

**THE CREATION OF ISLAMIC TRUST UNDER THE CIVIL REQUIREMENTS  
IN MALAYSIA**

Yusnita Mohd Yusof<sup>i</sup> & Akmal Hidayah Halim<sup>ii</sup>

<sup>i</sup> (*Corresponding Author*). Lecturer, Faculty of Law, Multimedia University, Malaysia (MMU).  
yusnita.yusof@mmu.edu.my

<sup>ii</sup> Associate Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia (IIUM).  
akmalh@iium.edu.my

<b>Abstract</b>	<p><i>Trust is an exclusive creation. It covers both legal and equitable rights in a concept created by English jurists which is based on Common Law principles. The trust as applicable in Malaysia is for both non-Muslims and Muslims, without any exceptions. In Islam, trust is justified as a method of transferring the ownership of property from the owner to the beneficiaries. While the main reason for creating such a trust is to secure the rights of a beneficiary who has an issue with legal capacity, such as minor and lunatic, the instrument of trust has been used by the Muslims to augment the share that should be received by the beneficiaries after the death of the settlor, which has already been fixed by Islamic law. Hence, this article seeks to determine and compare the creation of civil and Islamic trust in Malaysia, including the jurisdiction of the court in this matter, if challenged. This article adopts a content analysis by examining the existing primary and secondary materials, including the statutory provisions and case law. It is observed that the jurisdiction of the civil court in matters relating to the Islamic trust should be reformed. In addition, codified guidelines on the creation of trust by Muslims through civil trust requirements are highly necessary in order to ensure that the trust does not violate Islamic principles.</i></p> <p>Keywords: <i>Islamic, Trust, Civil, Requirement, Property.</i></p>
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**INTRODUCTION**

Trust is one of the estate planning instruments created by the owner of the property during his lifetime, which may take effect immediately or after his death. A trust is created by a settlor, who transfers the title of the intended property to a trustee, who then holds title to that property in trust for the benefit of the beneficiaries. Trust can be classified in various ways. However, the most noted classification is founded on the intention of the settlor and is termed express trust.<sup>1</sup>

Whilst, Islamic trust is created for a specific purpose for the benefit of a specific beneficiaries who are legally incapable of holding or managing his affairs. The principles seem to be similar but different in several ways with civil trust. The Islamic law of trust specifies that once trust is created, the property no longer belongs to the settlor, and the entrusted person will administer and manage the trust property according to the terms and conditions of the trust. The Qur'an clearly states that trust must be held by the trustee and the property is belong to the owner who intended to be passed on accordingly.<sup>2</sup> Tafsir al-Jalalalyn, supported the verse where this was revealed when 'Alī, may God be pleased with

<sup>1</sup> Wan Azlan Ahmad & Paul Linus Andrews. (2005). *Equity and Trusts in Malaysia*. Malaysia: Sweet & Maxwell Asia, 7.

<sup>2</sup> Al-Quran. an- Nisā: 58.

him, took the key of the *Ka'ba* from its keeper, 'Uthmān b. Talha al-Hajabī, by force, upon the arrival of the Prophet(s) in Mecca in the year of the Conquest.<sup>3</sup>

The instrument of trust has been advocated as one of the best mechanisms to be considered for Islamic wealth disposition in Malaysia.<sup>4</sup> The trust is completely constituted where the settlor (the owner of the trust property who is still alive) transfers legal ownership to an appointed trustee, or in circumstances where the settlor declares himself as a trustee to hold the property in trust for the beneficiary. For this purpose, various trust products have been created which combine trust instruments with the instruments of *hibah* (Islamic gift inter-vivos) in order to form a hybrid Trust *Hibah* or *Hibah Amanah* to meet the demand of the society in managing their property. In such cases, the *Hibah Amanah* embraces the concept of *hibah ruqba* which is a conditional gift specifying that the *hibah* property will belong to the donee if the donor died and that, the *hibah* property will revert to the donor if the donee predeceased the donor. The Syariah Advisory Council (SAC) of the Security Commission in its 44<sup>th</sup> meeting dated 15 January 2003 has confirmed that the principles of *hibah ruqba* are accepted in the execution of *hibah* declaration form for transactions that involve joint account for a unit trust, especially for the account held by the Muslims.<sup>5</sup>

In reference to the creation of Islamic trust in Malaysia, one must note that the applicable law in Malaysia is the civil law, although the customary law including Islamic law is still essential with regards to Muslim's estate. Federal Constitution, specifically in Schedule Nine,<sup>6</sup> states that trust is listed under Federal List. Consequently, matters on trust are governed and subject to the civil law of trust. This is applicable to all Malaysians without any exceptions. Thus, this article seeks to determine and compare the creation of civil and Islamic trust in Malaysia with a view to analyse the creation of Islamic trust through civil trust requirements including the jurisdiction of the court if challenged.

### THE CONCEPT OF CIVIL TRUST

Despite the fact that Malaysia does not have a specific statute on trust, this has not been an obstacle for the law to develop with a wider coverage. There are many definitions of trust and although Malaysia has no single statute governing the law of trust, the law developed and to some extent, the principles of English law of trust are fully adopted.<sup>7</sup>

<sup>3</sup> After he ['Uthmān] had tried to prevent him ['Alī from taking it] saying, 'If I had known that he was the Messenger of God, I would not have prevented him'. The Messenger of God (s) then ordered him ['Alī] to give it back to him ['Uthmān] saying to him, 'Here you are, [it is yours] now and always'. He ['Uthmān] was amazed by this, whereupon 'Alī recited to him this verse, and he accepted Islam. Upon his death, he ['Uthmān] gave it [the key] to his brother, Shayba, and thus it remained in [the keep of] his descendants. Although the verse was revealed regarding a specific occasion, it holds true in general on account of the plural person [to which it is addressed]. And when you judge between people, He commands, that you judge with justice. Excellent is (*ni'imma*, the *mīm* of *ni'ima* has been assimilated with the indefinite particle *mā*, which is the object described, in other words, *na'ima shay'an*, 'an excellent thing [is]') the admonition God gives you, to restore a trust and to judge with justice. God is ever Hearer, of what is said, Seer, of what is done. Tafsir al-Jalalayn, trans. Feras Hamza. <http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=74&tSoraNo=4&tAyahNo=58&tDisplay=yes&UserProfile=0&LanguageId=2> (accessed on 21<sup>st</sup> March 2016).

<sup>4</sup> Akmal Hidayah Halim. (2011). The Legality of a Living Trust as an Instrument for Islamic Wealth Management: A Malaysian Perspective. *IJUM Law Journal*, 19, 37.

<sup>5</sup> Suruhanjaya Sekuriti. (2006). *Keputusan Majlis Penasihat Syariah Suruhanjaya*. Kuala Lumpur: Suruhanjaya Sekuriti.

<sup>6</sup> List I—Federal List : 4. Civil and criminal law and procedure and the administration of justice, including— (e) subject to paragraph (ii), the following: (i) contract; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; bona vacantia; equity and trusts; marriage, divorce and legitimacy; married women's property and status; interpretation of federal law; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and minors; adoption; succession, testate and intestate; probate and letters of administration; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence.

<sup>7</sup> Ali, Zuraidah, Norlia Ibrahim, Abd Ghadas, Zuhairah Ariff, & Shariffah Nuridah Aishah Syed Nong. (2021). Law of Trust and the Beneficial Interest in Matrimonial Property. *Pertanika Journal of Social Sciences & Humanities* 29(S2), 105-117.

In order to create a valid trust,<sup>8</sup> one needs to fulfil the three certainties requirements. The first certainty is the certainty of intention. Certainty of intention is the characteristic feature of express trust which distinguish it from other types of trust. The general rule is no precise words are necessary to create a trust as “equity looks to intent rather than form”.<sup>9</sup> Therefore, a trust can be created by any language which is clear enough to show an intention to create it,<sup>10</sup> and the court may look also to the nature of the transaction and the relevant circumstances attending the relationship between them.<sup>11</sup> This means that the words used to convey the intention must be sufficiently expressive.<sup>12</sup> In the case of *Wan Naimah v Wan Mohamad Nawawi*<sup>13</sup> the court held that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. The use of the word “trust” is not mandatory, instead the words that indicate that the donor intended to divest himself of the beneficial interest would be sufficient for the purpose.<sup>14</sup> The court in the case of *Quah Eng Hock v Ang Hooi Kiam*,<sup>15</sup> referred to the need for the words used to be clear and unequivocal and held that words indicating that the donor intended to divest himself or herself to the beneficial interest would be sufficient for the purpose. In the event the instrument uses words that are unclear, the effect is no trust created, since unable to prove the exact intention of the donor.

Next is the certainty of the subject matter. The property subject to trust must either be clearly defined or capable of ascertainment.<sup>16</sup> This means that the trustee must be able to identify clearly the trust property he is to hold on trust,<sup>17</sup> and in the case of a fixed trust, the trustees must be able also to identify the precise entitlement of the beneficiaries.<sup>18</sup> Among the earliest English case that upheld the principle is *Sprange v Bernard*,<sup>19</sup> where the court held the trust failed for the uncertainty of the subject matter. The objective of this certainty is to ensure that the trustees are alert to which property the trust takes effect on. Furthermore, it must be noted that if a settlor failed to specify the trust property at all, there will be no trust.

The last essential certainty is the certainty of object. The general rule is a trust must be in favour of human beneficiaries or trust recognized for purposes recognized as charitable by law. This is known as a *beneficiary principle*.<sup>20</sup> The basic requirements of this beneficiary principle are affirmed in the case of *Morice v Bishop of Durham*<sup>21</sup> whereby every trust must have certain beneficiaries, as there must be somebody, in whose favour the court can decree performance. This concluded that trust for non-charitable purposes, as distinct from a trust for individuals, is clearly void because there is no beneficiary.<sup>22</sup>

A trust must comply with the requisite formalities, satisfy the test of the three certainties, and also must be properly and completely constituted. The general rule to the constitution of a trust is equity will not assist a volunteer and perfect an imperfect gift.<sup>23</sup> The complete constitution of trust can be achieved by three methods either by the owner

<sup>8</sup> George and Balan, Malaysian Trust Law, 123 – 126, for definition of “trust”.

<sup>9</sup> Wan Azlan Ahmad & Paul Linus Andrews. *op.cit.* 22; G E Dal Pont, D R C Chalmers, J K Maxton, 468.

<sup>10</sup> Halsbury’s Laws of Malaysia, Vol. 5, paragraph [90.043].

<sup>11</sup> Re Australian Elizabethan Theatre Trust (1991) 102 ALR 681 at 693.

<sup>12</sup> Yap Joyce v Tee Molly [2000] 6 VLJ 220.

<sup>13</sup> [1974] 1 MLJ 41.

<sup>14</sup> *Ibid*

<sup>15</sup> [200] CLJ 126.

<sup>16</sup> A. J. Oakley, Anthony R. Mellows, David Berkeley Parker. (2008). *Parker & Mellows: The Modern Law of Trusts*. Sweet & Maxwell, 53.

<sup>17</sup> Fusing Construction Sdn Bhd v EON Finance Bhd [2000] 3 CLJ 341. CA.

<sup>18</sup> G E Dal Pont, D R C Chalmers, J K Maxton, p. 476.

<sup>19</sup> (1789) 2 Bro CC 585, wherein this case, the testatrix left stock to her husband ‘for his sole use, and all that is remaining in the stock, that he has not necessary use for, to be equally divided between’ her brother and sisters.

<sup>20</sup> G E Dal Pont, D R C Chalmers, J K Maxton, p. 480; Wan Azlan Ahmad & Paul Linus Andrews. *op.cit.* 33.

<sup>21</sup> (1804) 32 ER 656.

<sup>22</sup> Re Recher’s Will Trusts [1972] Ch 526 at 538.

<sup>23</sup> Wan Azlan Ahmad & Paul Linus Andrews. *op.cit.* 41.

declaring a trust over it, by a valid and effective transfer the property to a trustee, and an outright transfer from the settlor to the donee.<sup>24</sup>

In cases of a declaration of trust, when the owner declares a trust over the trust property and is subject to compliance with any statutory formalities, the declaration itself is sufficient and effective to create a trust. In this case, the legal ownership of the property is retained by the settlor himself as a trustee.<sup>25</sup> As for trust by transfer, the owner must have caused the intended legal ownership of the trust property to be transferred to the trustees in order to make a trust completely constituted. According to Turner LJ in the case of *Milroy v Lord*,<sup>26</sup> an effective gift will not be saved by the court by construing it as a declaration of trust because there is no equity in court to perfect an imperfect gift.

Lastly, a trust will be completely constituted when the settlor appoints a trustee or in a case, the settlor declares himself as a trustee to hold property on trust for the benefit of the beneficiary. The trust property will no longer belong to the settlor's estate and irrevocable unless there is a revocation clause save when constituting the trust. A valid declaration of trust in Peninsular Malaysia is not dependent on any statutory formalities. Nevertheless, compliance with the formalities becomes pertinent if the trust is intended to take effect upon death. Thus, in respect, the formalities can be seen as to whether the trust is created during the lifetime of the donor, or by a will that shall take effect upon death<sup>27</sup> and is subject to Wills Act 1959.<sup>28</sup> Figure 1 below illustrates the civil concept of trust-

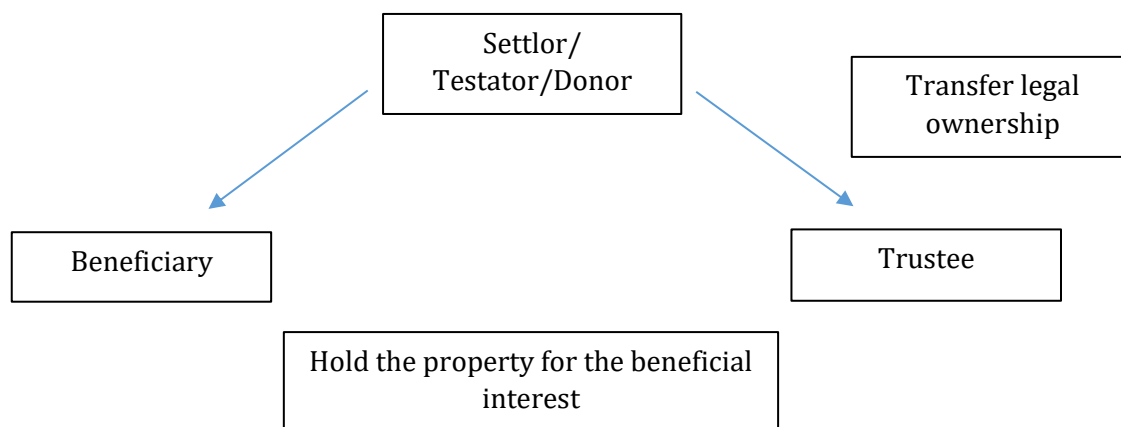


Figure 1 : Concept of Civil Trust

### THE CONCEPT OF ISLAMIC TRUST

In Islam, trust is justified as one of the methods of transferring the ownership of property from the owner to the beneficiaries for both immovable and movable property. The purpose of the trust is to secure the right and welfare of the beneficiary who has an issue with legal capacity such as minor and lunatic.

A trust in Islam is called *al-Amānah* which is defined as honesty that refers to fairness and straightforwardness of conduct.<sup>29</sup> It is also the conduct of telling the truth or being able to be trusted and not likely to steal, cheat, or lie.<sup>30</sup> Technically, *al-amānah* is related to anything that is entrusted to the human being either legal obligation in Islam

<sup>24</sup> Lee Ing Chin & Ors v Gan Yook Chin & Anor [2003] 2 CLJ 19 at p. 63.

<sup>25</sup> Akmal Hidayah Halim. *op.cit.* 39.

<sup>26</sup> 45 ER 1185.

<sup>27</sup> Mohd Arshad, Ain Husna. (2022). "Express Trust" In *Equity & Trust In Malaysia*. In: Law & Practice. Ali, Ashgar and Ahmad, Muhamad Hassan (Edt), Selangor: Sweet & Maxwell, 352- 353.

<sup>28</sup> Section 5.

<sup>29</sup> Merriam Webster. Honesty. <https://www.merriam-webster.com/dictionary/honesty#synonyms> (accessed on 15<sup>th</sup> April 2019).

<sup>30</sup> Cambridge Dictionary. Honest. accessed April 15, 2019, <https://dictionary.cambridge.org/dictionary/english/honest> (accessed on 15<sup>th</sup> April 2019).

(*taklīf*) or by allowing a person to keep the property belonging to oneself with another person for safekeeping purposes such as a deposit fund (*wadī'ah*).<sup>31</sup> Imām Ibn Al-Athīr defines that *al-amānah* can mean obedience, worship, safekeeping, trust, and security guarantees.<sup>32</sup> In Islam, an honest person is known as *al-amīn*.<sup>33</sup>

The concept of trusteeship of an appointed individual to manage and carry out certain duties in relation to certain assets is well-known in Islamic law<sup>34</sup> and shares similarities with the common law trust. However, some characteristics of the modern trust structures, such as requiring the vesting of the title of trust assets in the trustee and the roles of protectors, need consideration from the Shariah perspective.<sup>35</sup>

Trusteeship may also exist in the form of *waqf* (Islamic endowment) whereby the Islamic Religious Council of each state in West Malaysia is appointed as the sole trustee of the *waqf* property. This is an appointment by operation of law and will invalidate any other appointment made.

The duty of the trustee is to hold the property and develop it for the interest of the beneficial owner (beneficiary) until the beneficiary can manage the property themselves. For this purpose, the trustee has the power to manage the trust property such as to sell, buy, or lend the property for the benefit of the beneficiary as long as his act does not result in the extreme or excessive loss, grave and overreaching deception (*al-qubn al-fāḥish*)<sup>36</sup> It is also something that does not come under the evaluation of the rectifiers.<sup>37</sup>

In Malaysia, the power of trustees for Muslims is scattered in several provisions in Islamic Family Law (Federal Territory) Act 1984 for the movable and immovable property<sup>38</sup> including guardianship for minors<sup>39</sup> and unsound mind persons. Thus, it clearly shows that the jurisdiction in determining the authorities for Islamic trust falls in State rather than Federal.

In Islam, every person who is entrusted to a trust in every aspect of daily life is known as *walī* (guardian). The concept of a guardianship is a power in accordance with which a person will be able to establish contracts and other legal conducts, execute them and bear the consequences thereof.<sup>40</sup> The guardianship can be divided into two namely the guardianship of person and of property. The guardianship of person means the power and conduct of taking care of the ward's personal affairs such as marriage, education, and so on. For example, if a person is a guardian of the orphan, the person will be known as *walī al-*

<sup>31</sup> Wizārah al-awqāf wa al-shu'ūn al-islāmiyyah. (1404-1427). *al-mawsū'ah al-fiqhiyyah al-kuwaitiyyah*. Egypt: Dār al-Safwah, Vol. 6, 236.

<sup>32</sup> Ibn Al-Athīr, Abu al-ḥassan 'Alī ibn Muḥammad ibn Muḥammad al-Shaybānī. (1399H). *al-Nihāyah fi Qarīb Al-ḥadīth wa al-Athar*. Bayrūt: al-Maktabah al-'Ilmiyyah, Vol. 1, 71.

<sup>33</sup> Ibn Manzūr, Muḥammad ibn Mukarram ibn 'Alī ibn Aḥmad ibn Manzūr Al-Ansārī Al-Ifrīqī Al-Misrī Al-Khazrajī Jamāl al-Dīn Abū al-Fadl. (1414H). *Lisān Al-'Arab*. Bayrūt: Dār Ṣādir, Vol. 4, 11.

<sup>34</sup> 'Abd al-Razzāq al-Sanhūrī. (1954). *Maṣādir al-Ḥaqq fi al-Fiqh al-Islāmī*. n.p: Dār Ihyā' al-Turāth al-'Arabī. 126f; Ahmad Hidayat Buang. (2006). *Pembentukan dan Pentadbiran Harta Amanah Menurut Perspektif Undang-undang Islam*. In Siti Mashitoh Mahamood (Ed.). *Harta amanah orang Islam di Malaysia: Perspektif undang-undang dan pentadbiran*. Kuala Lumpur: Penerbit Universiti Malaya, 44-45.

<sup>35</sup> Aida Othman. <https://www.eurekahedge.com/Research/News/1213/Islamic-Trusts-An-Alternative-Option-for-the-Wealthy> (accessed on 19th April 2022).

<sup>36</sup> 'Abd al-Razzāq al-Sanhūrī. *op.cit.* 126f; Ahmad Hidayat Buang. *op.cit.* 44-45; Muḥammad Rawās Qal'ajī & Ḥamid Ṣādiq Qanībī. (1988). *Mu'jam lughah al-Fuqahā'*. Dār al-Nafā'is lil Tabā'ah wa al-Nashr wa al-Tawzi', Vol. 1, 328.

<sup>37</sup> 'Alī ibn Muḥammad ibn 'Alī Al-Zayn Al-Sharīf Al-Jurjānī. (1983). *Kitāb Al-Ta'rīfāt*. Bayrūt: Dār Al-Kutub Al-'Ilmiyyah, 161.

<sup>38</sup> Section 89

<sup>39</sup> Section 96 – Section 98.

<sup>40</sup> Al-Siba'i, Mustafā & al-Ṣabūnī, 'Abd al-Raḥmān. (1978). *Al-Aḥwāl al-Shakhsiyyah fi al-Ahliyyah wa al-Waṣiyyah wa al-Tarakat*. Damascus: al-Maṭba'ah al-Jadīdah, 40; Mahdi Zahraa & Normi A. Malek. (1998). *The Concept of Custody in Islamic Law*. *Arabic Law Quarterly*, 155-177.

*yatīm*. A father will be his daughter's *waliy* during the solemnization of marriage contract as he is the guardian and protector of his daughter.<sup>41</sup> The Prophet (PBUH) said to the effect:

*"If any ruler having the authority to rule Muslim subjects dies while he is deceiving them, Allah will forbid Paradise for him."*<sup>42</sup>

On the other hand, the guardianship of property is the power to conduct, administer and conclude contracts, as well as other legal conduct relating to the property of the beneficiaries.<sup>43</sup> "Guardian of property" means a person responsible for the execution of a will and includes a person appointed as a guardian of property by the Court.<sup>44</sup> For both guardianship of person and property, if the father is still alive, he will be the natural guardian of his small children. However, in the absence of the father, the guardianship will go, jointly or separately, either to the appointed guardian or to the male agnate (*'aṣabah*) according to the order of priority.<sup>45</sup>

The concept of Islamic trust nevertheless has the same requirements as the civil trust which is the donor, trustee, and beneficiary. The application however, may have a different impact. Whilst the civil trust can be created for any beneficiary, the creation of Islamic trust is mainly due to the concern for the beneficiary who is not able to manage his own affairs such as a minor and lunatic. In such cases, someone must receive the property on their behalf. The most eligible person who can accept the duty is the legal guardian of the property of beneficiaries is, (in order) the father, the father's executor, the paternal grandfather or his executor. In the case of a minor, the property will be transferred to him after he reaches the age of majority. In Malaysia, the age of majority (age of majority) is 18 years as provided in section 2 of the Age of Majority Act 1971. The trustee will thereafter be released from his responsibility to manage and administer the trust property. However, in the cases where the beneficiary is of unsound mind, the trustee is responsible to carry out the duties throughout his or her lifetime. Most importantly, it is to be noted that in Islam, once trust is created, the trustees should not treat the trust property as his own since this will amount to breach of trust.

## THE CREATION OF TRUST IN MALAYSIA

In Malaysia, there is no specific code or guideline to create a valid trust for both Muslims and Non-Muslim. The Public Trustee Act 1949 (Act 208) only provides for matters relating to *inter alia* appointment and powers of trustee. The Act does not have specific provisions on the requirements and execution of trust. As for Muslims, the only guideline for Islamic trust can be found in the Guidance Note on Islamic Trust in Labuan IBFC (International Business and Financial Centre)<sup>46</sup> which serves to complement Labuan IBFC's Shariah-based wealth management and succession planning offerings by clarifying the requirements and providing market guidance on the establishment of Islamic Trust,<sup>47</sup> established under Section 105 of Labuan Islamic Financial Services and Securities Act 2010 (LIFSSA). In

<sup>41</sup> Ibn Manzūr, Muḥammad ibn Mukarram ibn 'Alī ibn Aḥmad ibn Manzūr Al-Ansārī Al-Ifrīqī Al-Misrī Al-Khazrajī Jamāl Al-Dīn Abū Al-Fadl. (1414H). *Lisān Al-'Arab*. Bayrūt: Dār Ṣādir, Vol. 15, 407; Aḥmad Mukhtār 'Abd al-Ḥamīd 'Umar. (2008). *Mu'jam Al-Lughah Al-'Arabiyyah Al-Mu'āṣarah*. 'Ālam al-Kutub, Vol. 3, 2498.

<sup>42</sup> Al-Bukhārī, Abū 'Abd Allāh Muḥammad ibn Ismā'īl ibn Ibrāhīm ibn al-Mughīrah ibn Bardizbah Al-Ju'fī. (1422H). *Ṣaḥīḥ al-Bukhārī*. Dār Tūq al-Najāh, Hadīth 7151.

<sup>43</sup> Mahdi Zahraa & Normi A. Malek. *op.cit.*

<sup>44</sup> Section 2(1), Muslim Wills (Selangor) Enactment 1999 (Enactment No. 4 of 1999).

<sup>45</sup> Al-Siba'i. *op.cit.* 41; Mahdi Zahraa & Normi A. Malek. *op.cit.*

<sup>46</sup> Guidance Note on Islamic Trust In Labuan International Business and Financial Centre. [https://www.labuanfsa.gov.my/clients/asset\\_120A5FB8-61B6-45E8-93F0-3F79F86455C8/contentms/img/documents/Legislation\\_and\\_Guidelines/Guidelines/Islamic\\_businesses/Guidance%20Note%20on%20Islamic%20Trust%20in%20Labuan%20IBFC\\_08112019.pdf](https://www.labuanfsa.gov.my/clients/asset_120A5FB8-61B6-45E8-93F0-3F79F86455C8/contentms/img/documents/Legislation_and_Guidelines/Guidelines/Islamic_businesses/Guidance%20Note%20on%20Islamic%20Trust%20in%20Labuan%20IBFC_08112019.pdf)

<sup>47</sup> *Ibid*, Para 1.3.

addition to LIFSSA, the Labuan Trust Act 1996 (LTA) and any applicable guidelines issued by the Labuan FSA from time to time, will also apply to Labuan Islamic trusts.<sup>48</sup>

According to the Para 1.1 of the Guidance Note, Islamic Trust refers to a trust created by the settlor during his lifetime for the benefit of the beneficiaries whereby its aims and operations are in compliance with Shariah principles. The assets are entrusted to the appointed trustee to be held for the benefit of the beneficiaries in accordance with Shariah principles and the objectives of the Settlor.

The Guidance Note explains the creation of Islamic Trust in Labuan IBFC. Para 2.3 states that, Islamic Trust in Labuan can be created by a will (*wasīyyah*) or any other instrument in writing including a unilateral declaration of trust. The Islamic Trust can be registered with Labuan FSA for certain fee and must contain a statement that the trust company declared to be the trustee for the Islamic Trust. The operation of the Islamic Trust is illustrated in the diagram below:

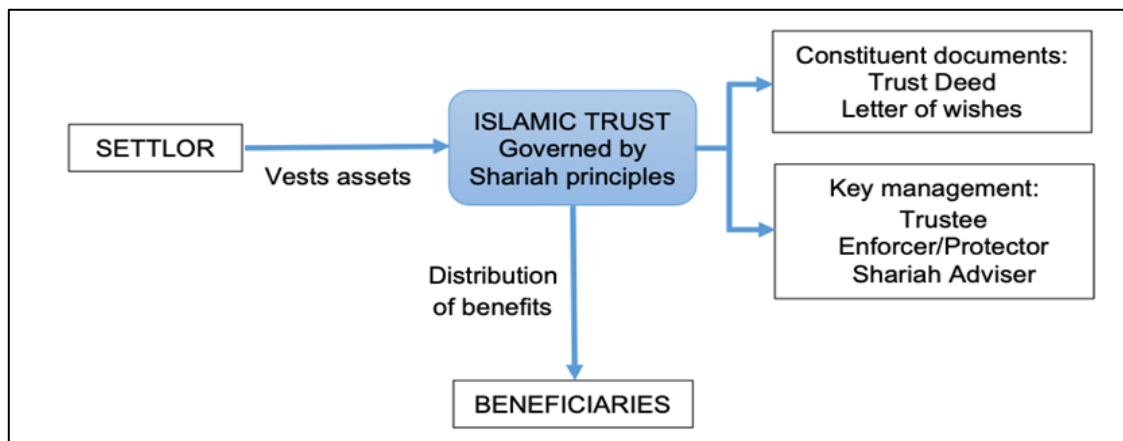


Figure 2: The operational structure of Islamic Trust

Para 3 of the Guidance Note lays down the operation of the Islamic trust including its management and beneficiaries. The key management of the Islamic Trust consists of the workforce that runs the trust, which includes the trustee, Shariah adviser, and enforcer or protector of the trust. In the creation of Islamic Trust, the Guidance note states that the Settlor can be the trustee or beneficiary for the trust provided that he is not a sole trustee. Thus, the Labuan trust company should also be appointed as one of the trustees. The trustee is responsible to hold the title to the trust property and administer the management of the Islamic Trust. This is no different from the civil trust applicable in Peninsular Malaysia. Furthermore, trustees have a fiduciary duty to ensure the Islamic trust assets are managed and wisely distributed in the best interests of the beneficiaries. The trustee shall appoint or consult a qualified person as a Shariah adviser to advise the trustee on the management and operations of the Islamic Trust to ensure its compliance with Shariah principles.<sup>49</sup>

As for the Islamic Trust Deed, the terms are provided in Para 4 of the Guidance Note. It is clearly stated that the terms of the trust shall be in compliance with Shariah principles as determined by the Shariah adviser. The Islamic Trust can be revoked during the lifetime of the settlor. Upon the settlor's death, the revoked trust assets shall be distributed according to the Islamic law of inheritance (*faraid*).<sup>50</sup> *Faraid* principles and rulings however, shall not apply if the vesting of the trust asset has been made immediate and irrevocable or

<sup>48</sup> Aida Othman. <https://www.eurekahedge.com/Research/News/1213/Islamic-Trusts-An-Alternative-Option-for-the-Wealthy> (accessed on 19th April 2022).

<sup>49</sup> Supra, Section 3, 4 & 5.

<sup>50</sup> Section 4.12 stated The terms of the Islamic Trust shall define that, in the event that the Islamic Trust is revoked while the Settlor is still alive, and the revoked trust assets remains with the Settlor until his death, then upon the Settlor's death, the revoked trust assets shall be distributed to the Settlor's heirs of inheritance in accordance with Faraidh rulings.

that the vesting has been made without any reserve power of the settlor. Similarly, if the vesting of ownership of the property through the trust instrument is absolute, *faraid* will not be applicable.<sup>51</sup> If the Islamic Trust is created by will, the property should not be distributed more than one-third (1/3) of the assets of the settlor after deducting all outstanding debts unless the consent from the heirs under *faraid* is obtained.<sup>52</sup>

Based on the Guideline Note, it is undeniable that the legal framework and guidelines issued by Labuan FSA as well as the rulings of the Shariah Supervisory Council of Labuan FSA accord legal certainty for the execution of Islamic trust.

## JURISDICTION ON TRUST IN MALAYSIA

Even though Islamic matters fall under State authority, the jurisdiction of trust is clearly stated in the Federal List. Thus, the jurisdiction for trust matters for Malaysian despite religion lies with the High Court. Eventually, in applying their inherent jurisdictions in cases relating to trust, the courts have applied the civil law for both Muslims and non-Muslims. In fact, the concept of civil trust is not a new trend in Malaysia. The case of *Re Man bin Mihat*<sup>53</sup> proves that as early as 1965, Muslims administered their estates by way of inter-vivos gift and automatically created a civil trust. In this case, the court applied the civil law of trust and not Islamic law in determining whether the money payable under the deceased's insurance policy formed part of the deceased's estate or belonged to his wife beneficially under a trust according to section 23 of the Civil Law Ordinance 1956. Later, Federal Court once again agreed in *Wan Naimah v Wan Mohamad Nawawi*,<sup>54</sup> that in order to put into effect a gift by an oral declaration of trust in Malaysia, the court should refer to the civil law of trust and not Islamic law even though the parties involved were Muslims.

The application of the civil law of trust was later reiterated by the Court of Appeal in the case of *TM Feroze Khan & Others v. Meera Hussain TM Mohamed Mydin*.<sup>55</sup> In this case, it was held that the applicable law in relation to trust in Malaysia is civil law regardless of whether the parties involved are Muslims or non-Muslims. As long as the trust is created in accordance with the requirements under the civil law of trust, it will be enforceable irrespective of whether the ownership of the property has been handed over or not during the lifetime of the settlor or whether the settlor has received or declared the rental income as his personal income.<sup>56</sup>

Interestingly, matters on trust are also stated in the State List<sup>57</sup> of the Federal Constitution. In this regard, it is observed that there are still rooms where matters on trust involving Muslims may also be subject to Islamic law and thus fall within the jurisdiction of the Syariah court. This would ensure that the creation of trust according to the civil requirements by Muslims does not violate the Islamic principles.

<sup>51</sup> Para 6.1, Guidance Note on Islamic Trust in Labuan International Business and Financial Centre.

<sup>52</sup> Section 7.2 stated ... Notwithstanding this, the Settlor can vest more than one-third of his assets with the consent of his heirs who are entitled to the Faraidh distribution.

<sup>53</sup> *Re Man bin Mihat* [1965] 2 MLJ 1.

<sup>54</sup> *Wan Naimah v Wan Mohamad Nawawi* [1974] 1 MLJ 41.

<sup>55</sup> [2006] 3 CLJ 616

<sup>56</sup> See also: *Dato' Kadar Shah Tun Sulaiman lwn. Datin Fauziah Haron* [2008] 7 MLJ 779.

<sup>57</sup> List II—State List: 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, 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 trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable 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 place 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, organization and procedure of Syariah courts, which shall have jurisdiction only over persons 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 and Malay custom.



## CONCLUSION

From the discussion, it can be established that there is no clear guidelines or codes on the creation of both civil and Islamic trust thus far. Since the instrument of trust has been used by both Muslims and non-Muslims as one of the instruments for wealth dispositions in Malaysia, it is therefore suggested that a codified law in matters relating to the execution of both civil and Islamic trust should be legislated. Especially for Muslims, this is highly necessary in order to ensure that the trust created by Muslims through civil trust requirements does not violate Islamic principles. As of now, the Guidance Note on Islamic Trust in Labuan IBFC can be a good example to start with. Even though the Islamic Trust in Labuan is also created according to civil trust requirements but the need to comply with Shariah principles has been given emphasis by the appointment of Shariah advisors to determine its compliance and to advise the trustee on the management of the such trust.

Hence, it is suggested to harmonizing the existing law of trusts with Islamic law may be possible in some cases, but it would require careful consideration and consultation with legal experts from both systems. Some possible areas of harmonization could include incorporating Islamic principles into the governance and management of trusts, such as requiring trustees to act in accordance with Islamic ethical and moral standards or allowing the creation of Islamic-style trusts.

However, there are also significant differences between the two legal systems, and it may not be possible to fully harmonize them without compromising the integrity of one or the other. Ultimately, any attempt to harmonize the law of trusts with Islamic law would need to balance the need for legal consistency and certainty with respect for religious and cultural diversity.

On the hand, the jurisdiction of the civil court over matters relating to trust involving Muslims and the determination of such instrument according to the civil law of trust do not seem to be the appropriate platform and basis respectively. Hence, it is submitted that the jurisdiction of the civil court in this matter should be reformed so that the dispute on Islamic trust is adjudicated by the right platform in order to ensure that its execution is Shariah compliance.

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