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ARTICLE

The Islamisation of the English Trust: The Hibah Trust in Malaysia

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Abstract

Malaysia, being a former English colony, inherited a corpus of English law which includes equity and trusts. In recent times, major banks, financial institutions, and trust companies have reimagined the English trust in combination with Islamic law, by offering an innovation called the *hibah* trust. This instrument represents the Islamisation of the English trust concept where the Islamic idea of the *hibah*, an *inter vivos* gift and the English trust is combined as a wealth management offering to clients. This article explores how the *hibah* trust works, reasons why institutions may be offering this hybrid instrument, and potential challenges to its validity both in the civil and Syariah court.

Introduction

In recent times, there has been a proliferation of scholarly work on how the concept of the trust spread from England to various parts of Asia.¹ The growth of the trust concept in Asia has been variously described as a form of ‘legal transplant’,² ‘global diffusion’³ and ‘laws’ travel’⁴ where the trust has been reconstructed, reimagined, and adapted for use in various jurisdictions in relation to a multitude of commercial and familial contexts. Malaysia, being a former English colony, has also seen the English trust concept take root since colonial days. Initially, there was the difficulty in adapting English trust law principles to accommodate local customary practices and Islamic law. In the colonial days, wealthy Chinese, Indian and Muslims merchants in Malaysia used the

*Professor, Yong Pung How School of Law, Singapore Management University. I am grateful to Ying Khai Liew, Katy Barnett and the anonymous reviewers for their perceptive comments on an earlier draft of this article and my research assistant, Noëmi Chaw, for her excellent work. The usual disclaimers apply, and the views expressed are my own.

¹The literature both in terms of articles and books on trust in various parts of Asia is voluminous. For a sample see eg, Joyman Lee, ‘The Irreducible Core of Trustee Duties in East Asian Trusts’ (2021) 27 *Trusts and Trustees* 302; Ying-Chieh Wu, ‘Trusts Reimagined: The Transplantation and Evolution of Trust Law in Northeast Asia’ (2020) 68 *American Journal of Comparative Law* 441; Ying-Khai Liew & Matthew Harding (eds), *Asia-Pacific Trusts Law* (vol 1, Hart Publishing 2020); Masayuki Tamaruya, ‘Japanese Law and the Global Diffusion of Trust and Fiduciary Law’ (2018) 103 *Iowa Law Review* 2229; Tang Hang Wu, ‘From *Waqf*, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore’ (2018) 103 *Iowa Law Review* 2263; Lusina Ho, ‘The Reception of Trust in Asia: Emerging Asian Principles of Trust?’ [2004] *Singapore Journal of Legal Studies* 287; Stelios Tofaris, ‘Trust Law Goes East: The Transplantation of Trust Law in India and Beyond’ (2015) 36 *Journal of Legal History* 299; Lusina Ho & Rebecca Lee (eds), *Trust Law in Asian Civil Jurisdictions: A Comparative Analysis* (Cambridge University Press 2013); Nurfadzilah Yahaya, ‘British Colonial Law and the Establishment of Family *Waqfs* by Arabs in the Straits Settlements, 1860–1941’, in Lionel Smith (ed), *The World of Trusts* (Cambridge University Press 2013) 167.

²Wu (n 1) 441, 442; Tofaris (n 1) 299, 300.

³Tamaruya (n 1) 2229, 2230.

⁴Tang (n 1) 2263, 2265–2267; Tofaris (n 1) 299, 300.

English trust to further the purposes of ancestor worship, funding temples and establishing *awqaf*.⁵ The use of English trust law presents a tension with Islamic law especially when the trust is used for the succession planning of Muslim persons. Malaysia has a parallel system of law in relation to personal laws involving Muslims and non-Muslims. In terms of inheritance, non-Muslims in Malaysia have full testamentary freedom and are governed by civil law which is similar to the English Wills Act⁶ whereas Muslim persons are subject to Islamic inheritance law as codified by State law where two-thirds of his or her estate must go to prescribed *Syariah* beneficiaries.⁷ Thus, if a trust is settled over much of a Muslim person's properties for certain beneficiaries leaving less than two-thirds of his or her properties to be dealt with under inheritance law, this might be said to be offensive to the spirit and intent of Islamic law.

Recently, major banks, financial institutions and trust companies have reimagined the trust and adapted the English trust in combination with Islamic law, by offering an innovation called the *hibah* trust, which is a hybrid between the *hibah*, an Islamic gift, and the English trust, as a wealth management offering to their clients. This instrument represents the Islamisation of the English trust with the incorporation of the Muslim idea of the *hibah*. The purpose of this article is to contribute to the literature on the proliferation of the trust in Asia by examining the reimagined trust concept in Malaysia, the *hibah* trust. In exploring the *hibah* trust, the present article seeks to shed light on the practical operation of the English trust in a foreign jurisdiction with a majority Muslim population and how the trust concept is developed and adapted by various institutional actors. The motivation for the development of the *hibah* trust is to accommodate a form of succession planning for Muslim persons seen to be compatible with *Syariah* law. A larger theme that is revealed in the development of the *hibah* trust is the importance which Muslims in Malaysia place on personal adherence to Muslim personal law. It is speculated that such observance stems not just from the desire to comply with the formal legal system but also the wish to follow religious, social, and cultural norms which is consistent with the growing religiosity of the Muslim population in Malaysia.

Reception of English Law in Malaysia

Due to its colonial past, Malaysia's trust law was derived from English law as modified by local legislation.⁸ Common law (which includes the law of equity and trusts) was ostensibly introduced into Penang via the First Charter of Justice in 1807 on the basis that Penang was *terra nullius* ie, the land of no one.⁹ But as Tun Abdul Hamid and Trakic have forcefully pointed out this assertion is almost certainly wrong; there are reliable historical documents which proves that Penang was not *terra nullius* at the time of the introduction First Charter of Justice in 1807 because there were organised

⁵*Awqaf* is the plural of *waqf*. See Yahaya (n 1) 167; Muhammad Zubair Abbasi, 'The Classical Islamic Law of *Waqf*: A Concise Introduction' (2012) 26 *Arab Law Quarterly* 121; Paul Stibbard, David Russell & Blake Bromley, 'Understanding the *Waqf* in the World of the Trust' (2012) 18 *Trusts and Trustees* 785. Malaysia's use of trust law in this context mirror's the use of trust in the colonial days in Singapore. See Tang (n 1) 2263.

⁶Wills Act 1959. For an overview of Malaysia's system, see Jaclyn L Neo, 'Competing Imperatives: Conflicts and Convergences in State and Islam in Pluralist Malaysia' (2015) 4 *Oxford Journal of Law and Religion* 1; Jaclyn L Neo, 'Religious Courts and Rights in Plural Societies: Interlegal Gaps and the Need for Complex Concurrence' (2021) 15 *Law & Ethics of Human Rights* 259, 276–278. Malaysia's system is not dissimilar to the Singapore system of legal pluralism. For an excellent analysis see Noor Aisha Abdul Rahman, 'Muslim Personal Law and Citizen's Rights: The Case of Singapore' (2012) 7(1) *Asian Journal of Comparative Law*, Article no 14.

⁷This has been recognised in a series of cases beginning in *Shaik Abdul Latif v Shaik Elias Bux* (1915) 1 *FMSLR* 204. For an excellent overview see Chee Ying Kuek & Eng Siang Tay, 'Religious Conversions and the Conflicts Between Civil and Islamic Law of Inheritance in Malaysia' [2013] 6 *Malayan Law Journal* lxvi.

⁸Tan Sook Yee, 'Some Aspects of the Law Relating to Trustees in the States of Malaya and Singapore' (1968) 10 *Malaya Law Review* 113; Tun Abdul Hamid Mohamad & Adnan Trakic, 'The Reception of English Law in Malaysia and the Development of the Malaysian Common Law' (2015) 44 *Common Law World Review* 123.

⁹See *Fatimah v D Logan* [1808–84] 1 *KY* 255, 259.

Malay communities living there at that time.¹⁰ Hence, this initial reception of English law is based on a contested legal fiction. Be that as it may, Penang was subsequently grouped with two other states, Singapore, and Malacca, and together was known as the Straits Settlement.

The Second Charter of Justice was then introduced into the Straits Settlement in 1826.¹¹ It was couched in archaic language and did not explicitly state that English law was introduced into the Straits Settlement. The relevant part of the Second Charter of Justice read as follows: ‘And We do further give to the said Court of Judicature of Prince of Wales’ Island, Singapore and Malacca, full Power and Authority. . . to give and pass Judgment and Sentence according to Justice and Right.’¹² In other words, a new Charter was granted by the Crown which created courts in Penang (otherwise known as Prince of Wales Island at that time), Singapore and Malacca (now known as Melaka). But the Charter does not explicitly address the pressing question: What law applied in these courts? It was the interpretation of Sir Peter Benson Maxwell in the decision of *Regina v Willans*¹³ in 1858 that caused English law to travel to the Straits Settlement. Maxwell R (as he then was), seized on the words ‘justice and right’ in the Charter and said that these are not abstract notions but ‘plainly a direction to decide according to the law of England.’¹⁴ This interpretation has never been seriously challenged since, and English law has been assumed to apply in the Straits Settlement. In a sense, the application of English law was a foregone conclusion – one could have hardly expected English judges sitting in colonial courts to have discarded their English law training.

In Malaya, the reception of English law was a matter of accepted judicial practice until formal recognition occurred in 1937.¹⁵ In 1937, a statute called the *Civil Enactment Act* was passed which provided that the common law of England and rules of equity as administered in England at that time were applicable in the Federal Malay States subject to modification by local legislation and local circumstances as necessary. Subsequently, the *Civil Enactment Act* was repealed and replaced with the *Civil Law Ordinance* in 1956 which provided for the reception of the common law and rules of equity as administered in England in 1956. In relation to Sarawak and North Borneo (now Sabah), the *Laws of Sarawak Ordinance 1928* and *Civil Ordinance 1928* formally acknowledged the introduction of English law into these respective states with the necessary regard to native customs and local conditions.

The Hibah Trust in Malaysia

In the colonial days, wealthy Chinese, Indian and Muslim merchants in the Straits Settlement used English trust law to further purposes such as ancestor worship,¹⁶ burial grounds,¹⁷ temples,¹⁸

¹⁰See Abdul Hamid & Trakic (n 8).

¹¹William Napier, ‘An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements’ (1974) 16 *Malaya Law Review* 4, 22–24; Andrew Phang, *From Foundation to Legacy: The Second Charter Of Justice* (Singapore Academy of Law 2006) 3. However, as Abdul Rahman (n 6) points out, the colonial policy in Malaya and Singapore was to facilitate the observance of Muslim law in cases of ceremonies of religion, marriage and rules of inheritance. See also Neo ‘Religious Courts and Rights in Plural Societies’ (n 6) 262 (describing the application of personal law as a form of ideological resistance to colonisation).

¹²See Phang, *From Foundation to Legacy* (n 11) 8.

¹³*Regina v Willans* (1858) 3 *Kyshe* 16, 40–42.

¹⁴*ibid* 26.

¹⁵See *Kandasamy v Suppiah* (1919) 1 *FMSLR* 381; *Re Yap Kwan Seng’s Will* (1924) *FMSLR* 313.

¹⁶*Yeap Cheah Neo v Ong Cheng Neo* (1875) *LR* 6 *PC* 381.

¹⁷*Lim Eow Thoon v Lim Keng Chuan & Ors* [1965] 2 *MLJ* 154 (express trust for burial grounds in Penang settled in 1930 which was subsequently compulsorily acquired by the government).

¹⁸*Lim Chooi Chua & Ors v Lim Chew Chee* [1948] *MLJ* 66 (a trust to establish a Chinese temple for ancestral worship in Penang); *Attorney-General v Thirpooree Soonderee* (1935) 4 *MLJ* 26 (a gift to a person for the benefit of a Hindu temple was held to be charitable. However, a gift to an idol in the temple was regarded as void as an absurdity). See generally Then Bee Lian, ‘The Meaning of “Charity” in Malaya – A Comparative Study’ (1969) 11 *Malaya Law Review* 220.

Muslim religious ceremonies¹⁹ and establishing *awqaf*.²⁰ The story of the use of the trust during the colonial days in Penang mirrors the early use of the trust in Singapore.²¹ In terms of the practice of Chinese ancestral worship, it is unheard of these days for persons to dedicate real estate or substantial funds for this purpose. Hence, such trusts have lost modern significance. *Awqaf* have also not been subject to frequent disputes in the civil courts. Nowadays, *awqaf* are usually regarded as a matter of State law and falls within the *Syariah* court's jurisdiction.²² Therefore, the complex interplay between Islamic *waqf* principles and English trust law has not been ventilated in the Malaysian courts in recent times.²³

More recently, banks, trust companies and other major institutions in Malaysia have begun offering an instrument called the *hibah* trust to their clients as a wealth management and succession planning vehicle. The *hibah* trust appears to be a *sui generis* instrument not found anywhere else in the Commonwealth. Essentially, it is a hybrid between the *hibah*, an Islamic gift, and the common law trust. The present article explores several questions which arise from the development of the *hibah* trust: How does the *hibah* trust work? Why are these institutions offering a *hibah* trust? How different is the *hibah* trust from the common law trust? Another theme which will be explored in this article is this: is the *hibah* trust susceptible to legal challenge? Finally, the present author considers the reasons why banks and institutions are marketing the *hibah* trust to their clients instead of offering them the English trust.

How Does the Hibah Trust Work?

Hibah trusts or the *hibah amanah* ('*amanah*' means 'trust' in Malay) or *hibah takaful* (*takaful* is a form of Islamic insurance) have become increasingly popular in Islamic estate management following its introduction in 2013 by Permodalan Nasional Berhad, a major Malaysian fund management company via Amanah Saham Nasional Berhad.²⁴ Major organisations offering the *hibah* trust include banks like Maybank and CIMB, and Tabung Haji, the Malaysian *hajj* pilgrims board.²⁵ Other *hibah* trust products have also been introduced in Malaysia by trust companies such as Amanah Raya Berhad.²⁶ As will be explained below, the flexible structure of the *hibah* trusts makes it particularly attractive as a wealth planning instrument.²⁷

In order to understand the *hibah* trust, one must first unpack the concept of the *hibah*. '*Hibah*' is derived from the Arabic root word, '*wahaba*', which means to (unilaterally) express a benefit to others during one's lifetime without any expectation of the possibility of return.²⁸ Many academics

¹⁹*Re Abdul Guny Abdullasa* (1936) 5 MLJ 174 (a gift in Penang for recital of prayers in the name of Muslim saints was held to be good charitable gifts).

²⁰The reported cases on Muslim charitable trusts have been in Singapore. See eg, *Mohamed Alsagoff v Syed Omar bin Mohamed Alsagoff* (1918) SSLR 103; *Attonery-General v Shaik Ali bin Awath* (1928) SSLR 101; *Re Syed Shaik Alkaff v Attorney General* (1923) 2 MC 38; *Hadjee Esmail bin Kaim v Hussain BeeBee Binte Shaik Ali Bey* (1911) 12 SSLR 74. See generally George Keeton & Lionel Sheridan, *The Comparative Law of Trusts in the Commonwealth and the Irish Republic* (Barry Rose (Publishers) Limited 1976) ch 7.

²¹This aspect was explored in Noor Aisha (n 6); Tang, 'From *Waqf*, Ancestor Worship to the Rise of the Global Trust' (n 1).

²²Nuarrual Hilal Md Dahlan & Abdul Rani Kamarudin, '*Wakaf* in Malaysia: Its Legal Evolution and Development' [2006] 1 *Shariah Law Review* 81.

²³See eg, *Shaik Zolkaffly Shaik Natar v Majlis Ugama Islam Pulau Pinang* [1997] 4 CLJ 70.

²⁴Nazrul Hazizi Noordin et al, 'Re-evaluating the Practice of *Hibah* Trust in Malaysia' (2016) 32 *Humanomics* 418, 427.

²⁵Mohd Yazid Zulkepli & Tajul Aris Ahmad Bustami, 'The Grey Side of *Hibah Amanah* as Inheritance Instrument in Malaysia' (2019) 24 *Al-Sharjah Journal of Islamic Thought and Civilization of The International Islamic University Malaysia* 267.

²⁶Noordin (n 24) 427.

²⁷Rusni Hassan & Nor Azdilah Mohamad Zaizi, 'The Concept and Application of *Hibah* as a Financial Instrument from the Malaysian Legal Perspective: An Analysis' (2020) 28 *International Islamic University Malaysia Law Journal* 227, 245.

²⁸Hassan & Zaizi (n 27) 229; Ahmad Khilmy Abdul Rahim, Azizi Abu Bakar & Mohd Mushidi Mohd Nor, 'The Innovations of *Hibah* Instrument of Islamic Finance and Islamic Estate Management in Malaysia' (2021) 18

have referred to *hibah* synonymously with an *inter vivos* gift²⁹ which suggests that *hibah* is the English law equivalent of a gift. Only a person who has perfect title (*milk al-tam*) over the intended *hibah* property is allowed by Islamic law to execute the *hibah*.³⁰ As an instrument of wealth management, the *hibah* is particularly useful as, unlike a testamentary bequest (*wasiyyah*), the *hibah* can be used to transfer a person's property to the extent of even excluding the donor's other legal Muslim heirs.³¹ This is because, traditionally, a *hibah* is executed during the lifetime of the donor.³²

Once a *hibah* is executed, the *hibah* property is no longer part of the donor's estate – upon his or her death, it will not be administered according to *fara'id* principles (Muslim inheritance law).³³ Thus, since a *hibah* can comprise the donor's entire estate, a *hibah* empowers the donor to decide for themselves who his or her property should be gifted to and in what proportion,³⁴ unlike a testator under Muslim law. In contrast, the *wasiyyah* instrument (ie, a will) only permits the testator to bequeath up to one-third of his or her estate with the rest of the estate going to prescribed *fara'id* beneficiaries. The major drawback to using the *hibah* is that the donor would have to relinquish the property during his or her lifetime. Understandably, donors may be reluctant to surrender all or part of their property during their lifetimes out of concerns that they may be neglected or abandoned by the *hibah* donees after the property is distributed.³⁵ Such concerns have contributed to the development of the *hibah* trust which ostensibly gives the donor control over the property during his or her lifetime while taking it out from the donor's estate upon his or her death.³⁶

The legal characterisation of a *hibah* trust appears to be a hybrid of a Muslim gift and the English conception of a trust. The steps involved in executing a *hibah* trust are:³⁷

Step 1: The donor settlor offers to transfer the *hibah* assets to the donee beneficiary without any consideration or expectation of return (*ijāb*). The donee beneficiary must accept this offer (*qabūl*).

Step 2: The terms of the *hibah* as agreed upon between the donor and donee(s) are recorded in the Trust Deed, which also outlines the duties and responsibilities of the trustee(s). The Trust Deed also includes the donee's consent to the donor using and enjoying the benefits of the *hibah* assets during his or her lifetime.

Webology (Special Issue on Management and Social Media) 112, 114, referencing Ibn Manzur & Jamal al-Din Muhammad b Mukram, *Lisan al-Arab* (vol 9, Dar al-Hadith 2003).

²⁹Alias Azhar & Mohd Zakhiri Md Nor, 'Hibah in the Administration of Islamic Property: *Ijtihadi* Elements and Reality in Malaysia' (2019) 10 Universiti Utara Malaysia Journal of Legal Studies 103, 103; Aini Hayati Musa, 'Awareness on Hibah Concept: Towards Cultivating Islamic Estate/Wealth Management' (Paper presented at the International Social Sciences Academic Conference, Malacca, Nov 2016) 89; Rusnadewi Abdul Rashid, Siti Asishah Hassan & Noor Inayah Yaakub, 'A Need for Legal Framework of Gift *Inter Vivos* (*Hibah*) in Malaysian Estate Planning' (2013) 2 International Journal of Business, Economics and Law 29, 29.

³⁰Muhamad Muizz Abdullah et al, 'Islamic Estate Planning in the Industrial Revolution Era 4.0: Issues and Challenges' (2021) 9 Journal of Emerging Economics & Islamic Research 40, 41.

³¹Badruddin Hj Ibrahim, 'Hibah (Gift *inter vivos*) by Parent in Favour of Some Children to the Exclusion of the Others under Islamic Law' (2017) 31 Arab Law Quarterly 54, 55 and 69.

³²Siti Asishah & Rusnadewi Abdul Rashid, 'The Legal Rights and Duties of Administrators and Executors of Deceased Muslims' Property in Malaysia' (2014) 9 The Social Sciences 98, 99.

³³Hassan & Zaizi (n 27) 245.

³⁴Siti Asishah et al, 'A Need for Legal Framework of Gift *inter vivos* (*hibah*) in Malaysian Estate Planning' (2013) 2 International Journal of Business, Economics and Law 29, 30, referencing Imam al-Nawawi, *Minhāj et-Tālibin: A Manual of Muhammadan Law According to the School of Shāfi* (EC Howard tr, Law Publishing Co 1977).

³⁵Asishah et al (n 34) 30.

³⁶Othman Yaacob, 'Pembentukan Trust Hibah Sebagai Alternatif Perancangan Harta [Trust Formation Grants as an Alternative Estate Planning]', in Siti Mashitoh Mahamood (ed), *Harta Amanah Orang Islam di Malaysia: Perspektif Undang Undang dan Pentadbiran* (Property Trust of Muslims in Malaysia: Perspectives and Administrative Law) (University Malaya 2006) 174–175.

³⁷Adapted from Noordin et al (n 24) 428.

Step 3: The donor ceases legal ownership over the *hibah* assets and transfers the assets to a trustee he or she appoints. This trustee will manage and administer the *hibah* assets as stated in the Trust Deed.

Step 4: During the donor's lifetime, the trustee manages and administers the *hibah* assets, pursuant to the Trust Deed.

Step 5: Upon the donor's demise (or following a period specified by the Trust Deed), the trustee will distribute and transfer legal ownership of the *hibah* assets to the donees, pursuant to the Trust Deed.

Thus, a *hibah* trust involves a Muslim gift, ie, the *hibah* from the donor to the beneficiaries declared during his or her lifetime. However, the assets constituting the gift do not vest directly with the beneficiaries. Instead, the assets will be held on trust by an appointed trustee and subsequently transferred to the beneficiaries pursuant to the trust deed following the donor's death.³⁸ Therefore, a *hibah* trust appears to be a combination of both the common law trust and Islamic *hibah*.³⁹ The resultant effect of *hibah* trust is the Islamisation of the equitable concept of the trust where *Syariah* law principles are expressly incorporated.

Another interesting characterisation of the *hibah* trust is that it is an innovative attempt to revive the *waqf ahli* in Malaysia albeit through another name.⁴⁰ The *waqf ahli* is a form of *waqf* which may be used to benefit family members which functions like a form of family endowment. According to Gaudiosi, a '*waqf ahli* would ultimately devolve to a charitable purpose' though not until it has benefited some generations of the family.⁴¹ Due to the fact that the *waqf* was viewed as charitable in nature, the Privy Council have interpreted the *waqf ahli* as void because it offends the rule that a charitable trust must be wholly charitable and not confer a private benefit on the settlor's family.⁴² Unsurprisingly, the *waqf ahli* has not been widely used in Malaysia.

Why Are Institutions Offering the Hibah Trust?

The stated reason for the introduction of the *hibah* trust in the literature is the problem of unclaimed estates in Malaysia.⁴³ Noordin et al reports that as of March 2016, estates of deceased people worth an estimated of RM 60 billion have not been claimed by their eligible heirs, of which it is believed that a substantial portion belong to Muslim estates.⁴⁴ It is speculated that the main factor which explains the magnitude of the phenomenon of unclaimed estate is that the management of Muslim estate is 'perceived to be complex, inconvenient, tedious and expensive'.⁴⁵ Prolonged inheritance disputes and Muslim heirs who cannot be located contribute to the delay in the distribution of Muslim estates. Furthermore, the cost of distributing the estate is expensive. All these reasons are said to cause many estates to be unclaimed. Unsurprisingly, the wealth management industry has capitalised on this by offering the *hibah* trust which promises to be an efficient means of distributing the clients' property upon his or her death without having to undergo an expensive and complicated court

³⁸Noordin et al (n 24) 426.

³⁹Asishah & Rusnadewi, 'The Legal Rights and Duties' (n 32) 99.

⁴⁰I am grateful to the anonymous reviewer for this perceptive point. On *waqf ahli*, see Nor Asiah Mohamad, 'A Study on the Socio-Economic Roles of *Waqf Ahli* (Family *Waqf*) in Promoting Family Security and a Sustainable Family Economy' (2018) 26 IIUMLJ 141; Stibbard, Russell & Bromley (n 5) 785.

⁴¹Monica M Gaudiosi, 'The Influence of the Islamic Law of *Waqf* on the Development of the Trust in England: The Case of Merton College' (1988) 136 University of Pennsylvania Law Review 1231, 1233.

⁴²See eg, *Ahsanulla Chowdhry v Amarchand Kundu* (1889) Law Rep 17 Ind Ap 37; *Abdul Fata Mahomed Ishak v Russomoy Pur Chowdhry* (1894) 22 IA 76. Even if the trust was construed as a private trust, it was avoided if it was not subject to the perpetuity period. See *Syed Ali bin Mohamed Alsagoff v Syed Omar bin Mohamed* [1915-1923] XV SSLR 103.

⁴³Asishah & Rusnadewi, 'The Legal Rights and Duties' (n 32) 420.

⁴⁴Noordin et al (n 24) 420.

⁴⁵*ibid.*

process. This is not a unique trend because one of the drivers to people settling a common law trust is to get around a complex and cumbersome probate process.

Quite apart from getting around potential complications arising from navigating the court process upon death, the *hibah* trust offers some attractive features from the wealth and succession planning perspective. There appears to be three principal uses of a *hibah* trust. First, it functions as a will substitute in relation to unit trusts, *haji* funds and bank accounts. Certainly, this is how the *hibah* trust functions in relation to Amanah Saham Nasional Berhad unit trusts, Tabung Haji *haji* funds and bank accounts. The donor would nominate the donee as the recipient of the funds upon his or her demise pursuant to a *hibah* trust. When the donor passes away, the funds will then be paid to the donee. Second, the *hibah* trust is used with a Muslim insurance known as *takaful*. This is sometimes known as a *hibah takaful* trust. Used in this way, the settlor will declare a *hibah* trust naming a bank or trust company as the trustee; the settlor will also purchase a *takaful* and service the premium. The *takaful* policy would be assigned to the trustees. Once the settlor passes away, the *takaful* policy pay-out will be managed by the trustees for the beneficiaries of the *hibah* trust. Such *hibah takaful* trusts are offered as solutions for maintenance of children, persons with special needs,⁴⁶ elderly parents, adult spendthrift off springs and furthering of philanthropic purposes. Third, the *hibah* trust involves the declaration of a portion of the settlor's assets to be held on trust for certain beneficiaries. However, the *hibah* trust specifically reserves the donor's right to use the property during his or her lifetime while taking the asset in question out of the donor's estate upon his or her death. This allows the donor to either enlarge the shares a person may benefit under Islamic inheritance law or to benefit someone who is not entitled to inherit property under Muslim law.

From a wealth planning viewpoint, a *hibah* trust enables the donor to achieve several objectives. First, a settlor/donor executing a *hibah* trust is not restricted by *fara'id* distribution principles while retaining the use of the property during his or her lifetime. In other words, when the settlor/donor executes a *hibah* trust he or she is not restricted by the *fara'id* rule that a testator may only dispose 1/3rd of his or her assets by way of a will.⁴⁷ Thus, the *hibah* trust effectively grants the settlor/donor full testamentary freedom while enjoying the use of the assets during his or her lifetime by reason of the beneficiaries giving their consent to the *hibah* assets being used by the donor. The upshot of this is that the *hibah* trust is more advantageous as compared to an outright *inter vivos* gift since the *hibah* assets is taken out of the Muslim person's estate while reserving use and enjoyment of the assets for the donor during the donor's lifetime. Second, the *hibah* trust may be used to give assets to non-Muslim donees,⁴⁸ something which not possible pursuant to testamentary dispositions under *fara'id* principles.⁴⁹ The use of the *hibah* trust might cater to Muslim converts (*muallaf*) who wish to benefit their non-Muslim family.⁵⁰ Due to the fact that *hibah* trust is ostensibly not restricted by the 1/3rd rule, the use of *hibah* trusts has been criticised as a potential tool to 'neglect one's obligations to creditors and avoid *fara'id*.'⁵¹ In fact, Noordin et al have advocated for the *hibah* trust to be structured as per *fara'id* rules and that settlors/donors ought to nominate two-third of the beneficiaries of a *hibah* trust to legal heirs under *fara'id* in the spirit of protecting rightful Muslim heirs.

⁴⁶On the special needs trust in another jurisdiction see Tang Hang Wu, 'Financial Planning Mechanisms Available to Persons with Special Needs in Singapore', in Lusina Ho & Rebecca Lee (eds), *Special Needs Financial Planning: A Comparative Perspective* (Cambridge University Press 2019) 212.

⁴⁷Noordin et al (n 24) 421.

⁴⁸See eg, AmanahRaya's 'Trust' brochure states that a donor may gift a *hibah* to a non-Muslim: AmanahRaya, 'Trust' <https://www.amanahraya.my/wp-content/uploads/2018/09/Amanahraya_Trust_ENG_CS6.pdf> accessed 13 Mar 2022.

⁴⁹Noordin et al (n 24) 421.

⁵⁰Zulkepli & Ahmad Bustami (n 25).

⁵¹Noordin et al (n 24) 421, referencing Mohmad Idham Md Razak et al, 'The Awareness of *Hibah* as a Tool to Reduce Estate Planning Risk in Malaysia' (2015) 3 International Journal of Economics, Commerce and Management 1558; Syed Ahmed Salman & Shiela Nu Nu Htay, 'Nomination and *Hibah* Issues in Malaysian *Takaful* (Islamic Insurance) Industry' (2013) 1(12) International Journal of Multidisciplinary Research 5.

Comparing the Hibah Trust with the Irrevocable English Discretionary Trust

This section compares the *hibah* trust with the irrevocable English discretionary trust and explores the question whether the same objectives sought under the *hibah* trust could be achieved via the use of an English trust. The comparison does not involve *hibah* trusts in relation to unit trusts, *haji* funds and bank accounts which essentially function as a form of will substitute. Instead, the comparison in this section involves a declaration of a *hibah* trust over a portion of the settlor's assets or a *takaful* policy that is assigned to the trustee. Noordin et al have compared the *hibah* trust with a revocable living trust and suggested that there are some differences between the *hibah* trust and living trust.⁵² According to the learned authors, the principal difference lies in the revocability of the living trust as compared to the *hibah* trust which is irrevocable. With respect, it is suggested that it is not meaningful to compare the revocable living trust with the *hibah* trust because the revocable living trust is used pre-dominantly in the United States for estate planning purposes for a variety of perceived reasons⁵³ and not elsewhere in the Commonwealth. Instead, it may be more meaningful to compare the *hibah* trust with the irrevocable discretionary trust which is more commonly used in other Commonwealth jurisdictions.

Upon closer scrutiny, it is suggested that almost all the central features of the *hibah* trust may be replicated with the standard irrevocable English discretionary trust commonly used in many Commonwealth jurisdictions. The common features of a standard discretionary trust⁵⁴ used in modern wealth management are as follows:

- (i) The beneficiaries of the trust are not fixed from the very start. Instead, there is a list of potential beneficiaries;
- (ii) The trustee is given a very wide power of appointment as to who should enjoy the capital and income of the trust. There is usually no mandatory direction to exhaust the trust fund during the trust period;
- (iii) The trustee is given a power to appoint new beneficiaries or to exclude current persons in the potential list of beneficiaries. Drafted in this form, the settlor might even be a potential beneficiary through an exercise of the trustee's discretion;⁵⁵
- (iv) If the trustee does not exhaust the trust fund during the trust period, the property will go to default or residuary beneficiaries. It is often made clear that the trustee does not have to consider the interests of the default or residuary beneficiaries in exercising the trustee's power of appointment;
- (v) There may or may not be an excluded list depending on settlor's familial circumstances – eg, the presence of an estranged spouse or children;
- (vi) The settlor will issue a letter of wishes to the trustee. The letter of wishes is usually drafted as a non-binding expression of wishes. Over time, fresh letters of wishes may be issued;

⁵²Noordin et al (n 24).

⁵³See eg, Richard Gould, 'The Living Trust: Fact v Fiction' (2000) 15 *Quinnipiac Probate Law Journal* 133; Alexandra Braun, 'Will-Substitutes in England and Wales', in Alexandra Braun & Ann Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart Publishing 2016) 51, 53.

⁵⁴For examples of such discretionary trusts from around the world see *Zhang Hong Li v DBS Bank (Hong Kong) Limited* [2019] HKCFA 45; *United States v. All Assets Held in Account Number 80020796, No 13-1832* (JDB), 2018 WL 1158002, 4–5 (DDC Mar 5, 2018); *Wibawa v Wibawa* [2016] SGHC 109; *Kan Lai Kwan v Poon Lok To Otto* [2014] 17 HKCFAR 414 paras 61–65 (HK); *Charman v Charman* [2007] EWCA 503 paras 30–32; *Fonu v Merrill Lynch Bank & Tr Co* [2011] UKPC 17 para 12 (appeal taken from Cayman Islands). On secondary literature describing such trusts see generally Tang Hang Wu, 'Teaching Trust Law in the Twenty-first Century', in Elise Bant & Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press 2010) 125; Tang, 'From *Waqf*, Ancestor Worship to The Rise of The Global Trust' (n 1); Rebecca Lee, 'The Evolution of the Modern International Trust: Developments and Challenges' (2018) 103 *Iowa Law Review* 2069; Lionel Smith, 'Massively Discretionary Trust' (2017) 70 *Current Legal Problems* 17.

⁵⁵See generally *Charman v Charman* [2007] EWCA (where the settlor was the primary beneficiary during his lifetime).

- (vii) The trust is usually used in connection with a company vehicle. Typically, the trust will hold 100% of the shares in a company. Assets will be injected in the company and the settlor or settlor's family members may be named as directors of the company. In some cases, there might be two layers of companies in this structure, ie, the trust will hold 100% of the shares in a holding company which in turn holds the shares of the company that controls the assets. The trust deed would usually state that the trustee is not obligated to interfere with the affairs of the company;⁵⁶
- (viii) The investment powers of the trust may in some cases be reserved by the settlor; and
- (ix) The trust might include a protector or a committee of protectors – ie, a third party who will have a role in the administration of the trust.

Therefore, a standard English discretionary trust especially one which is structured with a settlor's reserved power of investment and an appropriate letter of wishes stating that the settlor is the primary beneficiary during his or her lifetime plus specific stipulations of the manner of distribution upon the settlor's demise should achieve the same effect as a *hibah* trust. In both structures, the settlor is able to continue to enjoy the benefit of the assets during his or her lifetime with distribution only happening upon death. The fact that the English discretionary trust may achieve the same objectives as a *hibah* trust then raises the next question: why is the *hibah* trust offered in Malaysia even though the irrevocable English discretionary trust is able to achieve the same result? It is to this question that the next section turns.

The Hibah Trust: Institutional Actors Catering to Growing Religiosity

Given that the irrevocable English discretionary trust could achieve the same effect as the *hibah* trust, this raises the question of why the *hibah* trust is offered as a form of wealth management vehicle in Malaysia. It is speculated that the main reason to explain this phenomenon is the growing religiosity of certain segments of the Malay Muslim population where 'religious and ethnic identity are perceived as inextricably intertwined'.⁵⁷ With the growing religiosity amongst Muslims, it is unsurprisingly that there is the corresponding desire to abide by Muslim principles especially in the area of succession planning. Certainly, this is a trend which is witnessed in terms of Islamic banking in Malaysia where there is empirical evidence that consumers are motivated by religious considerations when choosing Islamic financial products.⁵⁸ I am aware that this stated reason for the introduction of the *hibah* trust could be criticised as oxymoronic; if the Malay-Muslim population is indeed becoming increasingly religious, then it could be argued that they would be more inclined to follow *Syariah* inheritance laws instead of attempting to circumvent the same by using the *hibah* trust. But I believe that there is no contradiction here. The fact of the matter is this: the *hibah* trust is marketed by various institutional actors, with edicts from Muslim experts engaged by these institutional actors, as a *Syariah* compliant instrument of succession planning. In other words, in the eyes of the lay consumer what they are doing when using the *hibah* trust is perfectly acceptable under Islamic law. However, this line of reasoning may not be viewed as legitimate in the context of the use of an English discretionary trust which avoids the application of Muslim inheritance

⁵⁶This is known as the anti-*Bartlett* clause. See the discussion in *Zhang Hong Li v DBS Bank (Hong Kong) Limited* [2019] HKCFA 45. For a critique, see Rebecca Lee & Man Yip, 'Exclusion of Duty and the Irreducible Core Content of Trusteeship: A Re-Assessment' (2020) 10 *Journal of Equity* 131.

⁵⁷See Yvonne Tew, 'Stealth Theocracy' (2018) 58 *Virginia Journal of International Law* 31, 47–49.

⁵⁸Abdelghani Echabi & Oladokun Nafiu Olaniyi, 'Malaysian Consumers' Preferences for Islamic Banking Attributes' (2012) 39 *International Journal of Social Economics* 859. For an example of the normative moral power of religious understanding despite a clear ruling by the civil courts, see Abdul Rahman (n 6) 19–20 and Jaclyn L Neo, 'State Legal Pluralism and Religious Courts: Semi-Autonomy and Jurisdictional Allocations in Pluri-Legal Arrangement', in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 32 (describing the phenomenon of Muslim persons in Singapore still using the *nuzriah* in relation to joint tenancy of real estate despite the fact that the Singapore Court of Appeal has ruled that the doctrine of survivorship meant that Muslim law of inheritance is not engaged).

law. On the part of the settlor, there may be lingering uncertainty and unease that even though the English discretionary trust may technically take the assets out of a Muslim person's estate, this is ultimately a breach of *Syariah* law. On one view, an English trust is not inconsistent with Muslim law since there is a historical argument that the English trust was developed from the *waqf*.⁵⁹ According to this interpretation, the discretionary trust is seen as an *inter-vivos* gift and perfectly compatible with Islamic principles. As opposed to this, it is possible for a settlor to settle all his or her property during his or her lifetime to a discretionary trust leaving nothing for the *fara'id* beneficiaries. In this context, there is the prospect of an English discretionary trust being declared as ultimately being in breach of *Syariah* law. Thus, religious motivations explain why the *hibah* trust is offered instead of the English discretionary trust.⁶⁰

Looking at Malaysia on macro level, it is unsurprising to see the *hibah* trust being offered as a succession planning instrument instead of the English discretionary trust in this context. Public law scholars working on Malaysia have long written about the rise of an Islamic constitutional order with Professor Yvonne Tew terming this as a form of stealth theocracy. Tew writes that what was happening in Malaysia involves:

'transformation towards a more religious constitutional order occurs informally through the engagement of judicial and political actors, rather than through formal mechanisms of constitutional modification like amendment or replacement of the constitutional text'.⁶¹

Given that such a profound shift is happening within the broader Malaysian political-legal context, it is entirely predictable that a similar phenomenon is occurring in the sphere of private law. In other words, the organisations offering the *hibah* trust are institutional actors contributing towards a more Islamic centric succession planning among the Muslim population. This drive towards using Islamic tools in terms of wealth management is also motivated by a corresponding demand from the consumers due to growing religiosity amongst Muslims in Malaysia. However, in terms of absolute numbers, it is not clear whether many *hibah* trusts have been set up. In a study published in 2016 involving Melaka, a state in Malaysia, a trust company is reported to have settled a total of only four *hibah* trusts in 2013 and 2014 whereas in 2015 there was no *hibah* trust set up.⁶² However, this study is not conclusive about the popularity of the *hibah* trust because it does not include the capital city, Kuala Lumpur, where the population is more affluent and involves only one trust company and not the major bank trustees in Malaysia.

Jurisdictional Uncertainty: Civil or *Syariah* Court for *Hibah* Trust Disputes?

Since the *hibah* trust is a hybrid concept, it raises difficult issues of conflict of personal laws between the jurisdiction of the civil and *Syariah* court should there be a court challenge. Because the *hibah*

⁵⁹See Gaudiosi (n 41).

⁶⁰It should be noted that the *hibah* trust may be subject to the same critique ie, that it is possible for the settlor/donor to settle all his or her entire property during his lifetime to circumvent *fara'id* principles. But the difference as stated above is that the *hibah* trust is marketed by institutional actors with edicts from Muslim experts that it is a form of *Syariah* compliant succession planning. cf Nordin et al (n 24) 434 argue that the *hibah* trust may result in the avoidance of *fara'id* principles. A sceptic may argue the *hibah* trust is essentially an irrevocable English discretionary trust packaged as an Islamic instrument.

⁶¹Tew (n 57) 33. See also Joshua Neoh, 'Islamic State and the Common Law in Malaysia: A Case Study of *Lina Joy*' (2008) 8(2) *Global Jurist (Advances)*, Article no 4; Li-ann Thio, 'Apostasy and Religious Freedom: Constitutional Issues Arising from the *Lina Joy* Litigation' (2006) 2 *Malayan Law Journal* i; Jaclyn L Neo, 'Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia' (2006) 13 *International Journal on Minority and Group Rights* 95; Jaclyn L Neo, 'Anti-God, Anti-Islam and Anti-Quran: Expanding the Range of Participants and Parameters in Discourse Over Women's Rights and Islam in Malaysia' (2003) 21 *Pacific Basin Law Journal* 29; Mohamed Azam Mohamed Adil, 'Law of Apostasy and Freedom of Religion in Malaysia' (2007) 2 *Asian Journal of Comparative Law* 1.

⁶²Khairiah Ahmad et al, 'Acceptance of *Hibah* as an Alternative Mechanism in Muslims Asset Management' (2017) 36 *SHS Web of Conferences* <<https://doi.org/10.1051/shsconf/20173600030>> accessed 1 Feb 2023.

trust involves an amalgamation of a Muslim gift and the English trust concept, it is not clear whether a dispute centred around a *hibah* trust is subject to the jurisdiction of the civil or *Syariah* court. The jurisdiction question is significant because presumably the *Syariah* court will be hostile to the *hibah* trust if it offends the 1/3rd rule in Islamic inheritance. Hence, the jurisdictional battle if a *hibah* trust is challenged, becomes of paramount significance, and may likely determine the outcome of the challenge. Presumably, if the *Syariah* court assumes jurisdiction, the *hibah* trust will be more likely to be declared offensive to *fara'id* principles if it deprives the beneficiaries of Muslim inheritance law.

To determine this jurisdictional question of whether the proper forum is the civil or *Syariah* court engages a tricky interpretation of the Malaysian Constitution and State court legislation. In 1988, the federal legislature amended the Constitution by inserting Article 121(1A) which provides that the High Court 'shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* courts'. Hence, decisions of the *Syariah* courts are not subject to appeal in the civil courts. The existence of *Syariah* courts is created by laws legislated by State Assemblies. Specifically, Article 74 of the Federal Constitution of Malaysia provides that a State legislature may make laws with respect to any matters enumerated in the State List. Item 1, List II, the Ninth Schedule of the Federal Constitution of Malaysia provides as follows:

Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs. Zakat, Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of *Syariah* courts, which shall have jurisdiction only over person professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.

Thus, a State is empowered to enact its own version of Muslim law and establish *Syariah* courts to adjudicate disputes arising from the State's Islamic laws.⁶³ Since a gift is mentioned in the Federal Constitution there is a strong argument that the *hibah* falls under the jurisdiction of the *Syariah* courts. Be that as it may, there is uncertainty whether a *hibah* trust falls within the jurisdiction of the civil courts or the *Syariah* courts since the *hibah* trust is not specifically mentioned in the Federal Constitution.

Another view is that the *hibah* trust is an instrument offered by Islamic finance providers pursuant to the Islamic Banking Act and the civil courts would have jurisdiction to hear any disputes on the *hibah* trust.⁶⁴ There is Malaysian jurisprudence which states that the civil courts have the jurisdiction to hear a claim based on an Islamic financial instrument.⁶⁵ Under the Islamic Banking Act, the civil courts would have guidance from the Shariah Advisory Council on matters of *Syariah* law.

⁶³See Farid S Shuaib, 'The Islamic Legal System in Malaysia' (2012) 21 Pacific Rim Law & Policy Journal 85; Neo (n 58); Jaclyn L Neo 'Religious Courts and Rights in Plural Societies: Interlegal Gaps and the Need for Complex Concurrency' (2021) 15 Law & Ethics of Human Rights 259.

⁶⁴I am grateful to the reviewer for this perceptive point.

⁶⁵See *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; *Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor* [2015] MLJU 2035; *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408.

Surprisingly, there does not seem to be any reported case law on the jurisdiction issue in relation to the *hibah* trust. However, there is case law on the *hibah*. In *Latifah Mat Zin v Rosmawati Sharibun*⁶⁶ the Federal Court held that the law relating to the *hibah* is within the jurisdiction of the *Syariah* court. This case involved monies held in a joint bank account between the late Dato Sharibun and his third wife. Upon Dato Sharibun's death, his daughters by his second wife filed a petition for a Letter of Administration of his estate and included the monies in the joint bank account as part of the deceased's estate. This would mean that the money in the joint bank account would be subject to Muslim inheritance law. The third wife disputed this and asserted that the monies were not part of the estate but constituted an *inter vivos* gift by Dato Sharibun to her. Parties agreed that the issue of the *inter vivos* gift meant that the proper legal characterisation was whether a *hibah* was intended by the deceased. Abdul Hamid Mohamad FCJ (delivering the judgment of the Federal Court) held:

where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in a petition for a letter of administration in the civil High Court, the answer to which depends on whether there was a gift *inter vivos* or not, that question shall be determined in accordance with the Islamic Law of gift *inter vivos* or "hibah". The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the *syariah* court and the civil court shall give effect to it in the grant of a letter of administration, and subsequently, in distributing the estate.⁶⁷

However, a *hibah* trust is not a classic *hibah* – it is a combination of both the Islamic *hibah* and English trust. Accordingly, the case of *Latifah Mat Zin v Rosmawati Sharibun* does not conclusively determine the issue although it does indicate that a future court might be inclined to hold that a *hibah* trust falls within the jurisdiction of *Syariah* court. This is consistent with the trend observed in recent Malaysian jurisprudence where the civil court has shown jurisdictional deference to the *Syariah* court in matters that could potentially traverse both the civil and Islamic courts.⁶⁸ If such jurisdictional deference is also followed in private law, then it is likely that the civil court would hold that the *Syariah* court would have jurisdiction over a *hibah* trust.

Although a *hibah* is not mentioned explicitly in the Federal Constitution of Malaysia, there is a strong argument that under the current positive law it falls within the *Syariah* court's jurisdiction. Article 74 in Item 4, List II of the Ninth Schedule of the Federal Constitution of Malaysia provides that 'Islamic law relating to ... testate or intestate ... gifts' is within the jurisdiction of the *Syariah* court. Hence, depending on the state law in question, it is strongly arguable that matters of Islamic law relating to gifts fall within the *Syariah*'s court jurisdiction and is not within the civil courts' purview.⁶⁹ As a matter of statutory interpretation, it may be argued that the phrase 'Islamic law relating to ... gifts' must be a reference to the *hibah*. Some Malaysian scholars have similarly taken the position that *hibah* falls under the Islamic religious administration which directly engages the jurisdiction of the *Syariah* court.⁷⁰ An example of State legislation conferring the *Syariah* court power over matters relating to *hibah* is section 46(2) of the *Administration of Islamic Law (Federal*

⁶⁶[2007] 5 MLJ 101.

⁶⁷ibid para 82.

⁶⁸See Tew (n 57) 33; Neoh (n 61); Jaclyn L Neo, 'Definitional Imbroglis: A Critique of the definition of religion and Essential Practice Tests in Religious Freedom Adjudication' (2018) 13 International Journal of Constitutional Law 574 (where the Malaysian civil courts have shown jurisdictional deference to the *Syariah* court even in key areas such as religious freedom).

⁶⁹*Latifah Mat Zin v Rosmawati Sharibun* [2007] 5 MLJ 101.

⁷⁰Azhar & Md Nor (n 29) 108; Hassan & Zaizi (n 27) 236, referencing Mohd Zamro Muda, 'Instrument of *Hibah* and Wills: Analysis of The Regulations and Applications in Malaysia' (*Hibah and Faraid National Convention*, Kuala Lumpur, 2008).

Territories) Act 1993 which states that ‘[a] Syariah Court shall ... in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslim and which relate to: ... gift *inter vivos*, or settlement made without adequate consideration in money or money’s worth, by a Muslim.’⁷¹ Under this State legislation, it seems clear that the *Syariah* court is conferred jurisdiction to hear *inter vivos* gifts between Muslim persons. If a *hibah* falls within the jurisdiction of the *Syariah* court, it follows that there is therefore a strong argument that a *hibah* trust which seeks to incorporate Muslim law principles would similarly fall within the jurisdiction of the *Syariah* court and be subject to *fara’id* principles. This provision is also interesting in that the jurisdiction is assumed only when all parties are Muslim. Thus, if a *hibah* trust purports to be in favour of non-Muslim beneficiaries, presumably that under this legislation, the *Syariah* court will have no jurisdiction to hear the matter. No doubt these tricky conflict of personal law issues will be played out in the courts as it is likely that there will be challenges on the validity of the *hibah* trust from disappointed Muslim heirs both in the *Syariah* and civil courts.

The Civil Court’s Jurisprudence on Trusts and Muslim persons

Even if this matter was decided in the civil court, it is far from clear whether a civil court will hold that a *hibah* trust is purely an *inter vivos* gift and does not engage Muslim inheritance law. While there is no case law on the *hibah* trust, there is jurisprudence in Malaysia that suggests an express *inter vivos* trust is not subject to *fara’id* distribution. In *Re Man bin Mihat*,⁷² the deceased took out an insurance policy for \$40,000 to be paid, either at the end of 25 years from the commencement of the assurance or upon his death, to himself or to who he assigns. The deceased named his wife as the beneficiary in the policy and also executed an instrument assigning the policy to his wife. Both the deceased and his wife were Muslims and, therefore, the question arose as to whether the \$40,000 was held on trust for his wife or the money belonged to the deceased’s estate. In accordance with section 23(1) of the *1956 Civil Law Ordinance*,⁷³ Suffian J (as he then was) held that the \$40,000 insurance pay out was held on trust for his wife and not subject to *fara’id* distribution. The learned judge analogised the trust over the insurance policy to a trust over land as follows:

Indeed it is quite common for a Muslim to buy land for his minor children and have himself registered in the land office records as trustee, though the effect would be to augment the share received by those children in his property after his death. During his lifetime the land is trust property and his death does not alter its character, for thereafter the land remains trust property and his administrator holds it for the purpose of the trust.

Thus, *Re Man bin Mihat* stands for the proposition that property held on an *inter vivos* fixed trust does not form part of the deceased’s estate and is not subject to *fara’id* distribution principles. The lingering difficulty is whether the same holding would apply to the *hibah* trust.

Another important case in analysing the difficult question of the conflict between Muslim personal laws and trust law is *TM Feroze Khan v Meera Hussain TM Mohamed Mydin* (*‘TM Feroze’*).⁷⁴ In this case, the deceased, a Muslim, transferred land to himself to hold on trust for the defendant (the then-8-year-old son of the deceased). This transfer was registered at the Land Registry and the deceased executed a trust deed declaring himself to be a trustee holding the property on trust for the

⁷¹Ibrahim (n 31) 66.

⁷²[1965] 2 MLJ 1.

⁷³Civil Law Ordinance 1956, s 23(1). According to section 23(1) of the Civil Law Ordinance 1956, ‘[a] policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife ... shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his ... debts.’

⁷⁴[2006] 5 MLJ 217.

defendant. During the deceased's lifetime, there was no transfer of the legal title of the land to the defendant nor did the defendant take physical possession of the land. Following the deceased's death, the defendant obtained an *ex parte* order to vest the land in his own name and so registered the property in his name. The plaintiffs, comprising the other children of the deceased, challenged this, and argued that the purported gift of the property was null and void under Islamic law as physical possession and legal title of the property did not pass to the defendant during the deceased's lifetime (*per* the requirements of a *hibah*). Instead, the plaintiffs submitted that the property formed part of the deceased's estate to be distributed under the terms of *fara'id* (to be shared amongst the deceased's heirs). Therefore, two issues arose in this case. First, what was the proper characterisation of the issue – was this a land law case or a situation where Islamic personal law is engaged? And if this was an issue of Islamic law, whether the trust was offensive under Muslim law? In *TM Feroze*, Nik Hashim JCA (delivering the judgment of the Putrajaya Court of Appeal) characterised this matter as an issue of land law and not Muslim personal law reasoning as follows:

... in the instant case, the applicability of Islamic law is subject to the civil law which are applicable to all irrespective of whether the parties are Muslims and non-Muslims. And here there are no preserving rules of Islamic law in the applicable land law and the law of trust that govern this case.⁷⁵

Hence, the plaintiffs' argument was rejected, and the Court of Appeal upheld the High Court's decision in favour of the defendant.

This decision is fascinating because Nik Hashim JCA went on to discuss Islamic law in relation to gifts and purportedly interpreted the trust via the lens of Muslim jurisprudence. He said that under Islamic law, a man may lawfully make a gift of his property during his lifetime provided the following three conditions are fulfilled: (i) a manifestation of the wish of the donor to give; (ii) the acceptance of the donee either impliedly or expressly; and (iii) the taking possession of the subject matter of the gift by the donee, either actually or constructively. While the Court of Appeal in *TM Feroze* recognised that, under Islamic law, delivery of possession is 'an essential element to constitute a complete gift',⁷⁶ the court chose to interpret this requirement broadly such that the only requirement to complete the gift was a *bona fide* intention to give in the context of a gift from a father to his minor son. As the deceased in *TM Feroze* had transferred the property to himself as trustee for his son, Nik Hashim JCA held that there was a transfer of legal possession of the property to the son. The learned judge said this was the only means of effecting transfer under Malaysia's National Land Code. Hence, the deceased's *bona fide* intention to give the property to the defendant was 'manifestly clear and unequivocal'. Thus, *TM Feroze* stands for the proposition that a fixed *inter vivos* express trust of land in favour of a beneficiary is not subject to Muslim inheritance law.

It may be argued that since *Re Man bin Mihat* and *TM Feroze* stand for the proposition that an *inter vivos* trust is not subject to Islamic inheritance law, a *hibah* trust is similarly not subject to *fara'id* principles. This characterisation is controversial because both *Re Man bin Mihat* and *TM Feroze* involved a *fixed* trust where the beneficiary was a third party and not a *hibah* trust. Under an express fixed trust, a beneficiary with full mental capacity who has reached the age of majority may demand the trustee convey legal title to the beneficiary.⁷⁷ However, a *hibah* trust presupposes the settlor/donor retaining use of the property prior to his or her death by way of a contract between the donor and the donee. This retention of interest coupled with the fact that property

⁷⁵[2006] 5 MLJ 217 para 19.

⁷⁶ibid para 13. See also Noordin et al (n 24).

⁷⁷*Saunders v Vautier* 41 ER 482; cited with approval in *Chen Khai Voon v Lim Beng Guan* [2020] 1 LNS 2222 (Unreported) para 119; *Jeyalakshmi Ratnavale v Tan Sri M Mahadevan* [2019] 1 LNS 965 (Unreported) para 46; *Liong Seow Keng v Ho Soon Cheng* [2015] 3 CLJ 808 para 66; *Salleh Bin Hussein v Punca Klasik Sdn Bhd* [1997] 1 LNS 392 (Unreported).

would only be transferred to the donee upon the donor's death makes the *hibah* trust vulnerable to challenge by disappointed *fara'id* beneficiaries. This is particularly so given its potentially controversial nature and the lack of any statutory provisions in relation to the *hibah* trust.⁷⁸

In conclusion, the position in relation to the *hibah* trust remains uncertain and a challenge may come from either the civil or *Syariah* court challenging the validity of the *hibah* trust. Looking at the Federal Constitution of Malaysia and State legislation, it is likely that for States where the legislation is clear, the *Syariah* court would assume jurisdiction over the *hibah* trust where all parties are Muslims. The situation where the beneficiaries are non-Muslims remain uncertain. With regard to the civil court's jurisprudence on the *hibah* trust, the position is ambiguous whether the civil court would uphold the *hibah* trust as an *inter vivos* gift which does not engage Muslim inheritance law. While there is case law involving an express *inter vivos* fixed trust where the beneficiary is a third party, there has not been any authorities deciding on the proper jurisdiction of *hibah* trust disputes where the settlor retains an interest during his or her lifetime. Given this uncertainty in relation to the jurisdictional question, it is interesting that major banks, trust companies and institutions are offering the *hibah* trust as a wealth management offering to their clients.

Potential Challenge to the *Hibah* Trust in the *Syariah* Courts

There appears to be numerous challenges to the *hibah* in the *Syariah* court. In a study published in 2016 involving Melaka, a state in Malaysia, it was reported that there were 12 challenges in 2013, 22 challenges in 2014 and 31 challenges in 2015 in the *Syariah* court.⁷⁹ It is not clear how many of these challenges were in relation to the *hibah* trust. The present author has conducted a search on a paid database which contains the decisions from the *Syariah* court and did not find any decisions on the *hibah* trust.⁸⁰ While there are numerous judgments on various aspects of the *hibah*, there were no specific court decision on the *hibah* trust which retains the use of the asset for the benefit of the settlor during the settlor's lifetime. The *Syariah* case law accepts that a valid *hibah* takes the assets out of the deceased's estate⁸¹ and many of the judgments are about whether the elements of a *hibah* had been fulfilled.⁸² Several explanations may explain the lack of court challenges in relation to a *hibah* trust. First, the *hibah* trust is a relatively new instrument and many settlors have not passed away. Therefore, potential challenges have not been filed. Second, it could be the *hibah* trust is in fact not a popular instrument of succession planning which explains the lack of court decisions. And finally, it could be that even if there was unhappiness in relation to the *hibah* trust, disgruntled legatees either do not take out formal court challenges or prefer to settle matters out of court. Without the benefit of a court decision on the *hibah* trust, the following issues remain live questions: (a) whether the *hibah* trust is void if it deprives beneficiaries of a Muslim's estate under Islamic inheritance law? and (b) whether a *hibah* trust which retains the use of the asset for the benefit of the settlor is considered to be a valid *hibah* under Islamic law?

Conclusion

This article has explored the Islamisation of the English trust via the *hibah* trust in Malaysia which incorporates English trust principles with the *hibah*. The *hibah* trust demonstrates the incredible

⁷⁸Hassan & Zaizi (n 27) 250–251.

⁷⁹Ahmad et al (n 62)

⁸⁰Current Law Journal Shariah, 'Home' <www.shariahlaw.com> accessed 19 Apr 2023.

⁸¹See eg, *Muhammad Awang v Awang Deraman* [2004] CLJ (Sy) 139; *Abdul Ghani Abdul Kadir v Arpah Abdul Kadir* [2012] 3 LNS 19.

⁸²See eg, *Eshah Abdullah v Che Aminah Abdul Razak* [2005] 1 CLJ (Sy) 276; *Ibrahim Hj Abu Bakar v Mohd She Mohd Ali* [2005] 1 CLJ (Sy) 177; *Poolimahee Rajeswary v Meah Hussain* [2006] 1 CLJ (Sy) 159; *MST Kulsoom Bibi v Muhammad Arif* [2006] 1 CLJ (Sy) 262; *Dalam Perkara Ex P Siti Noor Aseera Awang* [2007] 1 CLJ (Sy) 386; *Wan Mahmud Abdul Rahman v Aminah Hj Taib* [2009] 1 CLJ (Sy) 327; *Fatimah Hj Mohd Nong v Mohd Azmi Mohd Yaacob* [2011] 1 CLJ (Sy) 285.

versatility of the trust instrument which could be reimagined as a hybrid instrument involving Islamic principles to cater to a Muslim population from the perspective of succession planning. As demonstrated in this article, the *hibah* trust was introduced by various institutional actors to accommodate a form of succession planning for Muslim persons seen to be compatible with *Syariah* law. A larger theme that is revealed in the development of the *hibah* trust is the importance which Muslim persons in Malaysia place on personal adherence to Muslim personal law due to growing religiosity. Even though the *hibah* trust is being offered by major institutions like banks and trust companies, uncertainty remains as whether the civil or *Syariah* court have the jurisdiction to hear disputes on the *hibah* trust. If the proper jurisdiction to hear these matters is the *Syariah* court, there is also uncertainty whether the *hibah* trust would be upheld if it deprives Muslim legatees under Islamic inheritance law.