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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HARMONISATION OF SHARIAH AND LAW: ISSUES AND CHALLENGES
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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.
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

<table>
<thead>
<tr>
<th>MATTER</th>
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<th>CONCEPT OF IJARAH UNDER SHARIAH LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Concept of ownership</strong></td>
<td>• Lessee does not have ownership of the property. Name is registered on the IDT as lessee only.</td>
<td>• Lessee has no right over the leased land. Lease is created over the usufruct.</td>
</tr>
<tr>
<td></td>
<td>• Right to possess the land dependent on duration of lease.</td>
<td>• Right to possess and benefit from usufruct dependent on agreement between parties. Income from the lease belongs to the mawqūf ‘alayhi.</td>
</tr>
<tr>
<td><strong>Parties to transaction</strong></td>
<td>Transaction between the owner of the land (lessor) and the lessee.</td>
<td>Transaction between the Wakif, mutawalli or nazir and the lessee.</td>
</tr>
<tr>
<td><strong>Restrictions to grant lease</strong></td>
<td>Section 225(2) of NLC: No lease or tenancy may be granted to two or more persons or bodies.</td>
<td>No restriction as to number.</td>
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<td><strong>Duration of lease</strong></td>
<td>Section 221(3) of NLC:&lt;br&gt;The maximum term:&lt;br&gt;(i) 99 years if it relates to the whole of any alienated land&lt;br&gt;(ii) 30 years if relates to part of the land</td>
<td>No maximum prescribed period. However, jurists have imposed duration based on nature of the property/manfa’ah.</td>
</tr>
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<td><strong>Right of Lessee</strong></td>
<td>Dependent on agreement between lessor and lessee.</td>
<td>Lessee can utilize the manfa’ah as he desires as long as there is no damage to the waqf property. Similarly, the Wakif and the Mutawwalli may place certain conditions on the lessee.</td>
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<td><strong>Sub-lease</strong></td>
<td>Lessee may create sub-lease on the whole land or part of the land.</td>
<td>Permitted however based on approval of Wakif/Mutawwalli. Rent from sub-lease must not supersede initial rent paid by lessee (Imam Abu Hanifah).</td>
</tr>
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</table>
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.