Religious Courts, waqf and Islamic finance has become the absolute competence in the religious courts. Further, Article 49, the Law No. 3/2006 confirms the disputes in Islamic economics are not only limited to disputes in Islamic banking, but also in other Islamic economics sectors including Islamic cooperatives, *Baitul Mal wa Tamwil*/BMT (Islamic Micro-Financing Entities), *Takaful*, Islamic reinsurance, Islamic mutual funds, Islamic debenture, Islamic securities, Islamic finance, Islamic pawnshops, Islamic financial institution for pension funds, and Islamic business.

The authority for the dispute settlement in Islamic economic applies for people who run Islamic economic or persons and legal entities that voluntarily subject themselves to the Islamic law. This means, if *nazhir* and the flats managers apply Islamic principles in their contract, then the contract should meet the Islamic civil elements. To that end, if some disputes arise, its settlement falls under the jurisdiction of religious courts. The principle of submission to Islamic law as stipulated in the Law No. 3/2006 and the Law No. 50/2009 is one of the basis of the absolute authority of religious courts. (Basir: 2009, 96). In fact, since December 2016, Article 13 in the Regulation of the Supreme Court, the Republic of Indonesia No. 14/2016 regarding the Procedures for the Dispute Settlement of the Islamic Economics determines the execution of encumbrance and fiduciary rights based on the Islamic contract and the implementation of the arbitration decision and cancellation are conducted by the religious courts. Here, the old Law on Flats offer a chance to any court to settle disputes in accordance with the provisions which grant absolute authority. In addition, the Law No. 16/1985 Article 14 states: “Any disputes related to ownership

and utilization of house are settled by the judiciary in accordance with the provisions of the legislation in force.”

Besides courts, discussion forum is the first means of dispute settlement to take. Such forum attempts to find common ground and accommodate ideas to seek a solution to the dispute. If it does not give an answer, the parties may settle it through courts (litigation) or out of courts (non-litigation). According to Article 105 the Law No. 20/2011, several alternatives to dispute settlements outside the court include arbitration, consultation, negotiation, mediation, conciliation, and/or expert assessment. The arbitration selected here, for instance, is ad-hoc arbitration. Such arbitration is established by all parties and is considered temporary to handle certain cases. Another arbitration is institutional arbitrations such as the Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia/BANI*) or the National Islamic Board of Arbitration (*Badan Arbitrase Syariah Nasional/Basyarnas*). (Harahap 2006: 104-106). In the meantime, mediation, conciliation and expert assessment are forms of dispute settlement involving a third party to provide feedback, opinions, and suggestions to the parties. Thus, any decisions by the third party are not binding for they are simply opinions or dispute settlement proposal. (Salim: 2003, 154-155). Basically, the options to the dispute settlement forums in civil law are largely determined by the parties. Nevertheless, if the legislation has explicitly appointed certain judicial court, then the decision is absolute. In short, the quickest and easiest way to overcome these disputes is through the Supreme Court’s decision that can establish a competent court or file a judicial review to the Constitutional Court as performed to review the Law No. 21/2008 concerning Islamic Banking.

Conclusion

The merger of waqf and flats law offers legal solution only to the gap between housing needs and the availability of land. The emergence of legal issues as the consequence of this merger indicates the absence of the harmonization of legislation. Practically, the absolute authority by courts to handle Islamic economic cases is stipulated in the Islamic economic laws, Islamic banking laws and other regulations. On the other hand, the flats law which also regulates its dispute settlement does not give authority to the Islamic courts, especially for waqf cases

that fall within the Islamic economic. Such conditions can raise legal uncertainties that must be addressed.[]

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