

# Utilizing the Function of Waqf Land for Development of Flats Building for Public Housing (Study of Cooperation Agreement Between the Indonesian Government with the Executive Board of Nahdlatul Ulama)

Gemala Dewi and Irvan Saputra

Faculty of Law  
 Universitas Indonesia, Depok -16424, Indonesia  
 Email: [gemalafillah@gmail.com](mailto:gemalafillah@gmail.com); [ivankapau@gmail.com](mailto:ivankapau@gmail.com)

## ABSTRACT

This research paper discusses the arrangement and conformity of cooperation agreement between Secretary General of Ministry of Religious Affairs of the Republic of Indonesia, Directorate General of Public Works and Public Housing (PUPR) (on behalf of The Government) and The Executive Board of Nahdlatul Ulama (PBNU, with sharia principles and legislation. This research is a normative descriptive analytical research with qualitative analysis. The result of this research is that on the land of waqf can be constructed a common flats for the Low Income Community (MBR), through the mechanism of rent or cooperation of land use, written in the presence of the competent authority in accordance with the provisions of articles 18, 19,20 and 21 of law number 20 Year 2011 on Flats and Sharia Principles, however the agreement has violated the provisions of Article 21 point (1) of Notary law. Suggestions of this research so that the government an PBNU can form a good apartment management bodies and trustees, so that waqf property can be useful and growing productively, progressing and improving ummah economics.

**Keywords:** *Islamic cooperation agreement, flats, productive Waqf*

## Introduction

Housing is a basic human need that is very influential in the formation of national identity. Constitution of the Republic of Indonesia Year 1945 Article 28H paragraph (1) confirms that every person has the right to have prosperous living spiritually and physicaly, live under a shelter called home, and get a good and healthy living environment is a basic human need and has a very strategic role in the formation of character and personality of the nation, as an effort to develop Indonesian citizens completely, selfesteem, independent and productive. Therefore, the nation is responsible for guaranteeing the fulfillment of the right to residence in the form of a decent and affordable home.

In order to increase efficiency and effectiveness of land for construction of housing and settlement, as well as the effective use of land, especially in areas that are densely populated, it is necessary to do an arrangement on the land which its use can really be felt by the people, one of the solution is by constructing flats, Construction of flats is one alternative to solving the housing needs, especially in urban areas whose population continues to increase. Construction of flats can reduce the use of land, make the city more

spacious with more empty lands which can be allocated as a way to rejuvenate the city for slum areas.

Through religious institutions, development of this economic benefit that has the potential to be developed for the promotion of the general welfare. Seeing the development of coaching the national law in the country of Indonesia, we can see that Islamic law has been a positive influence in the development of national law, one transormasi Islamic law into national law of the land was waqf. Property endowments are managed and developed productively in accordance with Shari'a principles Muslims and the legislation in force, can be useful not only as a place of worship, but the allotment can be more widely, such as to help the poor, abandoned children, orphans, scholarships and others.

Endowments as religious institutions can not simply aim to provide a means of worship and social sharing but also has a strategic function to promote the general welfare regulated in Law No. 41 of 2004 on Waqf (Act 41 of 2004). The regulation of the waqf in the broader substance, which includes fixed objects such as waqf endowments of land and moving objects such as waqf money. With the existence of such arrangements, the institution was not only viewed as a

religious institution to rely on Islamic law alone, but enhanced its position as a formal institution in the National Agrarian law. Everything must not only meet the requirements stipulated and prescribed teaching of Islam alone but also have to meet all kinds of formal requirements specified in the regulations on Endowments. One of the breakthroughs made by the government is making laws that regulate the use and utilization of donated land for the construction of flats, as stated in Article 18 which states that the public housing flats and / or special can be constructed with the use of donated land. Article 20 states that the definition of utilization of donated land for the construction of flats is done by way of lease or pledge cooperation appropriate utilization endowments. If the donated land utilization is not in accordance with the pledge endowments, to do the conversion of the designation after obtaining approval and / or written permission Indonesian Waqf Board (BWI) in accordance with the provisions of the legislation. Changing the waqf land designation can only be made for the construction of public housing flats.

The implementation of the lease or joint use is conducted in accordance with Islamic principles and provisions of the legislation. As a proof of ownership of the apartment units above the property of the state or region in the form of land or land endowments by way of lease, with published Building Ownership Certificate (SKBG) apartment units. In connection with the lease or cooperative construction of flats on the land endowments, Article 21 of the Law towers Compose further stated that "the use and utilization of land for construction of flats as referred to in Article 19 and Article 20 should be done by a written agreement before the competent authority in accordance with the provisions of legislation ", the role of public officials to be important, and the only public official authorized to make an agreement is Notaries.

Related to the mechanism of cooperation or lease of waqf land that until now there is no government regulation published, when it is clear that as mandated by Flats Act, Article 20 (5) that provides further guidance regarding the utilization of donated land for public housing flats is regulated by Government Regulation. This leads to the implementation of the intent and purpose of Article 18 of Law of the Flats. Nahdlatul Ulama as one of the largest Islamic organizations in 2017 has been cooperating flat development on waqf land in Bojonegoro area, where as builders are the Ministry of Public Works and Directorate General of Housing through the Provision of Housing. Funds for the development of this comes from the budget of the fiscal year 2017. The question of this research is that can a common flats for the Low Income Community (MBR) be constructed on the land of waqf, through the mechanism of rent or cooperation of land use? And is the agreement written in the presence of the competent authority in accordance with the provisions of articles 18, 19, 20 and 21 of law number 20 Year 2011 on Flats and Islamic Law? Those question are to be answered on the research.

## RESEARCH METHODS

In carrying out the approach to the problems related to the topic of this study, used normative juridical approach, namely legal research was done by collecting secondary data

through library research and some interviews. The legal provisions is the reference that the draft Civil Code, Act No. 5 of 1960 About the Basic of Agrarian Law, Law No. 41 Year 2004 on Waqf, Act No. 20 of 2011 on the Flats, Law No. 4 of 2004 as amended by Act No. 2 of 2014 On Notary. The primary legal materials in the form of the Cooperation Agreement between the Secretary General of the Ministry of Religious Affairs and the Directorate General of Providing Housing Ministry of Public Works and Public Housing and Nahdlatul Ulama Number 3 Year 2017, Number 03 / MCC / Dr / 2017, No. 072 / MCC / LWP-NU / III / 2017. Secondary legal materials in the form of literature (books), scientific papers, research results, the subject matter of the study. The existence of secondary law is expected to clarify the theoretical and legal opinions relating to the legislation and the relevant provisions of the cooperation agreement object being studied. Tertiary legal materials in the form of a dictionary and a search on the internet, used to supplement and explain the ingredients of primary and secondary law. The qualitative analysis used serves to strengthen research analysis by presenting the data obtained.

## RESEARCH RESULT

### Endowments In Indonesian National Law

Endowments regulated by Law No. 41 Year 2004 on Waqf (hereinafter Act Pursuant to Article 1 paragraph 1 of the Waqf Act, waqf is a legal act of wakif to separate and / or transferring part of their wealth either permanently or for a period of time in accordance with certain interests for purposes of worship and / or the general welfare according to sharia. Endowments have goals utilizing waqf property in accordance with its function, endowments function is to realize the potential economic benefits of property and endowments for the benefit of worship and to promote the general welfare.

### Understanding the Flats.

Flats in Indonesia is regulated in Law Number 20 Year 2011 on the Flats. This law can be said to absorb new material for accommodating the development of various fields of public law, private law and Islamic law, namely the existence of the regulation concerning the construction of flats utilizing waqf land. Based on Article 18 of the Housing Act, it is stated that for public housing flats / special can be built with:

1. Utilization of state property / regions such as land; or
2. Utilization of donated land;

The utilization of donated land for the construction of flats under Article 20 and 21 of the Flats Act, with the following conditions: It must be done by way of lease or pledge of cooperation in accordance with the utilization of endowments; The Implementation of the lease or utilization cooperation carried out by Islamic principles and provisions of the legislation. If the utilization of donated land as outlined in the pledge of waqf is not intended for construction of flats, it is necessary zoning changes waqf land utilization. Utilization of donated land use changes require approval and / or clearance from BWI, where the change applies only to public housing flats.

The cooperation done by a written agreement made before a competent authority in accordance with the legislation, which at least the following:

- a. Rights and obligations of tenants and landowners;
- b. The term of lease of land;
- c. Certainty landowners to obtain the return of the land at the end of the rental agreement; and
- d. Guarantee the tenant against the returned land there are no physical problems, administrative and legal issues.

The term of the land lease granted for 60 (sixty) years since the signing of a written agreement. The determination of the rental rate on land by the government to ensure access to public sarusun selling price for the MBR. Then, the written agreement was listed at the land office. Other provisions concerning the utilization of donated land for flats is regulated by the Government

## DISCUSSION

In setting the cooperation agreement between the Secretary General of the DG MORA PUPR and NU, the contents of the development of this aid implemented by the government with funds sourced from the state budget. Nahdlatul Ulama as nadhzir remain a manager of apartment building completely. The government only helps to build the flats on top of the waqf land.

On the analysis conformity with Islamic principles and legislation, can be explain as follows.

### The Conformity with Islamic principles on contracts (Aqd).

As to the elements of an agreement / contract according to sharia is: The parties that make contract (*al-'aqidan*), in this cooperation agreement that a party is the General Secretariat of the Ministry of Religious Affairs, as the First Party; Directorate General for the Provision of Housing, Ministry of Public Works and Housing of the Republic of Indonesia, as the Second Party; and donated land Nadzhir NU, as the Third Party. When viewed from the terms "competent" by Book I of Article 2 of Law Compilation of Islamic Economics is people who are aged 18 (eighteen) years or have ever been married, cooperation agreements have already qualified competent according to sharia. In the expressions of will of the parties (*shigatul-'aqd*); shows that in agreement already stated premise that "The Parties agree to conduct cooperation agreement on Utilization of Land Endowment for the Development of Housing for Low-Income Communities in Bojonegoro". Thus this second element has been fulfilled.

About the object of the contract (*mahallul-'aqd*), the object of the contract is waqf land located in Jalan A. Yani No. 12, Sukorejo, District of Bojonegoro, Bojonegoro, with proof of ownership of Waqf Certificate No. 2128 / Sukorejo, on behalf of the Nahdlatul Ulama, based in Jakarta, to the

Assembly Deputy Branch ( MWC) NU Bojonegoro. This element was already filled in the cooperation agreement. While on the purpose of the contract (*maudhu 'al-aqd*), the purpose of the contract is mentioned that to realize the fulfillment of appropriate housing for low income people in the form of construction of flats conducted by way of lease. The fourth element is also met.

With the fulfillment of the elements above, the cooperation agreement is valid under sharia law. In the formulation of the clauses in the cooperation agreement, in whole does not violate the provisions of sharia, because one of the main principles of sharia in the agreement is freedom (*al-Hurriyyah*). The parties who want to perform the contract / agreement has the freedom to make arrangements, both in terms of material / content of the agreement determine the implementation and the requirements, an agreement with anyone, and the form of agreement (written or oral), including establishing methods for settling when a dispute. Freedom of contract is justified extent not inconsistent with the provisions of Islamic law. So that a cooperation agreement has been complied with Shariah.

### Conformance with Regulation Legislation.

The suitability cooperation agreements provisions of the Flats Act, then the utilization of donated land for the construction of flats can be explained as follows. Firstly, the agreement is done by way of lease or pledge of cooperation in accordance with the utilization of endowments; This provision is fulfilled with the establishment of a cooperation agreement between the parties, but this is just the cooperation in the form of development aid cooperation flats by the government. Sources of funds, also from the state budget, and the Nahdlatul Ulama remain a manager of the apartment building. In the concept of reciprocal cooperation there is usually obtained by the parties, especially the government, but in this agreement can not be found any achievement cons.

Secondly, the agreement was done by a written agreement made before a competent authority in accordance with the legislation, which at least the following:

- 1) Rights and obligations of tenants and landowners;
- 2) The term of lease of land;
- 3) Certainty landowners to obtain the return of the land at the end of the rental agreement; and
- 4) Guarantee the tenant against the returned land there are no physical problems, administrative and legal issues.

In Article 21 of the Flats Act stated that the written agreement must be made before a competent authority in accordance with laws and regulations. Under Article 15 of the Law Notary can be seen that the authorities made a covenant is a Notary, then such cooperation agreements should be made before a Notary or authentic deed. However, the cooperation agreement is made under the arm, and this is clearly contrary to law. An agreement made in violation of forms, resulted in null and void, then the cooperation agreement is null and void or deemed never existed (un existense). The term of the land lease granted for 60 (sixty) years since the signing of a written agreement. This

provision for the utilization of the lease. The determination of the rental rate on land by the government to ensure access to public flats selling price for the MBR. Lastly, the written agreement was listed at the land office.

## CONCLUSION

Pursuant to Article 18 (b) of the Flats Act, public housing flats can be constructed by utilizing the donated land, which is intended for low-income communities (MBR). In Articles 19 and 21 mentions that the construction of flats were performed on donated land on the basis of land lease agreement or cooperation utilization. Apartment units built on donated land can be sold or leased to the MBR. As proof of ownership granted Certificate of Ownership Building (SKBG).

A cooperation agreement made between the Secretary General of the DG MORA PUPR and NU is agreement on the development of this assistance by the government. In the agreement does not provide for reciprocity or for the results received by the parties. The agreement actually contained only grants or development aid from governments using state funds. Once the building is completed, the government menyerahkan the bunk house management entirely to nazdhir that NU and did not obtain any compensation. A cooperation agreement made between the Secretary General of the DG MORA PUPR and NU do not use the types or forms of Shariah agreement, however, the agreement still allowed because it does not violate the principles of sharia law.

Under the Housing Act, the agreement is in accordance with the provisions of articles 18, 19, 20 and 21 of law number 20 Year 2011 on Flats. However, the agreement has violated the provisions of Article 21 point (1), in which the agreement should be made in writing before the competent authority in accordance with laws and regulations. Officials authorized to make a written agreement is a Notary, this is in accordance with Article 15 (1) of Notary Law. Thus the agreement made between the Secretary General of the DG MORA NU PUPR and the result is null and void or deemed never existed, because it was made between the parties alone or under the hand (informal).

## SUGGESTION

NU as a nazdhir expected to manage the building of flats with either the form of a management board mandate, so that the waqf property can be useful and grown in a productive, forward and improve the economy of the people and to the government, the authors suggest that may issue government regulations regulates the construction of flats by utilizing the donated land, which is in line with the mandate of Article 20 point (5) of the Flats Act, so as to provide clarity regarding the procedures for lease or joint use of donated land in question, and provides certainty of ownership for the MBR on apartment unit on the donated land.

Against the cooperation agreement concluded between the Secretary General of Religious Affairs with the Director General PUPR and NU, the authors suggest that immediately made authentically in front of the competent authority, namely the Notary, according to the Article 21 paragraph (1) of the Flats, which states that "the use of and utilization of donated land for the construction of public housing flats should be done by a written agreement before

the competent authority in accordance with the provisions of the legislation ". It is important that the agreement be legally valid and binding.

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