

Cambridge Books Online

<http://ebooks.cambridge.org/>



Re-imagining the Trust

Trusts in Civil Law

Edited by Lionel Smith

Book DOI: <http://dx.doi.org/10.1017/CBO9780511894879>

Online ISBN: 9780511894879

Hardback ISBN: 9781107011328

Chapter

3 - Express trusts in Israel/Palestine pp. 83-118

Chapter DOI: <http://dx.doi.org/10.1017/CBO9780511894879.004>

Cambridge University Press

Express trusts in Israel/Palestine

A pluralist trusts regime and its history

Adam Hofri-Winogradow*

I. Introduction

The law of express trusts, as currently applied in Israel/Palestine, strikes the beholder as a normative patchwork. Settlers create both business and family trusts, drawing on normative traditions and sources from Islamic law to offshore trust regimes. Some Israeli Muslims still create and administer Islamic *waqfs* before the Jewish state's Shari'a courts. Other settlers rely either on Israel's idiosyncratic Trusts Act of 1979, which, while tracing much of the common law of trusts, refrains from identifying trustees' right in the trust property, or on the foreign trust regime of their choice. Still others administer – and, more rarely, create – trusts according to traditional Jewish law and the Canon law. This varied practice has since 2006 been overlaid with a complex trusts taxation regime. The draft Civil Code of Israel promises to replace the Act of 1979 with trust provisions defining the 'trustee' as owner of the trust

* Acknowledgments are due to Yousef Abu-Asmar, Muhammad Al-Ubeyd, Paul-André Crépeau, Alon Kaplan, Meir Linzen and Lionel Smith, whose perceptive comments were instrumental in the construction of this chapter.

corpus. The courts, on their part, have enriched the maelstrom with an active law of constructive trusts.

The late Ottoman Palestine of 1914, on the other hand, though fast developing as far as population, technology, transportation and many fields of law were concerned, knew only one form of trust: the Islamic *waqf*. The present chapter follows the process of normative sedimentation since, showing how different elements of the colourful Palestinian panoply of legal actors – traditional and modernizing Jews, Muslim and Christian Arabs, Ottoman and British administrators – have now received, now rejected the common law trust. This process serves as a mirror in which many of the complex social, economic, political and cultural processes which have taken place in the territory during this period are reflected, including the importation of Jewish monies into Palestine so as to realize the Zionist enterprise, the struggles of pro- and anti-Zionists in the British Mandatory Administration of Palestine, and debates among Jewish Palestinian legal scholars as to whether the law of the future Jewish state should be based on the common law, the civil law or Jewish legal traditions.

The history of the trust in modern Palestine/Israel can be fairly naturally divided into four distinct sub-stories, each of which reflects aspects of the area's complex political and economic history:

1. an **Islamic story** concerning the development of the law of *waqf* in Palestine since late Ottoman times;
2. a **Zionist story** concerning the importation of Jewish monies into Palestine during the build-up of Zionist settlements there;

3. a **colonial story** featuring British colonial legislators and judges debating whether to introduce the common law trust into the Palestine they ruled; and
4. a **classical ‘reception’ story** featuring the tortuous, difficult reception of the common law trust into independent Israel’s partly civilian legal system.

II. An Islamic story

A. *The classical Islamic waqf*

The Islamic story focuses on the Islamic law of *waqf*, the Islamic trust. Islamic law, including the *waqf*, was the principal legal tradition in force in the Ottoman Empire, which controlled Palestine from the sixteenth century until 1917–18.¹ The *waqf* can, much like the common law trust, be either charitable – the *waqf khayri* – or private – the *waqf ahli* (as it is called in Egypt) or *dhurri* (as it is called in Palestine). Unlike the modern Western trust, but much like the early English trust, the private *waqf* is limited to family trusts. Dedicating one’s property as a family *waqf* enabled Muslims to evade the strict fixed-share regime of Shari’a; to restrain the diffusion of family property outside the patriline; and to secure, by employing an institution seen as holy, some degree of immunity from often

¹ Ottoman Sultans did promulgate additional, non-*shari* norms, known as *kānūnnāme*. The practice was justified by the doctrine of *siyasa shar’iya* – as permissible human regulation of aspects of behaviour left unregulated by the divine law, without contradicting that law. On the *kānūnnāme* see H. İnalçık, ‘Kānūnnāme’, in P. Bearman et al. (eds.), *Encyclopedia of Islam*, 2nd edn (Leiden and Boston: Brill, 2006), vol. IV, p. 562, column 1.

predatory rulers.² To render a private *waqf* operative as such, its dedicator must insert a final limitation for charitable purposes, which is to fall into possession once the family becomes extinct. Like a common law trust, the *waqf* is a fund, created by a settlor (*waqif*) in completely severing the property to be dedicated from his own property, and administered by a settlor-appointed trustee, the *mutawalli*. The settlor can appoint himself, or one of his closest relatives, as trustee (of which, until the twentieth century, there could only be one at a time), and draw 10–15 per cent of the income on *waqf* assets as salary. The *mutawalli* can be made residuary beneficiary, and can employ other family members as *waqf* employees. *Waqf* law does not, thus, adhere to a separation of beneficial enjoyment and control, such as characterizes the common law trust. The state and religious elites, by way of the local Shari'a judge or *qadi*, always kept an eye on even private *waqfs*: the local *qadi*'s ratification was necessary to constitute a *waqf*.³ Once the *waqf* was up and running, beneficiaries or trustees could bring it before the

² A. Layish, 'The Family *Waqf* and the Shar'i Law of Succession in Modern Times' (1997) 4 *Islamic Law and Society* 352; I. Edge 'Methods of Avoidance of the Fixed Heirship Rules in Islamic Law: The Islamic Trust' (2008) 14 *Trusts & Trustees* 457.

³ This brief paragraph, intended to introduce the *waqf* to readers unfamiliar with the institution, is obviously limited to the barest of outlines. For fuller discussion of the *waqf* see R. Deguilhem et al., 'Wakf', in Bearman et al. (eds.), *Encyclopedia of Islam*, above, note 1, vol. XI, p. 59, column 1; M. Qadri Pasha, *Qanun al-'adl wa'l-insaf lla-qada'ala mushklat al-awqaf* (Bulaq, 1320/1902); H. Cattan, 'The Law of *Waqf*', in M. Khadduri and H. J. Liebesny (eds.), *Law in the Middle East: Origin and Development of Islamic Law* (Washington, DC: Middle East Institute, 1955), vol. I, p. 203; W. F. Fratcher, 'The Islamic *Wakf*' (1971) 36 *Mo. L. Rev.* 153. For a current treatment see T. Kuran, 'The Provision of Public

qadi much like English trusts could be brought to Chancery. Until, in the nineteenth century, the Ottoman Empire started its creeping nationalization of the many *waqfs* in its territory, court supervision of *waqfs* was completely dependent on beneficiaries triggering review by applying to the court. Under such circumstances, many *mutawallis* spent nearly all of the *waqf* income on salaries, including their own, and on distributions to beneficiaries, leaving little for maintenance. The incentives created by *waqf* law thus explain the tendency of *waqf*-owned properties, noticeable in many Middle Eastern cities, to stay in poor condition for long periods of time. The Shari'a does not see the *waqf* as itself a legal person; neither is the trustee understood to own the *waqf* property. The property is rather seen, not unlike property held in a Quebec *fiducie*, as owned by no one, or by God, and so is, in classical *waqf* law, inalienable, not to be exchanged.

B. The waqf during the late Ottoman period

In nineteenth-century Ottoman Palestine, as some Islamic legal experts and Palestinian *qadis* relaxed the traditional Islamic ban on non-Muslims dedicating *waqfs*, and even, occasionally, permitted them to dedicate *waqfs* for infidel religious purposes, such as the maintenance of non-Muslim religious sites,⁴ members of Ottoman Palestine's religious minorities – Christians and Jews – were dedicating both charitable

Goods under Islamic Law: Origins, Impact, and Limitations of the *Waqf* System' (2001) 35(4) *Law and Society Review* 841.

⁴ Compare the early modern English Chancery's refusal to recognize charitable trusts for non-Christian ends, such as the maintenance of a

and private *waqfs*. Minority use of the trust, as such, was consequent on the pious connotations which the instrument enjoyed in Judaism, Christianity and Islam. Minority use of the private *waqf* was motivated by the desire of *waqifs* for testamentary freedom, for minimizing the tax burden to which they and their estates were subject, and for preventing their family property passing outside their patriline. As for charitable trusts, the fact that public bodies, such as churches and local religious communities, were not, under Ottoman law until 1913, recognized as legal persons deprived them of a possible alternative to the *waqf khayri*. Christian use of the *shar'i* trust form was consequent on the status of Muslim trust law as law of the Ottoman state: the limited ambit of the Canon law made, and makes, Christians use the law of their various sovereigns, including that of modern secular nation states, to dedicate property for religious purposes. That Jews were dedicating *waqfs* before Shari'a courts is, prima facie, more surprising, considering that they could have dedicated property before their leading rabbis under Jewish religious law (*halacha*). The Ottoman state had even given those rabbis a limited formal jurisdiction over their community members, which included the creation and administration of *halachic* endowments. Minority use of the **Islamic** trust form had two further causes:

- (a) Following the empire's establishment of a land registry in the Ottoman Land Code and Land Registry (*tapu*)

yeshiva: Da Costa v. De Pas (1754) Amb. 228, 27 E.R. 150; 2 Swans. 487, 36 E.R. 716.

- Act, both of 1858,⁵ Christians and Jews desiring that their endowments be registered had to dedicate, or rededicate, them as *waqfs*, since no other form of trust was recognized by the land registry, and unregistered endowments were in danger of being challenged by rival claimants to the land.⁶
- (b) The *waqf* was, as a holy institution, seen as relatively secure from the governmental depredations which periodically plagued the empire's property-owning subjects: taxes, expropriations, the various demands of corrupt officials and the dangers consequent on conquest and reconquest. Though this perception was by no means always true to fact, it contributed to use of the Muslim trust form by non-Muslim subjects of the Muslim Ottoman government.⁷

The law of *waqf*, as applied in practice in nineteenth-century Palestine, was significantly less strict than it appears in the books of *fiqh* (Islamic legal theory). While the classical rule of *waqf* law limited leasing to three-year periods, trustees were in practice expressly permitted in *waqfiyyas* (trust deeds)

⁵ The official Ottoman version, in Ottoman Turkish, is in *Düstur*, vol. 1, 165 (Land Code) and 200 (Tapu Act); a French translation of the Land Code is in G. Young, *Corps de droit ottoman*, 7 vols. (Oxford: Clarendon Press, 1905–6), vol. VI, p. 45.

⁶ R. Shaham, 'Christian and Jewish *Waqf* before the Shari'a Courts of Late Ottoman Palestine' (1989) 32 *HaMizrach HaChadash* 46, 57–8 (Hebrew); see for an English version Shaham, 'Christian and Jewish *Waqf* in Palestine during the Late Ottoman Period' (1991) 54(3) *Bulletin of the School of Oriental and African Studies* 460.

⁷ Shaham, 'Christian and Jewish *Waqf*', above, note 6, 58–61; Kuran, 'The Provision of Public Goods', above, note 3, 854–8.

both to alienate trust property (*istibdal*) and to lease it for long periods (*khakar, ijāratayn*; though many *waqfiyyas* limited the period for which the property may be leased at any one time to four years). Frequent breaches of trust by *mutawallis* brought about the rise of the Shari'a protector or *nat'ar*, sometimes appointed by the *waqif*, sometimes by the court as a corrective measure. Many *mutawallis* were empowered to exclude and add beneficiaries. To counter the tendency of *mutawallis* to neglect the property, distributing the income between themselves, other *waqf* employees and the beneficiaries, many settlors provided that income be first used for maintaining the property, and the residue alone distributed among the beneficiaries.⁸ Further, the Ottoman Empire was by the nineteenth century gradually nationalizing the *waqf* system, originally an institution of civil society rather than of the state. Supervision over *waqfs* was transferred from local *qadis* to a (government) ministry of *evkaf*. This ministry and its officials eventually replaced settlor-appointed *mutawallis* as trustees of charitable *waqfs*, now called *waqfs madbut*, and acquired significant supervisory powers over the *mutawallis* of private, family *waqfs*, now called *waqfs mulhaq*. The modernized *waqf* system controlled much of the resources, both Muslim and other, of early twentieth-century Palestine.⁹

After the British conquest of Palestine during 1917–18, the *waqf* successively lost its exclusivity as the only form of trust

⁸ Shaham, 'Christian and Jewish *Waqf*', above, note 6, 50–1.

⁹ For the implementation in Palestine of Ottoman governmental efforts to centralize the administration of *waqfs*, see M. Dumper, *Islam and Israel: Muslim Religious Endowments and the Jewish State* (Washington, DC: Institute for Palestine Studies, 1994), pp. 14–18.

employed in Palestine, and its prominence as the form of trust employed more than any other. It ceded its dominance to other forms of trust, the Palestinian careers of which are described later in the present chapter. The British transferred the functions performed, during the late Ottoman era, by the *evkaf* ministry in Istanbul to a newly established Supreme Muslim Council controlled by prominent Muslim Palestinian families, primarily the Husseinis. The council's support, from 1929, for disturbances in the Palestinian national interest led the Mandatory government in 1937 to suspend the council's central committee and replace it with a government-appointed commission encompassing two British officials and a Palestinian lawyer.¹⁰ Most of the Palestinian elite having fled Palestine during the 1948 war, many *mutawallis* became 'absentees' under Israel's Absentees' Property Act.¹¹ The property they controlled was transferred to the Israeli Custodian of Absentees' Property, who later transferred much of it to state landholding and development agencies. Some properties categorized as *waqf madbut* were after 1965 transferred from the Custodian to Arab trustee committees, free – so far as positive Israeli law was concerned – from their *waqf* status. Despite the decline of the *waqf* in Palestine, which traced the decline in Palestinian national fortunes, numerous *waqf* properties are still administered, as *waqfs*, in

¹⁰ Y. Reiter, *Islamic Endowments in Jerusalem under the British Mandate* (London: Frank Cass Publishers, 1987); Dumper, *Islam and Israel*, above, note 9, pp. 18–24. On the Supreme Muslim Council see U. Kupferschmidt, *The Supreme Muslim Council: Islam under the British Mandate for Palestine* (Leiden: Brill, 1987).

¹¹ Absentees' Property Act (1950) Israeli Legislation, p. 86.

Palestine today.¹² Jews were still dedicating Muslim *waqfs* in Jerusalem in the 1940s and 1950s.

The many transformations since the late Ottoman era of the state control of *waqfs* appear to have modified at least some Palestinian lawyers' understanding of the *waqf* form itself, from a fund owned by no one – the classical *shar'i* position – to a legal person.¹³ This perplexing 'reification' of the *waqf* awaits further study. One possible cause for it is the late Ottoman practice, preserved ever since, of registering *waqf* property as such, rather than as property owned by a *mutawalli* (if only as *mutawalli*).

III. A Zionist story

A. *The pseudo-trusts of early Zionism*

The early twentieth century saw the beginning of another, parallel, Palestinian trust story: the use of trust-like arrangements by various arms of the Zionist movement in importing Jewish monies into Palestine. The Zionist project of encouraging large-scale Jewish immigration to poor, underdeveloped Ottoman Palestine necessitated investing large-scale capital in land purchase, infrastructure, construction, agriculture, industry and education. Since most Jewish immigrants before the 1930s were themselves poor, they often had to be

¹² Dumper, *Islam and Israel*, above, note 9, p. 25; for the fortunes of the *waqf* in independent Israel until the mid-1960s see also A. Layish, 'The Muslim *Waqf* in Israel' (1966) *Asian and African Studies* 41.

¹³ Conversation with Adv. Yousef Abu-Asmar, June 2009.

trained, settled and employed through the communal Zionist purse. Many of the earliest Zionist settlements in Palestine, founded in the 1880s and 1890s, received large grants from wealthy Jewish financiers, such as the barons de Rothschild and de Hirsch. Many settlers' entire existence was financed by gifts. Gift financing leads to patronage relationships, as the settlers realized when subjected to intervention by Rothschild's bureaucrats.¹⁴ Dr Theodor Herzl, an Austrian Jew, visionary leader of the Zionist movement from 1895 to 1904, concluded that Jewish settlers in Palestine should be given access to loans rather than to gift capital. The Second (1898) Zionist Congress, led by Herzl, decided that a Zionist bank should be established to provide loan capital for Zionism's many needs. Herzl hoped that world Jewry would subscribe £2 million, arguing that investment in the proposed 'Jewish Colonial Bank' was likely to make a profit, as the value of the land in Palestine which the bank would buy was sure to rise as Jewish settlers brought Palestine to a higher state of cultivation.¹⁵ That bank, the earliest financial arm of the World Zionist Organization, was founded in 1899 as the Jewish Colonial Trust (JCT): despite its name, it was a joint-stock corporation, incorporated in London, rather than a common law trust.¹⁶ Unlike the

¹⁴ G. Kressel, 'Rothschild, Baron Edmond James de', in M. Berenbaum and F. Skolnik (eds.), *Encyclopaedia Judaica*, 2nd edn (Detroit: Macmillan, 2007), vol. XVII, pp. 491–2.

¹⁵ T. Herzl, 'Die Jüdische Colonialbank', in *Die Welt*, no. 25, 19 November 1897, p. 1. See Hebrew translation in *Select Works of Herzl*, trans. Asher Barash et al. (Tel Aviv: Mitzpe Press, 1939), vol. V, p. 193.

¹⁶ The phenomenon of non-trust bodies called 'trusts' was quite common at the turn of the twentieth century: viz. the 'trust (*shintaku*) companies'

JCT, a trust in name only, other financial organs founded, to provide capital for settlement activity, by the World Zionist Organization and other Zionist groups during the early twentieth century had trust-type features; some were, in substance, trusts.¹⁷ An important example was the Jewish National Fund (JNF), established in principle by the World Zionist Organization in 1901, and finally formed in 1907 as a fundraising body, a land-purchasing organization and a long-term owner of land in Palestine in trust for the Jewish people.¹⁸ Following lengthy discussions, it was decided to establish the JNF not as an English joint-stock company, a German *Genossenschaft* (co-operative society) or a German *Stiftung* (foundation), nor as an English trust with the Jewish Colonial Trust as trustee, but as an association limited by guarantee, a type of company which does not issue shares: members' liability is limited to the amount that they each agree to contribute to the company's assets if it is wound up. The key reason for the rejection of the common law trust form was that as the fund's powers were to

of early twentieth-century Japan, which were, in substance, lending institutions rather than trusts: H. Dogauchi, 'Trusts in the Law of Japan', in M. Cantin Cumyn (ed.), *La fiducie face au trust dans les rapports d'affaires* (Brussels: Bruylant, 1998), pp. 105, 106; see further M. Arai, 'Japan', in A. Kaplan (ed.), *Trusts in Prime Jurisdictions*, 3rd edn (London: Global Law and Business, 2010), pp. 233, 234–5.

¹⁷ On private 'settlement companies', unrelated to the Zionist executive, see Y. Katz, *The 'Business' of Settlement: Private Entrepreneurship in the Jewish Settlement of Palestine, 1900–1914* (Jerusalem and Ramat-Gan: Magnes Press, 1994).

¹⁸ L. Doukhan-Landau, *The Zionist Companies for Land Purchase in Palestine* (Jerusalem: Yad Izhak Ben-Zvi, 1979), p. 63; T. Shiloni, *The Jewish National Fund and Settlement in Eretz-Israel, 1903–1914* (Jerusalem: Yad Izhak Ben-Zvi, 1990), pp. 26–9.

include powers to cultivate land, lease it and develop industry, it could not be seen as purely charitable, and was thus subject to the rule against perpetuities. The Zionists wanted, precisely, a perpetuity, in effect a Zionist *waqf*: the land the JNF purchased became inalienable, to be leased to Jewish lessees alone.¹⁹

*B. Ha'avara: transferring Jewish money from
Nazi Germany*

The clearest example of a common law trust, so called and structured as such, as an instrument of the Zionist project came later, as Germany's Jews came under threat on the establishment of the Nazi government in early 1933. Many German Jews were relatively propertied, and Nazi government policy, until 1939, supported their emigration. Wealthier Jews could immigrate to Mandatory Palestine more easily than the less fortunate, as the Mandatory government was, until 1937, prepared to issue an unlimited number of 'A-1' visas, granted to immigrants who could demonstrate their ownership of property worth at least £1,000. Before the Nazis' rise to power, the number of such relatively wealthy Jewish immigrants to Palestine was very limited: the prosperous Jews of Central and

¹⁹ The complex negotiations concerning the legal form of the JNF are discussed at length by H. Bentwich, 'Zur Legalisierung des jüdischen Nationalfonds', *Die Welt*, no. 39, 28 September 1906, pp. 27–32; M. Bodenheimer, 'Zur Legalisierung des jüdischen Nationalfonds', *Die Welt*, no. 40, 3 October 1906, pp. 13–14; no. 41, 12 October 1906, pp. 12–14. See also discussion in Doukhan-Landau, *The Zionist Companies*, above, note 18, p. 74; and a useful conceptual discussion in Edge, 'Methods of Avoidance', above, note 2, 462.

Western Europe – not to mention those of the Americas – were generally intent on staying in their host societies. The Nazis' rise to power brought a relatively prosperous Jewish population under direct threat for the first time since the late nineteenth-century rise of Zionism; and as other options for emigration were increasingly closed off, the Palestinian option became more attractive.

Prosperous immigrants, however, generally want to take their wealth along with them. German legislation enacted in 1931–2, before the Nazi takeover, in an effort to stem capital flight from Germany, limited the amount of funds those leaving German territory could take with them, absent special permission, to 200 Reichsmarks (then about thirteen pounds sterling). Such a sum did not suffice in order to obtain an 'A-1' visa, far less to settle in Palestine. Various commercial enterprises took advantage of German Jewry's plight by offering, e.g., insurance policies which could be purchased in Germany, then cashed abroad after emigration, at a significant discount. Under those circumstances, the leaders of the small German Jewish community of pre-Nazi Mandatory Palestine, principally Felix Rosenblüth and Werner Senator, along with the then-head of the Jewish Agency's political department, Chaim Arlosoroff, conceived of a large trust operation for the extraction of Jews, along with their property, from Germany to Palestine. Negotiations between private Jewish businessmen, German Jewish banks, representatives of the German Zionist movement and the Nazi Wirtschaftsministerium proved successful, and two 'trust companies' were in late 1933 set up and registered in Germany and Palestine. The German trust company, PALTREU – Palästina Treuhandstelle zur Beratung

Deutscher Juden, or the Palestine Trust Office, was a partnership of the Anglo-Palestine Bank, a subsidiary of the Jewish Colonial Trust, and two major German Jewish banks, owned by the Warburg and Wassermann families. The Palestinian trust company, the Trust and Transfer Office 'Ha'avara' ('transfer'), was a Tel-Aviv subsidiary of the Anglo-Palestine Bank. The scheme worked as follows. German Jews deposited property in excess of the equivalent in reichsmarks of £1,000 in one of two specially earmarked accounts at the Reichsbank. Having received a certificate for doing so, they were able to prove their ownership of funds in the sum deposited to the Mandatory immigration authorities and receive an 'A-1' visa for Palestine. Palestinian merchants and industrialists, meanwhile, placed orders for German products – typically products German manufacturers had trouble selling on the free market – with the 'Ha'avara' office in Tel-Aviv. Monies taken from the PALTREU Reichsbank accounts were channelled, through Ha'avara and Palestinian banks, to the German manufacturers as payment. As the Palestinian purchasers repaid the Palestinian banks involved for the credit extended, 'Ha'avara' paid the countervalue to the newly arrived immigrants from Germany. So was the German need for export markets for German products exploited to permit German Jews to escape Hitler's noose with their property almost intact: Ha'avara–PALTREU charged a five per cent commission for the service, far less than the discount involved in the other available methods for bypassing the German foreign-exchange embargo.²⁰

²⁰ For the history of the 'Ha'avara' transfer operation see W. Feilchenfeld, *Five Years of Jewish Immigration from Germany and the Haavara-Transfer*,

The Ha'avara transfer mechanism amounted to a highly creative use of the trust form, in order to bypass the strict German exchange controls of the time and achieve the Zionist goals of extracting German Jews, along with their property, from Germany and bringing them to Palestine. The German money deposited at the Reichsbank not only stayed in Germany, in line with German exchange-control policy, but also lined German manufacturers' pockets. Monies paid to the immigrants to Palestine originated with Palestinian purchasers of German goods (from 1934 'Ha'avara' marketed German goods to non-Palestinian purchasers as well, to accelerate capital flow to the immigrants). It was, in substance, a trust rather than a *waqf*, as the trust companies served as conduits rather than as permanent depositories. The familiar trust model closest to it may be the pension fund: a standardized trust fund intended for a specific, predefined class of beneficiaries, where employee and employer contributions to the fund are made at time *X* (during employment) and disbursed at time *Y* (retirement). The Ha'avara transfer substituted the

1933–1938 (Tel Aviv: Haaretz Press, 1938); W. Feilchenfeld et al., *Haavara-Transfer nach Palästina und Einwanderung Deutscher Juden 1933–1939* (Tübingen: Mohr, 1972); L. Pinner, 'Vermogenstransfer nach Palästina, 1933–1939', in H. Tramer (ed.), *In Zwei Welten: Siegfried Moses zum Fünfundsiebzigsten Geburtstag* (Tel Aviv: Verlag Bitan, 1962), p. 133; Y. Gelber, *New Homeland: Immigration and Absorption of Central European Jews, 1933–1948* (Jerusalem: Leo Baeck Institute and Yad Izhak ben-Zvi, 1990), pp. 26, 154; R. Bondy, *Felix: Pinchas Rosen and His Time* (Tel Aviv: Zamora-Bitan Press, 1990), pp. 120, 247, 290; R. N. Rosenzweig, *The Economic Consequences of Zionism* (Leiden: Brill, 1989), pp. 81–9; H. A. Strauss, 'Jewish Emigration from Germany: Nazi Policies and Jewish Responses (II)' (1981) 26 *The Leo Baeck Institute Yearbook* 326, 343.

physical distance between Germany (where the emigrants-to-be deposited monies) and Palestine (where they were disbursed) for the distance in time in the pension fund example, and the difficulties of Nazi repression, German exchange controls and Mandatory immigration controls for the hardships of age.

The transfer also had an intriguing conflict-of-laws dimension. While 1930s German law did know a form of trust in the *Treuhand*,²¹ it was seen as more appropriate to establish PALTREU as a partnership. The fact that the (positive) law of Mandatory Palestine did not know the trust – a 1931 decision of the Supreme Court of Palestine, *Eliash v. The Director of Land*, held that the private trust was no part of the law of Palestine²² – forced the registration of the Trust and Transfer Office ‘Ha’avara’ as a company according to the Palestinian Companies Ordinance.²³ Two non-trust bodies thus formed, in effect, one highly effective trust.

IV. A colonial story

A. Did the common law private trust exist in Mandatory Palestine?

The aforementioned 1931 decision by the Supreme Court of Palestine takes us to our third Palestinian trusts story,

²¹ On the *Treuhand* see, e.g., H. Kötz, ‘Trusts in Germany’, in M. Cantin Cumyn (ed.), *La fiducie face au trust dans les rapports d’affaires* (Brussels: Bruylant, 1998), p. 175.

²² H.C. 77/31 *Eliash v. The Director of Land* 1 PLR 735.

²³ Companies Ordinance, no. 98 of 1929, *Palestine Gazette* [1929], p. 378.

having to do with the British administrators of Mandatory Palestine's struggles with the private trust. The British Mandate regime controlled Palestine from 1922 to 1948, though British control started in 1917–18, as the British conquered Palestine from the Ottomans. Those short thirty years saw several generations of British administrative personnel run the administration of Palestine. The earliest of these generations, in power during the 1920s, included several British Jews who were Zionist enthusiasts. They flocked to Palestine to make good, so far as was in their power and according to their lights, on the Balfour declaration, which promised that His Majesty's Government shall 'use their best endeavours to facilitate . . . the establishment in Palestine of a national home for the Jewish People'.²⁴ A key figure among them was the first Attorney General of Mandatory Palestine, Norman Bentwich. Bentwich is often identified as a key author of a string of ordinances issued by the Mandatory government during the 1920s, many of them fundamentally reforming the commercial law of Palestine.²⁵ No Mandatory ordinance dealt with private trusts as its principal subject matter, but several of them referred to trusts and trustees in passing, clearly assuming that private trusts were part of the law of Palestine. So did the Partnerships

²⁴ Given in a letter of 2 November 1917, by British Foreign Secretary James Balfour to Walter, 2nd Baron Rothschild.

²⁵ On Bentwich see his autobiography, *My 77 Years: An Account of My Life and Times, 1883–1960* (London: Routledge & K. Paul, 1962); see further A. Likhovski, 'In Our Image: Colonial Discourse and the Anglicization of the Law in Mandatory Palestine' (1995) 29 *Israel Law Review* 291, 313–14; Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006), pp. 57–9.

Ordinance,²⁶ the Companies Ordinance²⁷ and later Mandatory ordinances such as those dealing with bankruptcy, the criminal law and the income tax.²⁸

That there was no Private Trusts Ordinance reflected the Mandatory authorities' cautious approach to law reform in any field but the commercial. Trust law was not then seen in England as a commercial subject, but rather as a borderland between family law and private law. The British did transform the Palestinian law of *charitable* trusts by empowering the religious courts of the non-Muslim communities in Palestine to supervise the creation and administration of such trusts by community members according to the religious law of each community. The religious courts of the Muslim community and of all twelve other legally recognized religious communities, including Jews, the Druze, Bahai's and nine varieties of Christians (but not including any Protestant or other post-Reformation churches), still enjoy this power today, as the Mandatory legislation in which it was granted is still in force in Israel.²⁹ The British also enacted a Charitable Trusts

²⁶ Partnerships Ordinance, no. 19 of 1930, *Palestine Gazette* [1930], p. 646, s.20.

²⁷ Companies Ordinance (n 23) ss.29(2), 78(1) and (3), 79(1) and (3), 98(1)(b), 124(1), 128, 180, and subsections (o) and (w) of Schedule II.

²⁸ Income Tax Ordinance 1941, ss. 24–5.

²⁹ King's Order in Council on Palestine, 1922, articles 52 (Muslim Courts), 53(3) (Rabbinical Courts), 54(3) (Ecclesiastical Courts). The legally recognized religious communities are Muslims, the Druze, and the eleven communities listed in the second schedule to the Order in Council. That Muslims are not listed was an effect of their undoubted majority status as of 1922, as well as a legacy of the Muslim (Shari'a) Courts' status as all-purpose state courts of the pre-*tanzimat* Ottoman

Ordinance. This, while leaving jurisdiction over charitable trusts endowed before the religious courts of the various communities in the hands of those courts, created a parallel civil track for the dedication of charitable trusts.³⁰ One purpose of the ordinance was to enable the conversion of *waqfs* dedicated by non-Muslims, absent any other choice, during the Ottoman era, into civil charitable trusts.³¹

As the number of practitioners in Palestine began to grow under the Mandate, they started making use of common law private trusts. Many of these practitioners tied their professional fortunes to their knowledge of English law, as well as to practice before the courts of the Mandatory Government, which came increasingly to apply parts of English law as the law of Palestine, along with Mandate ordinances and Orders in Council and the Frenchified Ottoman law the disappeared

Empire. Recognition was seen from an Ottoman perspective as a boon extended to minority communities, and unnecessary for the Muslim majority. The Druze were only made a 'recognized' religious community by the Israeli legislator in a special Act of 1962 (rather than by amending the Order in Council). For a recent Rabbinical court discussion of such courts' powers over Rabbinical trusts (*hekdeshim*), see Rabbinical Appeal 900031565-44-1 *Mosayof Shlomo Trust v. Bucharites' Trusts*, delivered 14 January 2009, paras. 14–17. For recent Israeli Shari'a Court decisions concerning *waqfs*, see www.justice.gov.il/MOJHeb/BatiDinHashreim/PiskeiDin2/Waqf.

³⁰ An Ordinance to Regulate Charitable Trusts Established Otherwise than in Conformity with Religious Law, no. 26 of 1924, *Palestine Gazette* [1924], in Norman Bentwich (comp.), *Legislation of Palestine, 1918–1925* (1926), vol. 1, Cap. 14, p. 120.

³¹ R. H. Eisenman, *Islamic Law in Palestine and Israel: A History of the Survival of Tanzimat and Shari'a* (Leiden: Brill, 1978), p. 95; *Eliash v. The Director of Land*, above, note 22.

empire left in its wake. The Mandatory courts' application of principles and rules of English law was facilitated by article 46 of the King's Order in Council of 1922, which provided that subject to pre-existing Ottoman law, to Orders in Council and to ordinances and regulations made especially for Mandatory Palestine, 'and so far as the same shall not extend or apply', the civil courts of the Mandate Government shall apply the common law of England, as well as English equity, 'so far . . . as the circumstances of Palestine and its inhabitants . . . permit, and subject to such qualification as local circumstances render necessary'.³² This open-ended provision clearly permitted the importation of English trust law into Palestine; it also provided means for its rejection as unsuitable for local conditions.

The Janus-faced character of article 46 has characterized the law of trusts in Palestine/Israel since the early days of the mandatory regime, and arguably it characterizes it still. The reception of the common law of private trusts in Israel has since progressed in two parallel tracks. *Practitioners* have since the 1920s grasped the utility of the trust for purposes from the allocation of family wealth among one's progeny to bypassing the inconvenient necessity of paying one's taxes. Many *legislators and judges*, on the other hand, have shown little enthusiasm for the adoption of the common law trust as part of the law of Mandatory Palestine, and later Israel. For just as Palestinian lawyers were starting to discover the power of the common law trust, the enterprising Mandatory administrators of the 1920s, notably Bentwich, were replaced by a new, noticeably surlier, guard.

³² King's Order in Council on Palestine, 1922, above, note 29, article 46.

In *Eliash*, Chief Justice McDonnell of the High Court of Palestine, abetted by Justice Khayat, saw the Palestinian law of private trusts as exhausted by the *waqf* regime the Mandatory government had inherited from its Ottoman predecessor.³³ While admitting that the common law private trust was occasionally mentioned in the Bentwichian ordinances of the 1920s, McDonnell, anti-Zionist and quite hostile to Bentwich, believed that one cannot ‘seriously hold, knowing the nature of the legislation with which we are dealing, that the legislature intended by a mere side-wind to introduce a new principle of law, such as the doctrine of private trusts, into Palestine’.³⁴

McDonnell further noted that the land which the petitioner before him sought to have registered as held on trust was classified, according to the Ottoman zoning law which was in force in Palestine/Israel until 1970, as *miri* – state-owned land leased to private holders. According to both the Ottoman Land Code of 1858, and the Mandatory Succession Ordinance of 1923,³⁵ lessees of *miri* land could neither bequeath their land nor dedicate it as a *waqf*.³⁶ Though McDonnell’s argument was technically correct, he ignored the reality that since very little land in Palestine was not state-owned, the practice of dedicating state-owned land had, by the end of the Ottoman era, become fairly popular: such land was called *mevkufe*, to distinguish it from land held in genuine *waqfs*.³⁷ Since the law

³³ *Eliash v. The Director of Land*, above, note 22.

³⁴ *Ibid.* On McDonnell, who was on the Arab side of the Palestine question, see Likhovski, ‘In Our Image’, above, note 25, 320–2.

³⁵ Mandatory Succession Ordinance of 1923, s. 19. ³⁶ See above, note 5.

³⁷ E. Malchi, *The History of Law in Eretz-Yisrael*, 2nd edn (Tel Aviv: Dinim, 1953), pp. 52–3.

of *waqf* exhausted the trust law of Palestine, that, so far as the High Court was concerned, was that. Mr Justice Khayat added the perplexing argument that since trustees are ‘merely nominees bound by certain obligations with the right of revocation of the imaginary transfer being reserved for the transferor with no interest to the trustees’, the transfer of land to a trustee, to hold as such, is no transfer at all and cannot be registered.³⁸

Except for the last argument, which arguably confuses the common law trust with agency, these were technically solid reasons. As far as the courts were concerned, the decision was a death-blow to the common law trust in Palestine. Later Mandatory decisions cited it and applied its *ratio decidendi*.³⁹

V. A classical ‘reception’ story

A. *The 1940s Jewish Bar of Palestine debates the reception of the common law trust*

We now switch to our final Palestinian trusts story, which focuses on the reception of the common law trust in the independent State of Israel. The terminal crisis of European Jewry in the 1930s drove Jewish jurists educated in civil law systems, including academics, to emigrate, with property or without, to what was then still Mandate Palestine. When the State of Israel came into being in 1948, several Italian- and German-educated jurists managed to get themselves installed

³⁸ *Eliash v. The Director of Land*, above, note 22.

³⁹ C.A. 16–24/45 *Ben-Ya’acov v. Forer* (1945) ALR 628; C (Tel-Aviv) 125/43 (1945) *Malatzky v. Bavly*, PMN 265.

in key legislative, academic and judicial positions. This fact was what made for the civilian character of much of Israeli private law.

Starting some years before 1948 and ending some years later, the trust was at the centre of a controversy raging in the pages of the Palestinian Jewish Bar journal, *HaPraklit*. Professor Guido Tedeschi, lately arrived from Italy after being fired from his post at Siena University following Mussolini's anti-Semitic legislation of 1938, argued in favour of recognizing the private trust as part of the law of Palestine despite the local system only containing a limited common law element. Tedeschi pointed to the early instances of the adoption of the trust in civil law systems, viz. Quebec, South Africa and Japan, as examples for the Jewish polity to follow.⁴⁰

Tedeschi's brief piece attracted several ripostes. One was by Alfred Witkowski, a leading Jewish lawyer of German birth, who received his legal education in both Germany and England and was to be appointed in 1954, as Alfred Witkon, to the Supreme Court of Israel, and serve as its undisputed tax expert until 1980.⁴¹ Witkowski pointed out how trust law was developing in Palestine under conditions similar to those which drove its development in late medieval England. Since most land in both the agricultural and the urban areas of Palestine was state-owned *miri*, its possessors only being, at best, lessees, it could not be bequeathed or dedicated as a *waqf*.

⁴⁰ G. Tedeschi, 'Contemporary Trust Business' (1943) 1 *HaPraklit* 78.

⁴¹ For biographical information see M. Landau, 'In Memory of Alfred Witkon', in A. Barak et al. (eds.), *Justice and the Judiciary* (Tel Aviv: Schocken, 1988) (a collection of Witkon's articles), p. 11; H. Cohn, 'On Alfred Witkon', in *ibid.*, p. 15.

Much like in England before the Statute of Wills of 1540, the impossibility of making wills of land proved a fertile ground for the adoption and popularization, in practice, of the common law trust. Famously, a further reason for the medieval employment of the English trust was the feudal burdens accompanying intestate succession; that is, medieval taxation.⁴² Witkowski was understandably vague in his treatment of this aspect of the parallelism between late-medieval and Mandatory Palestinian circumstances, noting that ‘though feudal burdens are not now imposed on property owners in Palestine, it is certainly possible that under modern conditions, too, a need will occasionally arise for the legal owner to be other than the beneficiary’.⁴³ Witkowski’s technical conclusion was that contrary to the Supreme Court decision in *Eliash*, article 46 of the King’s Order in Council permitted the importation of the common law trust into the law of Palestine: since nearly all land was state-owned, out of which *waqfs* could not be declared, there was evident need, not satisfied by existing Ottoman law, for an alternative form of trust.

Joining in the attack, Tedeschi noted in a second piece on the subject that in light of the promulgation of the Charitable Trusts Ordinance and the references to the trust in other ordinances, the common law trust could not be seen as contradicting any pre-existing principles of Palestinian law, and

⁴² See a listing of ‘the chief custodial purposes of [medieval] uses’, in J. Getzler, ‘Duty of Care’, in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford: Hart Publishing, 2002), p. 43. Wielding power to dispose of land, including testamentary disposition, and escaping the Crown’s fiscal claims are the last two.

⁴³ A. Witkowski, ‘Private Trusts in Palestine’ (1947–8) 3 *HaPraklit* 99, 102.

thus did not fall foul of the restrictive clauses of article 46. He further argued that instead of receiving the common law trust into the law of Palestine by way of article 46, it should be seen as permitted as one result of the freedom of contract, which had been a basic principle of Palestinian law since late Ottoman times: the late nineteenth-century Ottoman regime of Sultan Abdulhamid II, having become fearful of explicitly contradicting the Shari'a, which does not recognize the freedom of contract, in substantive legislation, introduced the freedom of contract in an amendment to the Code of Civil Procedure.⁴⁴ While a common reading of article 46 understood it to permit the importation of English case law while blocking that of English statutes, contracting parties could agree to adopt, as between themselves, not only that part of the English law of trusts which was contained in the cases, but also its statutory part.⁴⁵

The Italian-born Tedeschi, who had studied law in Rome, and the German-born Witkowski, who had received a PhD from Freiburg University, having both advocated the reception of the common law trust into the law of Palestine, it was left to Professor Paltiel Dickstein of the Tel-Aviv School of Law and Economics, a generation older than both and a product of Russian Zionism, to blatantly oppose that reception.⁴⁶ Echoing Chief Justice McDonnell, Dickstein argued that

⁴⁴ For this amendment see Malchi, *The History of Law*, above, note 37, pp. 62–3.

⁴⁵ G. Tedeschi, 'On English-Style Private Trusts in Eretz-Yisrael' (1947–8) 3 *HaPraklit* 306.

⁴⁶ For Dickstein see Likhovski, *Law and Identity in Mandate Palestine*, above, note 25, p. 127.

ill-drafted legislation does not prove that a foreign legal form has been received into local law. Difficulties such as the fact that most of the land in Palestine was impossible to bequeath should be corrected by direct amendment rather than by the importation of means for circumventing them.⁴⁷ The reason for Dickstein's negative attitude was his ideological support for the fundamental refashioning of the law of the fast-increasing Jewish population of Palestine along lines drawn from ancient Jewish law, suitably modernized for the twentieth century. In such a world view there was no place for the importation of the English trust, and Dickstein emphasized the trust's deep roots in English culture and history. In the 1940s, when the adoption of the Anglo-American trust by non-anglophone jurisdictions was less advanced than it is today, describing the trust as somehow peculiar to the English national character and history must have seemed far more plausible than it can now seem.

B. The private express trust in independent Israel

As the Mandatory period came to a close in May 1948, the private common law trust was received into legal practice, but not into the 'law in the books', the law as stated by the government and its judges. The consequences of this situation remained noticeable in Israeli law for most of the country's sixty-year history. Until the enactment of the Trust Act of 1979 the very existence of the private, non-charitable, express trust

⁴⁷ P. Dickstein, 'On Ways for Completing Our Law and on the Private Trust' (1948) 4 *HaPraklit* 4.

in Israeli law was in some sense doubtful, at least for jurists more attuned to the books than to trusts and estates practice. Immediately after independence, the Tel-Aviv District Court held that if Mandatory courts saw no reason to import this foreign legal institution into the law of Palestine, so much more should the courts of independent Israel refrain from so doing. Adopting an approach similar to Paltiel Dickstein's, the court, finding a lacuna in the civil law of Palestine, turned to the *Shulchan Aruch*, a sixteenth-century *halachic* codex.⁴⁸ While later courts enforced several contracts purporting to create trusts,⁴⁹ they were enforced as a matter of contract law, the Supreme Court holding in 1992 that the notion of freedom of contract was not a sufficient basis for the reception of the common law trust in Israeli law prior to the Act of 1979, and leaving the question whether such a reception had occurred on any other basis undecided.⁵⁰ Like their Mandatory predecessors, Israeli courts responded with more vivacity to the constructive trust, which they gladly received into local law, but the reception of the constructive trust – a discretionary remedy rather than a proper trust – is beyond the ambit of the present chapter.

⁴⁸ Estate Case 200/47 *Alkalay v. Alkalay*, 1 Psakim (District Courts) 95 (1948–9).

⁴⁹ See, e.g., C.A. 87/50 *Liebman v. Lifschitz*, 6 P.D. 57 (1952); C.A. 158/54 *De Bouton v. Bank HaMizrachi*, 10 P.D. 687 (1956); C.A. 323/59 *Ben Artzi v. Ben Artzi*, 15 P.D. 742 (1961); C.A. 400/67 *Howard v. Melamed*, 22 P.D. 100 (1968); C.A. 8109/98 *Abu-Hatoum v. Abu-Hatoum*, 55 P.D. 267 (2000); C.A. 5533/98 *Agudat Yeshivat HaSharon v. Segal*, 54 P.D. 538 (2000).

⁵⁰ C.A. 414/87 *Tax Assessor for Large Businesses v. Association for the Development of Kiryat Nordau Ltd*, 46 P.D. 387 (1992) 390, 391.

The courts' indecision left reception of the private trust to the legislature. But once the state was established, for several years private law legislation took a back seat to more urgent concerns. When the Ministry of Justice eventually turned to drafting private law legislation in the 1950s, it was largely controlled by the German- and Italian-educated émigrés, which orientation was reflected in the legislation eventually passed in the 1960s and 1970s. The Trust Act was almost the final part of the ministry's private law legislative programme to be enacted – in 1979 – and it reflected the vicissitudes of trying to fit the trust into a largely civilian context. The Act defined a trust as 'a connection to an asset, which obliges a trustee to hold it or employ it for the benefit of a beneficiary or some other purpose'.⁵¹ It refrained from defining this 'connection', and particularly from restricting the trust concept to situations where trustees own the trust property. Other sections well expressed the principles that trust assets are a separate fund from the trustee's personal assets, and are not to be held liable for his personal debts.⁵² Still others noted trustees' duty to preserve this separation and fulfil the trust's goals.⁵³ The Act's noncommittal approach to defining trustees' interest in the trust property rendered its definition of a trust even wider than that of the Hague Convention on the Law Applicable to Trusts and on Their Recognition, itself intended as a catch-all, compromise definition, in not requiring, as article 2 of the Convention does, that, for an arrangement to be regarded as a trust, assets 'be placed under the control of a trustee',

⁵¹ Trust Act, 1979, I.L. (1979), p. 128. ⁵² *Ibid.*, s. 3(a)–(b).

⁵³ *Ibid.*, ss. 3(c), 10(a).

and that ‘title to the trust assets stand[s] in the name of the trustee’.⁵⁴

The Act’s peculiarities did not end with its open-ended definition of the trust concept. On the one hand, section 5 stated that anyone with notice – actual or constructive – of the trust was subject to the trust. On the other, section 14 provided that the court may only avoid actions taken by trustees vis-à-vis third parties, and hold the latter liable as trustees themselves, where the third party either was a volunteer, or had actual or constructive notice that the trustees’ action was in breach of trust – and notice of the trust’s existence was no notice of a breach. The Act was subject, almost immediately on its enactment, to a devastating academic critique by Joshua Weisman, a leading Israeli property scholar. Identifying the trust with the common law trust, Weisman regarded the Act’s not requiring that the trustee own the property as a grave mistake.⁵⁵

While the local trust regime is now fairly often used for simple trusts for incompetents and charitable trusts, Israel’s sophisticated tax bar often prefers using foreign trust regimes to the local regime.⁵⁶ This preference has less to do with the Trust Act’s disadvantages than with several features of Israel’s

⁵⁴ Hague Convention on the Law Applicable to Trusts and on Their Recognition, The Hague, 1 July 1985, in force 1 July 1992, article 2.

⁵⁵ J. Weisman, ‘Problems in the Trust Act’ (1980) 7 *Legal Studies* 282, 284–9; though note the contrary opinion of S. Kerem, *Trusts*, 4th edn (Tel Aviv: Perlstein-Ginossar, 2004), pp. 100–5.

⁵⁶ Conversations with Adv. Alon Kaplan, longtime chairman, and now president, of STEP Israel, with Adv. Meir Linzen, its current chairman, and other Israeli practitioners.

Inheritance Act which severely curtail the use of both *inter vivos* and testamentary trusts governed by Israeli law. Section 8(b) of that Act provides that gifts which are to take effect on the donor's death may only be given by will.⁵⁷ Section 29 provides that a testator may not empower another either to choose legatees or to choose which parts of the estate each legatee shall receive. This harsh rule is compromised to the extent that empowering another to choose legatees from among a list of named persons is permissible, but not choosing them from among a class. Section 33 reinforces the resulting inflexibility, providing that 'a testamentary clause which leaves the legatee's identity, or the contents of the gift, undetermined, or which is incomprehensible . . . is void'. Section 28(b) adds that 'testamentary clauses the force of which is dependent on a person other than the testator . . . are void'.

The Israeli tax Bar's use of trusts focuses on using offshore trust regimes as governing law. Israel itself may in certain contexts be seen as a low-tax offshore jurisdiction, as there have since 1981 been no inheritance, estate or gift taxes;⁵⁸ the only transfer tax applicable in Israel is that on the disposition of rights in land.⁵⁹ Holding personal property in Israel is thus a relatively tax-efficient investment, especially as Israel's

⁵⁷ Inheritance Act, 1965, I.L. (1965), p. 63.

⁵⁸ Estate Tax Act (Abolition) 1981, I.L. (1981), p. 160.

⁵⁹ Taxation of Capital Gains on Land Act, 1963, I.L. (1963), p. 156. The exemption from capital taxation of the distribution of land held in trust from trustee to beneficiary in s. 69 has given rise to a great amount of case law.

company and capital gains tax rates have recently been gradually lowered. The primitive trust provisions of the 1941 Income Tax Ordinance – sections 82–4 and 86, which exhausted Israel's trusts taxation regime until 2006 – seem, on their face, to give Israeli taxpayers an excellent reason to be interested in setting up common law trusts: they are concerned exclusively with giving the tax authorities power to ignore sham trusts, where the settlor retains actual power over trust assets. Genuine trusts, where the settlor's interests in the property have been completely and demonstrably severed, were until 2006 arguably exempt in Israel unless either trustee or beneficiary was unmarried and under the age of 20.⁶⁰ Still, while Israeli use of the local trust regime was primarily restrained by the above-mentioned restrictions in the Inheritance Act, even after the 1979 Act made clear that Israeli law did recognize the private trust, Israeli use of foreign trust regimes was until 1998 restrained by Israel's strict exchange controls, which for long periods made even holding money in a bank account abroad difficult, if not illegal.⁶¹ A further cause for Israelis' sparse use of the trust until the mid-1990s was that until that time relatively few Israelis had large amounts of disposable capital. Certain strata of Israeli society have in the last twenty years amassed significant quantities of wealth, however, and the removal of most exchange restrictions in 1998 appears to have prompted a large wave of Israeli investments in foreign trusts,⁶² until the

⁶⁰ Income Tax Ordinance, above, note 28, ss. 82–4, 86.

⁶¹ See Currency Control Act, 1978, I.L. (1978), p. 108.

⁶² Currency Control Permit 1998, Regulations (1998), p. 722.

tax authorities attempted to close the resulting loophole in Amendment Number 147 to the Income Tax Ordinance, which came into force on 1 January 2006.⁶³

The complex provisions of this ambitious legislative effort, Israel's first bona fide attempt to tax private trusts, are beyond the ambit of the present chapter.⁶⁴ It pulls together several strands of our story, as its goals included both plugging a notorious tax loophole and creating conditions conducive to rich foreign Jews immigrating to Israel and bringing their wealth along: while the general effect of the amendment has been to tax previously untaxed trusts, trusts created by foreign settlers for Israeli beneficiaries are largely exempt.⁶⁵ The amendment includes new definitions of 'trust' and 'trustee' and a definition of 'protector', which apply to taxation issues alone. The new definition of the 'trust', while different from that in the Trust Act of 1979, which remains in force, is again extremely broad, defining a 'trust' as 'an arrangement where a trustee holds his assets for a beneficiary, made in Israel or abroad, whether defined by the applicable law as a trust or otherwise'.⁶⁶ Aiming to include both common law trusts and other arrangements for Israeli tax purposes, this definition explicitly includes as trusts arrangements defined by the applicable law as something other than trusts. It acknowledges

⁶³ Income Tax Ordinance Amendment Act (no. 147) 2005, I.L. (2005), p. 766.

⁶⁴ For an English-language summary see STEP Directory and Yearbook 2009, 359.

⁶⁵ Income Tax Ordinance, above, note 28, s. 75I. ⁶⁶ *Ibid.*, s. 75C.

Israeli residents' making use of foreign trust regimes, seeking to include monies channelled into such regimes in Israel's tax base.

During the last few years, it appears that Israelis' increased use of private trusts – prompted by the enrichment of many Israelis since the mid-1990s, and the removal of exchange controls – is now finally moving Israel's legislature and courts to a complete acceptance of the express common law private trust, and the common law of such trusts, as part of the law of Israel. The draft Civil Code of Israel, intended to replace the private law legislation of the 1960s and 1970s, provides, in section 564, that 'a trustee is an owner of an asset, who must employ it for the benefit of a person or some other purpose'. Section 10 of the separate Inheritance Part of the draft Code expressly excepts the creation of a trust from the section's avoiding of non-testamentary obligations to transfer property either on the promisor's death or on condition that he dies. Some attention seems to have been given to facilitating the creation of private express trusts according to local law. Still, the draft Code, which has profited from the most careful drafting in Israeli history (a twenty-year process), treats trust law with such extreme brevity, not unlike the 1979 Act it is set to replace, that even should the draft be enacted, most of the relevant law will have to be sought outside the Code, much as it is today sought outside the 1979 Act. And as to the courts, one recent high-visibility decision of the Tel-Aviv District Court enforced an express trust in which one of Israel's most successful bankers held shares on trust for one of its best-known lawyers. Myriad objections to the finding that a common law-type express private trust had been created were

brushed aside.⁶⁷ Another recent decision firmly held that where land is registered in a trustee's name, without the register showing any indication of his holding as trustee, the beneficiaries trump his personal creditors.⁶⁸ Both decisions seem to evince a confidence in upholding and enforcing express private trusts which is new to Israeli case law.

VI. Conclusion

What may one learn from the above brief exposition of the colourful and complex history of the trust in modern Palestine/Israel? While the long-term trend towards the acceptance of the common law private express trust is unmistakable, this trend has taken almost a century to rise, largely as a result of McDonnell CJ's 1931 decision to stamp such trusts out of local law. The history also highlights the trust's identity as the propertied individual's trump card in his struggle against unpropitious political, social and economic circumstances. It was used by Ottoman subjects to weather uncertain times and evade tax and military service, then later by the Jews of the 1930s, desperate to escape a hostile Europe. The collectivist, socialist Israel of the 1950s and 1960s had little use for it, and little funds to place in it. It was only with the opening up of Israeli society in the 1990s that individuals were again using the trust, now primarily for the classic purposes of providing for their dependants and minimizing their tax

⁶⁷ H.P. (Tel-Aviv) 548/06 *Arnon v. Pyotrkovsky*, delivered 1 March 2009.

⁶⁸ Bankruptcy Case (Jerusalem) 4044/07 *Hoffmann v. The Receiver-General, Jerusalem*, delivered 24 June 2009.

burden. Present-day Israeli society resembles other contemporary societies in many individuals' deep sense of dissatisfaction. The private express trust appears to be seen as one way of insulating at least some of one's capital from the whirlwinds of a hostile, unpredictable world.