



RECONCILING THE CONCEPT OF PRIVATE LEASE UNDER MALAYSIAN LAND LAW WITH THE CONCEPT OF AL-IJARAH UNDER THE SHARIAH IN WAQF LAND DEVELOPMENT

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ONLINE ROUNDTABLE DISCUSSION
HARMONISATION OF SHARIAH AND LAW:
ISSUES AND CHALLENGES
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OBJECTIVE OF PAPER

To see whether the concept of private lease under the National Land Code 2020 and the concept of *al-Ijarah* under the Shariah are compatible and suitable for application in the context of Waqf land development



BACKGROUND

CURRENT PRACTICE

Current housing development projects on Waqf land:

- Property built on Waqf land is **leased** to the lessee for 99 years. (Wakaf Seetee Aisah in Penang)
- Lease of property created through Form 15A (By virtue of Section 221) of the National Land Code
- The State Islamic Religious Authority (as *Mutawwali*), developer and lessee enters into a tripartite **lease agreement**
- After period of 99 years end, lessee **must return property** to the SIRC.

COMPARISON BETWEEN LEASE UNDER NLC & AL-IJARAH

MATTER	PRIVATE LEASE UNDER NLC	CONCEPT OF IJARAH UNDER SHARIAH LAW
Concept of ownership	<ul style="list-style-type: none"> • Lessee does not have ownership of the property. Name is registered on the IDT as lessee only. • Right to possess the land dependent on duration of lease. 	<ul style="list-style-type: none"> • Lessee has no right over the leased land. Lease is created over the usufruct. • Right to possess and benefit from usufruct dependent on agreement between parties. Income from the lease belongs to the <i>mawqūf 'alayhi</i>.
Parties to transaction	Transaction between the owner of the land (lessor) and the lessee.	Transaction between the <i>Wakif</i> , <i>mutawalli</i> or <i>nazir</i> and the lessee.
Restrictions to grant lease	<p>Section 225(2) of NLC:</p> <p>No lease or tenancy may be granted to two or more persons or bodies.</p>	No restriction as to number.

COMPARISON BETWEEN LEASE UNDER NLC & AL-IJARAH

MATTER	PRIVATE LEASE UNDER NLC	CONCEPT OF IJARAH UNDER SHARIAH LAW
Duration of lease	Section 221 (3) of NLC: The maximum term: (i) 99 years if it relates to the whole of any alienated land (ii) 30 years if relates to part of the land	No maximum prescribed period. However, jurists have imposed duration based on nature of the property/ <i>manfa'ah</i> .
Right of Lessee	Dependent on agreement between lessor and lessee.	Lessee can utilize the <i>manfa'ah</i> as he desires as long as there is no damage to the waqf property. Similarly, the <i>Wakif</i> and the <i>Mutawwali</i> may place certain conditions on the lessee.
Sub-lease	Lessee may create sub-lease on the whole land or part of the land.	Permitted however based on approval of <i>Wakif/Mutawwali</i> . Rent from sub-lease must not supersede initial rent paid by lessee (<i>Imam Abu Hanifah</i>).

ISSUES

Issues that have been raised:

- 1 Security of tenure
- 2 The **miscomprehension of 'purchasers'** on the nature of proprietary rights accorded by the lease as opposed to a document of title
- 3 **Duration of the lease** over the property

METHODOLOGY

Legal Doctrinal Methodology:

- i. Statutes
- ii. Relevant Lease/*Ijarah* Agreements
- iii. Books
- iv. Articles
- v. Fatwas

Identify **best practices** available in the Waqf land development sector in Malaysia.

OUTCOME OF EXPECTED FINDINGS

1

Identify the areas and suitable method for reconciliation of the two concepts that would uphold the principles under Shariah with legal requirements under the NLC.

2

Facilitate in the implementation of private leasing in the Malaysian conveyancing practice for properties built on Waqf land.