Criticizing apartment ownership regulation in Indonesia: A study of New South Wales and Netherlands

Putri Purbasari R. Marditia^{(a)*} Andrew D. Hasiholan^(b) Valencia Wijaya^(c)

^(a,b,c) Faculty of Law, Atma Jaya Catholic University, Jakarta, Indonesia

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ABSTRACT

Housing is a basic necessity, yet land availability is limited. This phenomenon urges residents to resort to vertical living and developers to provide vertical housing. The escalation of the vertical housing market has raised potential issues, particularly the use of strata titles in commercial properties advertisement. Strata title is proof of apartment unit ownership which has been widely recognized in the common law system. Meanwhile, Indonesia as a country that adheres to the civil law system regulates apartment ownership based on SHMSRS or Certificate of Apartment Ownership. This practice will result in legal consequences in the ownership status. Hence, this research is carried out by comparing the concept of strata title in the civil law and common law legal systems through a normative juridical methodology based on a statutory and conceptual approach. This study strives to differ strata title and SHMSRS concept to provide a comprehensive knowledge of apartment ownership and prevent legal problems from surfacing in the future.

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Introduction

The common knowledge regarding legal certainty of land ownership in Indonesia has made conventional houses as the favorite residence for Indonesian citizen. As a primary human need, house also functions as a valuable investment property. This value is highly reflected on the annual increasing land price, added value from the development of surrounding areas, and protection of purchasing power against inflation. Therefore, it is not surprising that investment become a reason for Indonesian citizen to purchase properties (Yuniyanti, 2020; Khotimah, 2018; Martin et al., 2019; Sujana et al., 2019).

The rising demand for housing often results to land scarcity. For instance, due to the massive disparity between demographics and availability of land, Jakarta City applies the concept of reclamation through Presidential Regulation Number 52 of 1995 concerning North Coast Reclamation. Reclamation is considered as a solution to reduce population density. However, from a marine science perspective by taking Grydehøj's study of reclamation projects by Macau, Bahrain, Xianmen, New York, Dubai, and Copenhagen, reclamation is an expropriation by transforming marine resources into solid and static assets. Ocean grabbing carried out with poor management will directly result to a socio-ecological crisis in coastal communities, including the decrease in water salinity, sedimentation that threatens marine life, damage to the livelihood of the fisherman profession due to the decreasing number of fishing zones and boat docks, and changes in sea tides, and flow patterns (Susilo, 2021).

In the Indonesian legal literature, proof of apartment ownership is indicated by the existence of SHMSRS or Certificate of Ownership of Flats. SHMSRS as regulated in Article 1 number 11 of Law Number 20 of 2011 concerning Flats (referred to as Law 20/2011) is proof of ownership of an apartment unit on land with property rights, building usage rights, or usage rights both on state land and land management rights (Sanjaya, 2018; Fauziana et al., 2018; Palmer et al., 2018).

* Corresponding author.

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The term apartment itself, as defined by Article 1 Number 1 of Law 20/2011, is a multi-story building built in an environment that is divided into functionally structured parts, both horizontally and vertically and each can be owned and used separately, especially for dwellings equipped with shared parts, shared objects, and shared land. There are several parts in the system of flats, among others, as follows.

- i. Common parts, namely components of flats whose ownership is integrated with flats for shared use, such as foundations, walls which are the main structure, emergency stairs, and corridors;
- ii. Common objects, namely objects that are separated from the flats and are intended for shared use, such as elevators, escalators, electricity networks, electricity networks, gas networks, parks, and parking lots;
- iii. Common land, namely the land where the flats are built on joint rights; and
- iv. Description, namely a description of the boundaries between flat units, shared land, and objects contained in writing and drawings.

Ownership of the apartment unit obtains legal certainty through issuing a Certificate of Ownership of the Flat Unit or SHMSRS, which consists of a copy of the land register book of ownership rights to the apartment unit, the plan of the apartment unit, and a copy of the measurement letter on the shared land. SHMSRS is issued by the district/city land office and can also be used as debt security with mortgage rights charged under Indonesian law (Edelman et al., 2017; Wachsmuth & Weisler, 2018).

The method that is used is normative legal research through Strata Title: A Comparative Study on Apartment Ownership in Civil Law and Common Law Legal Systems. The research was conducted with a library-based approach that focuses on reading and examining primary and secondary legal sources. Primary legal sources are actual sources of law, namely, laws and court decisions and regulations related to Strata Title: A Comparative Study on Apartment Ownership in Civil Law and Common Law Legal Systems. Meanwhile, secondary legal sources are materials that include commentary on the law discovered in legal literatures and journals. The approach used by the author for this legal writing in this study is a statutory approach (the statute approach).

Literature Review

The use of the term strata title by developers in advertising apartments in Indonesia is considered inappropriate. This is due to the use of strata title as a foreign term tends to be a method benefiting irresponsible developers in concealing facts and information related to the ownership status of the apartment unit in question. Developers find it difficult to be transparent in sharing information related to building permits, function-appropriate certificates, apartment land status, and apartment descriptions. Meli Budiastuti from the Jakarta City Public Housing and Housing Area Office argues that consumers are hardly given the clear information regarding the ownership status of the apartment to be purchased, especially if the right to use the building (Hak Guna Bangunan or HGB) for the apartment stands on a land management right (Hak Pengelolaan Lahan or HPL) (Dessiani et al, 2019; Ibrahim et al., 2021).

Concerning the legal consequences, HPL land can only be occupied for 30 years and can be extended for 20 years accompanied by developer recommendations. If the developer disagrees to the extension, the HGB will be invalid. The problem is illustrated in the Mediterania Palace Residence Apartment located in Kemayoran, East Jakarta managed by the developer Agung Podomoro Group which was built on land with HPL status owned by the Ministry of State Secretariat, where the developers attract buyers by using the term 'strata title'. The problem is consumers only acknowledged that the HPL period of their apartment will expire in 2022 prior to making the purchase and discovering the information themselves. In fact, the status of HPL land only allows for obtaining a certificate of ownership of the apartment building unit (Sertifikat Kepemilikan Bangunan Gedung or SKBG) where the value of the building is cheaper than the certificate of ownership of the apartment unit (Sertifikat Hak Milik or SHM). The Secretary of the Director General of Housing at the Ministry of Public Works and Housing, Dadang Rukmana, admitted that commoners who do not understand the difference between SKBG and SHM, where SHM can be encumbered with mortgage rights, while SKBG can only be guaranteed fiduciary (Martin et al, 2019; Soemarwi, 2020).

A similar case was also reflected in 2008 in Indonesian Supreme Court Decision Number 364 PK/Pdt/2016 (Case of Residential Mangga Dua Court Area) where the statement of the plaintiff who was a resident explained that the developer was not transparent in informing that land ownership was HGB over HPL belonging to the Jakarta City Regional Government. Before purchasing the unit, buyer admitted that he was only shown pure HGB. In the Sale and Purchase Binding Agreement (Perjanjian Pengikatan Jual Beli or PPJB) there is no clause explaining the status of land or where the apartment is built, so the developer's statement promising pure HGB is not included in the PPJB. In fact, new buyers acknowledged the status of HGB above HPL when extending the certificate to BPN. Furthermore, the apartment unit owners were declared losing in the review of the Supreme Court Decision so that they had to bear the loss for the extension fee of 4.3 billion which should only have been worth 289 million if the land had pure HGB status. (Lubis & Ramadhani, 2021; Yuwita, 2021; Gomulja & Adji, 2020)

Based on the case mentioned above, we can conclude that the implementation of the regulation regarding ownership status in apartments in Indonesia creates confusion towards Indonesian citizen and leads to the violation of the law which ultimately harms the legal protection for apartment ownership in Indonesia. Through this research, the author attempts to analyze the legal system to provide the basis for analysis and building regulatory models that can be used as recommendations (Sugita et al, 2020; Fauzan, 2021).

The proposed regulatory recommendations will be based on a comprehensive study from 2 countries namely New South Wales and the Netherlands. Why these two countries? The basic and main reason in determining is the applicable legal system. New South

Wales is a country with a common law system, while the Netherlands uses a civil law system, but in practice both countries apply the same provisions in the arrangement of apartment ownership, namely through the strata title. Hence, the discussion will be focused on the mechanism for implementing the regulation of the two countries for a regulatory pattern to be formed and further result in recommendation that is applicable in Indonesia.

Landscape Settings in Indonesia

In the Indonesian legal literature, proof of ownership of the apartment is shown from the existence of SHMSRS or Certificate of Property Rights to The Unit of Flats. SHMSRS as stipulated in Article 1 number 11 of Law No. 20 of 2011 on Flats (hereinafter Law 20/2011) is evidence of ownership of flat units on property rights, building rights, or right to use both on state land and land management rights. Ownership of the flat's units obtained legal certainty through the issuance of a Certificate of ownership, among others:

Certificate of Property rights to Unit Flats or SHMSRS

Consists of a copy of the land register book of property rights to the unit of flats, a floor plan of the unit of flats, and a copy of the measuring letter on the common land. SHMSRS is issued by the district / city land office and can also be used as a debt guarantee by mortgage rights under the provisions of the law in Indonesia. In Government Regulation No. 24 of 1997 on Land Registration is further explained that the process of issuing SHMSRS is no different from the issuance of land rights. As for the procedure of making land books and the expansion of SHMSRS has a slight difference with land registration in general. Whereas in SHMSRS must first be registered on behalf of the developer as the first owner, then can be issued on behalf of the buyer after the purchasing agreement is completed.

The developer has an obligation to prepare several documents for the issuance of SHMSRS in the National Land Agency, namely the proposals for the construction of apartment, the identity of the applicant (individuals/ legal entities), certificates of rights to original land, habitation permits and advising planning. Deed of separation made by the management of the apartment construction, with the attachment of images and descriptions of the contest in vertical and horizontal directions and the value of the proportional comparison. The deed of separation accompanied by the attachment of the image and description of the interview are authorized by the competent Authority (Regent / Mayor).

Certificate of Ownership of Buildings or SKGB

In the case of apartments built on land that belongs to the government or waqf land, the apartment certificate obtained is SKGB. SKGB ownership status is lower than SHM since the land is owned by a third party. The term apartment itself, as defined by Article 1 Number 1 of Law 20/2011, is a multi-story building built in an environment divided into functionally structured parts, both in horizontal and vertical directions and is units that can each be owned and used separately, especially for residential areas equipped with shared parts, things together, and the land together. There are several parts in the apartment system, among others as follows.

- i. Common part, namely the apartment component whose ownership is fused with the apartment for joint use such as foundations, walls that are the main structure, emergency stairs, and corridors;
- ii. Common objects, namely objects that are separate from the apartment and aim for joint use, such as elevators, escalators, power grids, power grids, gas networks, parks, and parking lots;
- iii. Common land, the land on which the apartment was established on common rights; and
- iv. Description or *pertelaan*, which is the description of the boundaries between units of apartment, common ground, and objects contained in a writing and image.

Boedi Harsono in the book Indonesian Agrarian Law states that property rights are the strongest rights that can be owned on land and give authority for unlimited utilization within a certain period of time. But in Article 46 paragraph (1) of Law 20/2011, the right of ownership of an apartment is a separate individual property with a common right to the common part, common objects, and common land. Furthermore, in Article 46 paragraph (2) it is explained that the right to a common part, affirms that the right to the common part, the common object, and the common land as referred to in paragraph (1) is calculated based on the NPP.

Government Regulation No. 24 of 1997 on Land Registration also explains that the process of issuing SHMSRS is no different from issuing land rights. As for the procedure of making land register books and the issuance of SHMSRS has a slight difference with land registration in general. Where in SHMSRS must first be registered on behalf of the developer as the first owner, then can be issued on behalf of the owner of the person after the transaction process.

The developer has an obligation to prepare several documents for the issuance of SHMSRS in the National Land Agency, namely applications accompanied by proposals for the construction of riots, the identity of the applicant (individuals/legal entities), certificates of rights to original land, habitable permits and advising planning. Deed of separation made by the organizer of the construction of the apartment, with the attachment of images and descriptions of the contest in vertical and horizontal directions and the value of the proportional comparison. The deed of separation accompanied by the attachment of the image and description of the interview are authorized by the competent Authority (Regent / Mayor).

Best Practice in New South Wales and Netherlands

The transition of the nature of horizontal life to vertical may become an alternative to be taken by the community to overcome land scarcity. This vertical life is realized by the rise of apartment development in urban areas, especially dense office areas. Developers generally target these vertical properties to the younger generation who need practical housing in big cities or to the older generation as passive income-generating assets in retirement age. However, the issue arises when developers often equate the phrase strata title as evidence of apartment ownership in advertising their property. Strata title is a product of the common law legal system for proof of ownership of apartment units that divide apartment buildings into small units to make it easy to trade in the wider and larger market (Mahdi & Khaddafi, 2020; Hardi et al., 2021; Safitri et al., 2020).

Best Practice: New South Wales

Strata title method is firstly introduced by New South Wales through The Conveyancing (Strata Title) Act 1961 to facilitate proportionally division of an apartment building into two types of ownership; (1) units for individual ownership and (2) common property for collective ownership. The origin of strata title is inseparable from the company title concept New South Wales used to adopt. In the company title concept, buyer bought shares from the developer corporations in exchange for exclusive rights to live in the apartment unit(s). Due to the company title nature has the tendency to align more to the shareholding model rather than the unit ownership, problems occur for developers in terms of commercializing the apartment units and for the apartment owners in the terms of the need for the corporation (i.e. developer) to represent themselves in court.

To divide the apartment into small sub-sub, there needs to be a strata schemes registration represented by individuals or legal entities first in the NSW Land Registry as described in Article 22 paragraph (1) of the Strata Schemes Development Act 2015. Strata schemes contain apartment plans, floor plans along with the area and limits of each unit, as well as other administrative files needed such as application forms and development proposals. After the strata schemes registration process is completed, on the strata schemes the individuals or legal entities can apply for strata subdivisions to divide the ownership of apartment units. When looking at Article 4 paragraph (1) and Article 4B of the Environmental Planning and Assessment Act 1979, the conception of strata subdivisions is nothing but a solution to one whole building into small parts. After the subdivision strata is approved, then the strata title is issued in the name of ownership of each individual in each apartment unit. If the strata title has been held by each individual, the owner of the strata title is given the freedom to transfer the unit, both in the form of buying and selling and renting. As the strata title concept stated by The Conveyancing (Strata Act) 1961, the ownership of apartment units is divided into individual ownership and joint ownership.

Joint ownership is charged to apartment facilities or what is referred to as common property. Strata Community Association defines common property as an area in an apartment that does not categorize as a lot / unit in an apartment whose facilities can be experienced together by the residents of the apartment. Although not definitively explained the meaning of common property, by conducting a normative comparison to Wohnungseigentumsgesetz from Germany, the structural parts of the apartment affecting the stability and existence of apartments (bestand und sicherheit) are common property. Common property, under Section Titles Scheme Management Act No. 8 of 2011, contains three main elements.

- i. The land on which the apartment was established, as an affirmation that the residents of the apartment on the ground floor have no special right to alter the structure or function of the land under the unit of his apartment for personal gain;
- ii. Other parts that are not classified as private lots such as apartment roofs, parking lots, and apartment lobbies; and
- iii. Another additional land purchased by the apartment resident's association itself.

The management of common property is charged to the apartment residents association or termed as Owners Corporation. Owners Corporation is an apartment resident's association consisting of each apartment unit owner and is headed by a chairman elected at the annual meeting of owners' corporation. Owners Corporation has the right to create and enforce the articles of association and household budget of apartments; Owners Corporation has the highest power in maintaining the peace of the apartment. In the concept of Strata Living, it is not uncommon for disputes to arise within the internal residents of the apartment itself. NSW through Article 86, Article 146, and Article 147 of the Strata Management Act 2015 has specifically regulated the resolution of cases in the NSW Civil and Administrative Tribunal as follows.

- i. In the event that one of the citizens does not pay his or her operational dues, the Owners Corporation may request the Tribunal to force the payment;
- ii. If one of the residents violates the agreed household budget, the Owners Corporation may provide a warning letter. If the citizen is indifferent, the Owners Corporation may ask the Tribunal to impose a maximum penalty of AU\$2100.

The Dutch strata title registration system adheres to the concept of unitary system. This concept resembles the concept of a company title that was previously embraced by New South Wales, with the exception of the absence of the purchase of certain corporate shares as a return on the right to occupy apartment units. In this system, the holder of the ownership rights of strata title is held by one individual who will be broken down into several ownership. Unlike New South Wales which recognizes the existence of individual

ownership of each apartment unit, apartment owners are given the freedom to break ownership of the apartment. Here are the main elements contained in the concept of apartment ownership in the Netherlands.

- i. The value of shares or ownership parts of complex buildings and land;
- ii. Exclusive right to use certain parts called private parts. The use of this right is not property and cannot be transferred, hence only an additional share of common ownership; and
- iii. Compulsory membership in the apartment owner's association (Vereniging van Eigenaars (VvE)).

Ownership rights to the apartment arise after the registration of splitsingsakte or main deed in the land registration book in the Netherlands' Cadastre, Land Registry and Mapping Agency which contains (1) apartment complex description, (2) individual unit's descriptions along its purpose, and (3) bylaws. After splitsingsakte successfully registered, the owner of the registered apartment performs a split of ownership. Generally, this split is known by the name of shares (the concept of shares referred to in the Dutch legal system is not the same as the concept of company title applied in the New South Wales legal system) where the value of each apartment owner's shares is specifically regulated in the household budget and splitsingsakte. With regards to Article 113 paragraph (1) of Burgerlijk Wetboek, developers are given the freedom to determine the method of calculating the amount of apartment shares both based on the area and the value of each unit.

The value of shares in apartment ownership in the Netherlands serves to be the ratio of overall apartment ownership in the event that the apartment is seized or repossessed by the state although the practice of the value of the shares also determines the number of votes and operational dues of the apartment. As for the strata title concept in the New South Wales legal system, each apartment is required to register an association or Vereniging van Eigenaars (i.e., Owners Corporation) in Handelsregister, a registration body for Dutch associations, non-governmental organizations, and trading businesses, to manage common property facilities. In the event of a dispute, such as a violation of bylaws, the dispute may be resolved in the District Court. The comparison of landscape of regulations in Indonesia, Netherland and New South Wales can be seen in Table 1.

Table 1: Comparison of Landscape of Regulations in Indonesia, Netherland and New South Wales

Indicator	Indonesian	Netherland	New South Wales
Regulation	Law No. 20 of 2011 on Flats and PP No. 4 of 1998 on Flats	Civil code	The Conveyancing (Strata Title) Act 1961 (telah dicabut oleh Strata Schemes Development Act 2015) dan Community Land Management Act 1989 No 202.
Proof of Ownership	Certificate of Property Rights of Unit Flats (SHMSRS), which contains <ol style="list-style-type: none"> i. Copy of land book of property rights to flat units ii. flat plan, iii. copy of the measuring letter on the ground together 	<i>Splitsingsakte</i> , which contains <ol style="list-style-type: none"> i. Apartment complex description ii. Unit apartment description and its purpose iii. Bylaws 	Strata Title of each apartment unit
Ownership Record	National Land Agency	Netherlands' Cadastre, Land Registry and Mapping Agency	NSW Land Registry Services
Dispute Resolution	District Court	District Court	NSW Civil and Administrative Tribunal

Analysis of Policy Necessity in Indonesia

Based on the description of landscape arrangements in Indonesia related to Strata Title: Study of Flat Ownership Appeal in The Civil Law System and Common Law. Based on the study, the author tried to conduct a comparative study on the implementation of Best

Practice in other countries, namely New South Wales and The Netherlands, to get a comprehensive picture. The results of this comparative study can be used as a basis in determining and analyzing policy needs in Indonesia.

Apartment as arrange in Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration, provide the following definitions:

Land is the surface of the earth both covered in the form of land and water, including space above and below the earth, to a certain extent whose use and utilization is directly or indirectly related to the use and utilization of the earth's surface. State land or land directly controlled by the State is a land without attachment to a right to land, not a waqf land, nor ulayat and / or not an asset of State property / property belonging to the Apartments Unit is apartment unit which purpose mainly used in an immutal manner with the main function as a place of residence and as a connector to public roads.

The next arrangement is related to ownership of apartment units in evidence with the existence of SHM Sarusun if the apartments are established on land with property rights, HGB, or Right of Use. As for apartments built on state/regional property in the form of land or waqf land by rent as evidenced by SKBG Sarusun. Based on the regulation, it is occurred why Indonesia acknowledged 2 signs of ownership and / or control of apartment, since it lies on the basis of different regulations related to land rights attached to the land, so that it resulted in the emergence of a level / hierarchy in property rights and / or the right to control apartment is a diverse land.

The arrangement of the level / hierarchy of property rights and / or the right to control this diverse apartment in its implementation creates a loophole on the mechanism of legal certainty over protection enabling legal smuggling by certain parties, as in the case example described earlier. An uneven public on the level/hierarchical scheme of arrangement in property rights and/or the right to control apartment and the lack of socialization related to regulatory mechanisms becomes the reason. Therefore, a new regulatory pattern is needed related to the regulation of levels / hierarchical property rights and / or the right to control apartment.

Regulatory Model Recommendations

Proof of Ownership Arrangement, as a State that adheres to the land registration publication system in Indonesia that implements the negative publication system, is a publication system used to protect the real rights holder, so that the rights holder will always be able to reclaim his rights even though they have been registered under different name. In a negative publication system, the state only passively accepts what is stated by the party who will register the land, hence at any time it can be sued by the party who believes to own a right to the land. The regulation related to proof of ownership is the main basis. In the Best Practice is stated that New South Wales regulates related systems that are applied to apartment facilities or common property. Strata Community Association defines common property as an area in an apartment that does not categorize as a lot / unit in an apartment whose facilities can be used collectively by apartment residents. Although not explained definitively the meaning of common property, through normative comparison, the structural parts of the apartment affecting the stability and existence of the apartment (bestand und sicherheit) are common property, common property, contains three main elements.

- i. The land on which the apartment was built, as an affirmation that the residents of the apartment on the ground floor have no special right to change the structure or function of the land under the unit of his apartment for personal advantages;
- ii. Other parts that are not classified as private lots such as apartment roofs, parking lots, and apartment lobbies; and
- iii. Another additional land purchased by the apartment resident's association itself.

Recognizing the existence of individual ownership of each apartment unit, apartment owners are given the freedom to separate the ownership of the apartment. Here are the main elements contained in the concept of apartment ownership:

- i. The value of shares or ownership parts of complex buildings and land;
- ii. Exclusive right to use certain parts called private parts. The use of this right is not ownership rights and cannot be transferred, thus it is only an additional to the common property; and
- iii. Membership is compulsory in the apartment owners' association (VvE).

The practice in New South Wales is applicable in Indonesia. Recognition of individual ownership of each apartment unit, apartment owners are given the rights and freedom to separate ownership of the apartment without being affected by the characteristics of land rights above it. Hence, the regulation of apartment ownership proof is nothing more than a strata title related regulation, which will provide a simpler understanding which means it will better guarantee the implementation of legal protection related to the regulation and enforcement of law proof of apartment ownership.

The regulation regarding ownership registration, considering that Indonesia adheres to the land registration publication system in Indonesia which adheres to a negative publication system that is a publication system used to protect the actual rights holder, so that the rights holder will always be able to reclaim his rights even though they have been registered in the name of others. Thus, the concept of strata title should be formed in the legal system where each apartment is required to register into the relevant authority.

Resolving disputes based on the law concerning flats, Article 105 stipulates that the resolution of disputes in the field of flats must first be pursued through alternative dispute resolution, such as arbitration, consultation, negotiation, conciliation, and/or expert judgment in accordance with the laws and regulations. However, in the practices, many parties still directly pursue litigation to resolve the dispute, this is because alternative dispute resolution is viewed to be less accommodative and non-enforceable. In conclusion, it is necessary to provide regulations that can facilitate the mechanism of alternative dispute resolution that is enforceable between the parties to the dispute.

Conclusions

As reflected in the practices regarding the complicated status of ownership in apartments in Indonesia, we can conclude that it has caused confusion and created loopholes for violation of the law that ultimately result into the lack of legal protection and legal certainty of apartment ownership in Indonesia. Hence, the author attempts to provide a comprehensive and critical description to the legal system which will be the basis for analysis and to build a regulatory model that can contribute to the future recommendations. Consequently, recommendation for the regulatory model in question will focus on: (1) Proof of ownership regulation; (2) Ownership registration mechanism; and (3) Dispute resolution.

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Data Availability Statement: The data presented in this study are available on request from the corresponding author. The data are not publicly available due to privacy.

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