

# SHAPELESS TRUSTS AND SETTLOR TITLE RETENTION: AN ASIAN MORALITY PLAY

*Adam Hofri*

## I. INTRODUCTION

The recent Chinese Trust Act has created a stir in trusts scholarship by neither requiring that title to the trust assets vest in the trustee nor specifying another location for that title. The Act thus permits settlors to appoint another as trustee while retaining title in the trust assets. Leading trust scholars have criticized the Chinese Trust Act's noncommittal approach based on the difficulties created by settlors continuing to own the trust assets. This Article evaluates the efficacy of such shapeless trusts and settlor title retention trusts by examining the career of the Chinese Trust Act's principal predecessor—the Israeli Trust Act of 1979—which established the world's first shapeless trust regime.

The Article identifies two advantages of such regimes. First, shapeless trusts make trustees' duties and beneficiaries' effective remedies applicable in fiduciary situations conventionally analyzed under common law systems as agency, nomineehip, or, under civil law systems, as mandate. Second, "settlor title retention trusts" may help introduce the trust mechanism to settlors who are unfamiliar with trusts and may be deterred by the prospect of giving away title in their property. Many property owners outside the traditional Anglo-Saxon sphere of trust practice would be very much deterred by such a prospect. To encourage the creation of trusts and allay property-owners' fears of relinquishing title to and control of trust assets, offshore jurisdictions that purport to adhere to the Anglo-American trust model have developed "settlor-reserved powers." Although the Chinese and Israeli "shapeless trusts" differ formally from the traditional Anglo-American trust in that they do not vest title to the trust assets in a trustee, they are, compared to offshore trusts with "settlor-reserved powers," functionally much closer to traditional active trusts, which leave actual power to administer and dispose of trust assets in the hands of trustees. Shapeless

trusts can, thus, be viewed as a relatively direct means, involving less smoke, fewer mirrors, and less real injury to the separation of enjoyment and control, one of the foundational ideas behind trusts, for making the trust palatable for a wider circle of potential settlers.

This Article combines the rich black letter discourse characteristic of comparative trusts scholarship with a functionalist, legal realist view of the use practitioners make of the law, as well as of the real-life effects of doctrinal formulations. Part II describes the “shapeless” nature of the Chinese Trust Act’s trust model and discusses the criticism that has been leveled at that model. Part III discusses the Israeli “shapeless” trust regime. It explains the regime’s shapelessness and shows, based on primary sources declassified especially for this research project and recently conducted interviews, how that shapelessness emerged during the protracted process of drafting and enacting the 1979 Act. It then describes courts’, practitioners’, and academics’ responses to the Israeli trust model’s shapelessness. Interestingly, while the courts have come to accept that model and are applying it, many academics have been critical, continuing to identify the trust with the internationally hegemonic model, which vests title to the trust assets in the trustee. Finally, Part III goes on to describe the Israeli shapeless trust model’s apparently impending demise with the upcoming enactment of the Israeli Civil Code, which will rearrange the local trust model, expressly granting title in the trust assets to the trustee. Part IV concludes the Article by trying to tease out the lessons of the Israeli experience for the general viability of “shapeless” trust regimes, permitting, among other configurations, “settlor title retention trusts.” The uptake is that despite the flaws of existing Chinese and Israeli legislation, as well as the many doctrinal difficulties created by those innovative trust models grating against established doctrine, which reflects the traditional trust model, both “shapeless trusts” and “settlor title retention trusts” could have their uses, particularly, perhaps, in making trusts more understandable and accessible for populations foreign to traditional Anglo-Saxon trust culture.

## II. THE CHINESE SHAPELESS TRUST

The first eleven years of the present century have seen several jurisdictions formulate and enact new trust regimes,

including the French statutory *fiducie*, the British Virgin Islands' VISTA trust, the Uruguayan *fideicomiso*, the *affidamento fiduciario* of the Republic of San Marino, and the trust chapters of the new draft civil codes of the Hungarian and Czech Republics.<sup>1</sup> From a comparative perspective, the most challenging of the new regimes may be the People's Republic of China's Trust Act of 2001.<sup>2</sup> By not specifying who of the three main protagonists of the trust—settlor, trustee, or beneficiary—must hold title in the trust assets, and by permitting the settlor's retention of title in those assets without his declaring himself trustee, China has produced a truly “shapeless” trust.

Maurizio Lupoi, one of Italy's great trust scholars, coined the term “shapeless trust” to describe the definition of the trust in the Hague Convention on the Law Applicable to Trusts and on their Recognition.<sup>3</sup> The Convention defined the trust as “the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose,” adding that it is a characteristic of trusts that “title to the trust assets stands in the name of the trustee or in the name of another

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1. See (a) France: The loi n°2007-211 du 19 février 2007 instituant la fiducie (amending several Codes, including the Code Civil, to which new Arts. 2011-2031 were added); see also discussion in François Barrière, *The French Fiducie, or the Chaotic Awakening of a Sleeping Beauty*, in RE-IMAGINING THE TRUST: TRUSTS IN THE CIVIL LAW (Lionel Smith ed., forthcoming 2012); Pierre Crocq, *National Report for France*, in TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS 99-113 (SCJJ Kortmann et al., eds. 2009); (b) The British Virgin Islands: Virgin Islands Special Trusts Act, 2003. See also discussion in GERAINT THOMAS AND ALASTAIR HUDSON, *THE LAW OF TRUSTS* (2nd ed., Oxford Univ. Press, 2010) 1167-1179; (c) San Marino: Law of 1 March, 2010, no. 43, on the *affidamento fiduciario*; see discussion in Maurizio Lupoi, *The New Law of San Marino on the “Affidamento Fiduciario,”* in TRUST LAW INTERNATIONAL 51-59 (2011); (d) Uruguay: Ley de Fideicomiso, N° 17.703; D.W.M. Waters, *The Future of the Trust—Part I*, 13 J. INT'L TR. & CORP. PLAN. 179, 197-98 (2006); (e) Hungary: 2009 évi CXX. Törvény a Polgári Törvénykönyvről (Law no. 120/2009 on the Civil Code) (not yet in force) §§ 5:583-95. See discussion in Norbert Csizmazia, *National Report for Hungary*, in TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS 99-113 (SCJJ Kortmann et al., eds. 2009); (f) Czech Republic: see discussion of the new draft civil code in Tomáš Richter, *National Report for the Czech Republic*, in Kortmann, 59, 65-70.

2. Trust Law of the People's Republic of China (promulgated by Order No. 50), P.R.C. LAWS & REGS. (Apr. 28, 2001, effective Oct. 1, 2001) (official trans. at [http://www.npc.gov.cn/englishnpc/Law/2007-12/10/content\\_1383444.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/10/content_1383444.htm) (last visited August 3, 2011)) [hereinafter Chinese Trust Law].

3. Maurizio Lupoi, *The Shapeless Trust*, 1 TR. & TRUSTEES 3, 15 (1995); MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 327-67 (Simon Dix trans., Cambridge Univ. Press 2000).

person on behalf of the Trustee.”<sup>4</sup> Lupoi substantiated his description of the Convention definition as “shapeless” by noting that as it does not require, as American, English, and Commonwealth trust law does, that title to the trust assets vest in the trustee, the definition seems to include, under the term “trust,” a great many types of relationships, both bilateral and trilateral, including relationships leaving the settlor as owner of the trust fund despite his having appointed, rather than become, a trustee.<sup>5</sup>

The definition of the trust in the Chinese Trust Act is no less shapeless than that in the Hague Convention. The Chinese definition provides “that the settlor, based on his faith in trustee [sic], *entrusts* his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes.”<sup>6</sup> The precise meaning, in this context, of the term “entrusts”—*weituo*—is obscure. It does not, according to Professor Lusina Ho of Hong Kong University, amount to a requirement that settlors transfer title in the trust assets to their trustees; the Chinese term for “transfer” is *zhuan yang*. Chinese courts, having started to interpret and apply the Act, have similarly ruled that the Act does not mandate the transfer of title in the trust assets from settlor to trustee.<sup>7</sup> Ho and others note that Chinese law uses *weituo* in describing the relationship of principal and agent.<sup>8</sup> The

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4. Convention on the Law Applicable to Trusts and on their Recognition art. 2, (July 1, 1985), available at <http://www.hcch.net/upload/conventions/txt30en.pdf> [hereinafter: the Convention]. See discussion in Emmanuel Gaillard & Donald T. Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 37 AM. J. COMP. L. 307 (1987).

5. Such situations should be distinguished from “declaration of trust” situations, where the settlor declares that he holds assets on trust, thereby making himself into a trustee and transforming his ownership of the trust assets into fiduciary ownership. The “declaration of trust” is a regular part of, for example, the American law of trusts. See RESTATEMENT (THIRD) OF TRUSTS §10(c) (2011). For Lupoi’s discussion, mentioning several further points of doctrine on which the convention stakes no position at all, thus rendering its trust concept “shapeless.” See Lupoi, *supra* note 3, at 16-17, and Gaillard & Trautman, *supra* note 4, at 339.

6. Chinese Trust Law, *supra* note 2 (emphasis added).

7. Lusina Ho, *China: Trust Law and Practice since 2001*, 16 TR. & TRUSTEES 124, 126-27 (2010) (discussing Beijing Haidian Sci. & Tech. Dev. Co. v. Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsì (First Instance Civil Cases, Chongqing High People’s Court, 19 March 2007)).

8. My discussion of the Chinese Act in the following paragraphs draws on the following materials: Lusina Ho, *Trusts in China: Property or Contract?*, in RE-

phrase “allows the trustee . . . [to administer or dispose of the property] according to the will of the settlor” also carries considerable echoes of agency. English law, noticeably, uses the verb “entrust” to describe fiduciary relations generally, rather than a trust.<sup>9</sup>

The Chinese Trust Act includes several other provisions that appear to envision a continuing connection between the settlor and the property he has already transferred into trust. The Act provides that “[t]he trust shall be differentiated from other property that is not put under trust by the settlor.”<sup>10</sup> Under most trust regimes, such differentiation is achieved by transferring title in the trust assets from settlor to trustee. Where such transfer is a fundamental feature of any trust, a provision mandating differentiation of trust property from the settlor’s non-trust property is unnecessary, other than, perhaps, in “declaration of trust” situations. Rules of law requiring the trustee to keep trust and non-trust property separate are far more common.<sup>11</sup> Yet the Chinese provision just quoted is not restricted to “declaration of trust” scenarios.<sup>12</sup>

The Chinese Trust Act gives the settlor of an already-constituted trust an impressive array of powers, thereby demonstrating an understanding of the trust as a continuing

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IMAGINING THE TRUST: TRUSTS IN THE CIVIL LAW (Lionel Smith ed., forthcoming 2012); Lusina Ho, *The People’s Republic of China*, in THE INTERNATIONAL TRUST 38-825 (J. Glasson & G. Thomas eds., 2d ed. 2006); Lusina Ho, *Reception of the Trust in Asia: Emerging Asian Principles of Trust?*, SINGAPORE J. LEGAL STUD. 287-304, 293-303, 294 n.35 (referring to the use of the term *weitu* in an agency or mandate context in the General Principles of Civil Law of China (promulgated by Order No. 37 of the President of the People’s Republic of China, adopted on April 12, 1986, arts. 64 and 65); Lusina Ho, TRUST LAW IN CHINA (Hong Kong: Sweet & Maxwell Asia, 2003); Ho, *supra* note 7; David Hayton, *The Core of the Chinese Trust Law 2001*, 3 TR. Q. REV. 24-27 (2005); Rebecca Lee, *Conceptualizing the Chinese Trust*, 58 INT’L & COMP. L.Q. 655 (2009); Waters, *supra* note 1, at 219-22; Frances H. Foster, *American Trust Law in a Chinese Mirror*, 95 MINN. L. REV. 602 (2010).

9. In *Reading v. The King*, (1949) 2 K.B. 232, Asquith, L.J., explained that “a ‘fiduciary relation’ exists (a) whenever the plaintiff *entrusts* to the defendant property . . . and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him . . .” (emphasis added).

10. Chinese Trust Law, *supra* note 2.

11. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 84 & cmt. B. (2011) (enjoining trustees “to keep the trust property separate from the trustee’s own property”); Chinese Trust Law, *supra* note 2, § 16 (“The trust property shall be segregated from the property owned by the trustee.”).

12. See discussion of § 15 and its implications for the Chinese Act’s fundamental trust model in Ho, *supra* note 7, at 295, n.42-43 and text thereto.

contractual relationship between settlor, trustee, and beneficiary.<sup>13</sup> It provides, for example, that “[t]he settlor shall have the right to know the administration, use and disposition of, and the income and expenses relating to, *his* trust property, and the right to request the trustee to give explanations in this regard.”<sup>14</sup> Moreover, it states,

If, due to special reasons unexpected at the time the trust is created, the methods for administrating [sic] the trust property are not favorable to the realization of trust purposes or do not conform to the interests of the beneficiary, the settlor shall have the right to ask the trustee to modify such methods.<sup>15</sup>

It continues, stating that “where the trustee’s appointment is terminated, a new trustee shall be appointed according to the provisions in the trust documents; where there are no such provisions in the documents, the settlor shall make the appointment”;<sup>16</sup> and under certain circumstances, “[a]fter a trust is created, the settlor may replace the beneficiary or dispose of his right to benefit from the trust.”<sup>17</sup>

In the decade since its enactment, the unique approach of the Chinese Trust Act has drawn the attention of numerous scholars, both in China and elsewhere.<sup>18</sup> Much of the discussion has centered on the Act’s lack of a requirement that the settlor transfer title in the trust assets to the trustee.<sup>19</sup> As the principal point was recently put by Scottish property scholar Kenneth Reid, “the location [under Chinese trust law] of title [in the trust assets] is a matter of choice—an arrangement unparalleled, so far as I know, in any other country”<sup>20</sup>—a shapeless trust, indeed.

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13. See, e.g., Ho, *supra* note 7, at 125; Hao Wang, Lusina Ho & Yi Zhou, *Contract or Trust: Examining the First Trust Decision of the Chinese Courts*, 5 TR. Q. REV. 11, 12, 14 (2007).

14. Chinese Trust Law, *supra* note 2, at § 20 (emphasis added).

15. *Id.* at § 21.

16. *Id.* at § 40.

17. *Id.* at § 51.

18. See *supra* note 8.

19. See, e.g., Lusina Ho’s criticism of this feature of the Act in her *Reception of the Trust in Asia*, *supra* note 8, at 293-96.

20. Kenneth G. C. Reid, *Conceptualising the Chinese Trust: Some Thoughts from Europe*, in TOWARDS A CHINESE CIVIL CODE: HISTORICAL AND COMPARATIVE PERSPECTIVES 9 (Remco van Rhee & Lei Chen eds. forthcoming 2012).

In commenting on the Chinese Trust Act, Professors Ho and Reid noted that trusts, the trustees of which do not own the trust assets, raise several difficulties. Following recent comparative trusts literature, Reid admitted that trustees' ownership of trust assets cannot be described as "an essential feature of a trust," further admitting that "the difficulties of [placing ownership in the settlor or beneficiary] are practical rather than doctrinal."<sup>21</sup> The difficulties pointed out by Reid and Ho are as follows:

(i) "[A] trustee who derives powers indirectly, from the ownership of others, will have the tiresome burden of proving these powers to the satisfaction of third parties."<sup>22</sup>

(ii) If ownership of the trust assets is placed in settlors or beneficiaries rather than trustees, situations may arise where trust assets have no owner or where the identity of some or all of their owners is disputed. The settlor or beneficiary might die or be dissolved. While the Chinese Trust Act provides a mechanism

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21. Kenneth G. C. Reid, *Conceptualising the Chinese Trust: Some Thoughts from Europe*, in *Towards a Chinese Civil Code: Historical and Comparative Perspectives* 9 (Remco van Rhee & Lei Chen eds. forthcoming 2012) (internal quotes omitted). For comparative trusts scholarship counting the "essential features of trusts" and finding that trustees' ownership of the trust assets is not one of them, see Ho, *Reception of the Trust in Asia*, *supra* note 8, at 289-90; Tony Honoré, *Trust: the Inessentials*, in *RATIONALIZING PROPERTY, EQUITY AND TRUSTS—ESSAYS IN HONOUR OF EDWARD BURN* 7, 14 (Joshua Getzler ed., 2003) ("[The South African and Quebec trust regimes show that] the essential relation of a trustee to the trust assets is one not of ownership but of control."); Tony Honoré, *On Fitting Trusts into Civil Law Jurisdictions*, available at <http://ssrn.com/abstract=1270179>, at 7, 12 ("[I]t does not matter where the title to the trust property is located. To locate it in the trustee, as in Anglo-American trust law, is convenient but not essential."); Luc Thévenoz, *Trusts—The Rise of a Global Legal Concept*, in *EUROPEAN PRIVATE LAW: A HANDBOOK*, vol. 2 (Mauro Bussani & Franz Werro eds. forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1723236](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723236), at 22-23 ("The actual legal owner of the trust property also appears not to be critical. It is the trustee in Scotland; it can be either the trustee or the beneficiary under South African law; but there is no legal owner under the recent codification of Quebec. One should infer that the vesting of legal title with the trustee is inconsequential."). For the view that trustees' ownership of the trust assets is an essential feature of all trusts properly so called, see George L. Gretton, *Trusts without Equity*, 49 INT'L & COMP. L.Q. 599, 603 (2000) ("[T]hough it functions as a trust, the *bewind* is not trust, for a simple reason: the location of legal title is the reverse of the trust."); Maurizio Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 970 (1999) ("[T]he transfer of property to the trustee, or a unilateral declaration of trust" is part of the "definition of the trust in comparative law terms.").

22. Reid, *supra* note 20, at 7; the same point was noted by Ho, *Reception of Trusts in Asia*, *supra* note 8, at 295-96; Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at ¶ 8.

for replacing a dead or dissolved trustee,<sup>23</sup> it does not provide a mechanism for replacing a dead or dissolved settlor or beneficiary.<sup>24</sup> Some trusts have no living, identified, or identifiable beneficiaries, for a time or permanently. The identity of a trust's beneficiaries can also be disputed.<sup>25</sup>

(iii) Settlers who never parted with ownership in the trust assets seem, under Chinese law, to owe no fiduciary duties:

. . . [I]f the settlor misappropriates the trust assets, and it is very easy for him as the owner to do so, there is very little the beneficiaries could do. As the property is not owned by the trustee, any action against him will face the difficulty of proving lack of prudence on his part in not pre-empting the conduct of the settlor, who is after all the legitimate owner of the trust assets. . . . any direct action against the settlor will meet the even greater difficulty that the Chinese Trust Law does not subject him to any duties . . . .<sup>26</sup>

Those difficulties give rise to a variety of questions: Are they enough to condemn a trust model under which title to the trust assets is left in the settlor, despite his having appointed, rather than become, a trustee, as inferior to the conventional model, under which that title is in the trustee? And what of the "shapeless trust" itself? Is the Chinese Trust Act's silence on the locus of title in the trust assets inferior to a trust regime positing one—any one—of the three points of the "eternal triangle of the trust"<sup>27</sup> as the locus of that title?<sup>28</sup> Or is it just inferior to the conventional model locating that title in the trustee?

23. Chinese Trust Law, *supra* note 2, at § 40; under § 52, a trust is not terminated by the death, insolvency, or incapacity of its settlor or trustee.

24. Chinese Trust Law, *supra* note 2, at § 15 provides that where a settlor is not also a beneficiary, on his death, dissolution, cancellation or bankruptcy, "the trust shall subsist, and the trust property shall not be his legacy or liquidation property."

25. Reid, *supra* note 20, at 7, 10-12.

26. Ho, *Reception of Trusts in Asia*, *supra* note 8, at 296; Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at ¶ 8.

27. Cf. Menachem Mautner, "The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties, 90 MICH. L. REV. 95 (1991).

28. Lupoi's criticism of the "shapeless trust" was confined to its use in the Hague Convention's description of the class of legal instruments to which it applies as a matter of conflicts law. His criticism did not extend to the adoption of a "shapeless" definition of the trust as part of a specific jurisdiction's substantive trusts regime. See Lupoi, *The Shapeless Trust*, *supra* note 3, at 16-17, and LUPOI, TRUSTS, *supra* note 3, at 339.



It is the task of this Article to begin an examination, both analytical and empirical, of the relative efficacy of “shapeless” trust regimes, which permit, among other configurations, trusts under which ownership of the assets remains with the settlor even when he has appointed, rather than become, a trustee. Empirical data on the operation of such regimes is limited, however, due to their small number. The Chinese regime is still too recent for empirical data to be available in useful quantities; as late as 2010, few judicial decisions appear to have interpreted or applied the 2001 Act.<sup>29</sup> While South Africa, Germany, and the Netherlands, as well as Quebec and its Uruguayan and Czech offshoots, offer examples of regimes placing title to the trust assets elsewhere than in the trustee, their trust models are the opposite of shapelessness; they are clear, definite, and concrete regarding the locus of title.<sup>30</sup> Alone of this group, the German *unechte treuhand* is notable for leaving title in the settlor (who *treuhand* law assumes to also be the beneficiary<sup>31</sup>); shapeless, however, it is not.<sup>32</sup>

Fortunately, however, the efficacy of shapeless trusts, a question made urgent by the Chinese Trust Act, may be illuminated by the annals of a jurisdiction at the other end of continental Asia: Israel. Predating the Hague Convention by a

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29. Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at ¶ 10; Ho, *China: Trusts Law and Practice*, *supra* note 7, at 126.

30. South Africa and the Netherlands both allow the *bewind*, according to which title to the assets is in the beneficiary, though the *bewindvoerder* (in the Netherlands) or *bewindhebber* (in South Africa) enjoys an exclusive right to administer and dispose of them. For the Netherlands, see S.C.J.J. Kortmann & H.L.E. Verhagen, *National Report for the Netherlands*, in PRINCIPLES OF EUROPEAN TRUST LAW 195-215, 199-200 (D.J. Hayton et al., eds. 1999). For South Africa, see Trust Property Control Act, Act 57 of 1998, § 1, s. v. “trust,” and EDWIN CAMERON ET AL., HONORÉ’S SOUTH AFRICAN LAW OF TRUSTS 272-77 (5th ed., 2002). Article 1261 of the Civil Code of Quebec provides that “[t]he trust patrimony . . . constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.” Studies of the Quebec trust are many. See, e.g., JOHN B. CLAXTON, STUDIES ON THE QUEBEC LAW OF TRUST (Thomson, 2005). Uruguay has adopted, and the Czech Republic is apparently about to adopt, the Quebecois solution; see sources cited *supra* note 1. For Germany, see *infra* notes 31 & 32 and text thereto.

31. Stefan Grundmann, *Trust and Treuhand at the End of the 20th Century: Key Problems and Shift of Interests*, 47 AM. J. COMP. L. 401, 402-03 (1999).

32. See Dieter Krimphove, *National Report for Germany*, in TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS 116-17 (SCJJ Kortmann et al., eds. 2009). An empirical examination of the operation of the *unechte treuhand*, while important, is beyond the ambit of the present Article.

few years, the Israeli trust regime under the Trust Act of 1979<sup>33</sup> seems to have been the world's first shapeless trust regime. The next Part describes the Israeli regime and how Israel came to adopt it. It then attempts to evaluate the regime's success by way of describing the Israeli legal community's evolving response to that regime.

### III. THE ISRAELI SHAPELESS TRUST: THE TRUST ACT OF 1979

#### A. THE ISRAELI SHAPELESS TRUST REGIME

The Israeli Trust Act of 1979 (1979 Act) is designedly vague regarding several key aspects of the trust relationship, defining neither the trustee's nor the beneficiary's rights in the trust property. It rests content with a definition of a "trust" as "a relationship to property by which a trustee is bound to hold the same or act in respect thereof, in the interest of a beneficiary or for some other purpose."<sup>34</sup> The notion of "trustee" implicit in this definition includes fiduciaries such as executors, administrators, guardians, and liquidators.<sup>35</sup> The beneficiary's rights in the trust property not being defined, it appears that the traditional Anglo-American split ownership model of trusteeship,<sup>36</sup> characterizing the beneficiary as the "owner in equity" of the trust property, is not part of Israeli law; rather, an Israeli beneficiary has, like

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33. Trust Act, 5739-1979, 941 *Statutes*, Aug. 3, 1979, p. 128 [hereinafter: "1979 Act" or "the Act"].

34. 1979 Act, § 1. An unofficial English translation of the Act, as promulgated in 1979, was published in the *Israel Law Review*, Vol. 15 (1980) 418ff. While the Act was thrice amended since then, those amendments are not material to our discussion. See discussion of the scholarly debate over the trustee's rights in the trust property under the Act, *infra* notes 127-138 and accompanying text.

35. The application of statutory trust regimes beyond trustees on the Anglo-American trust model by an extended use of the terms "trust" or "trustee" is not unheard of in England itself. The English Trustee Act, 1925, c. 19 (15 and 16 Geo. 5), for example, provides in § 68 (17) that "the expression . . . 'trust' . . . extend[s] to . . . the duties incident to the office of a personal representative, and 'trustee' where the context admits, includes a personal representative." The difference is that in England, this extended application of rules principally applicable to trustees is not achieved by transforming the traditional trust concept.

36. Lupoi insisted that "[t]he 'Anglo-American' trust does not exist." See LUPOI, TRUSTS, *supra* note 3 at 328 n.3. The qualifier "Anglo-American" is used to refer to features common to the trust regimes of England, the United States, and other jurisdictions adhering to the traditional common law trust model, such as the common law provinces of Canada. There are, of course, many significant differences between those regimes.

Indian, Scottish, and Chinese beneficiaries, merely an obligatory right vis-à-vis the trustee.<sup>37</sup>

Following this general definition, the Act contains two distinct trust regimes. One applies only to “trusts created by an instrument of endowment,” which, where not created by will or by beneficiary designation under an insurance policy or pension plan, must be created by the settlor signing a trust instrument before a notary.<sup>38</sup> The other, focused largely on trustees’ duties and powers, applies to any fiduciary relationship involving property which the fiduciary must hold, use, or “act in respect of,” applying the term “trust,” unconventionally, to this large class of relationships. Imposing duties, which traditional Anglo-American trust law made specific to trustees, on a much wider class of fiduciaries, this second regime serves as a common background to specific Israeli statutory regimes governing fiduciary situations such as those of the executor, administrator, guardian, liquidator, trustee in bankruptcy, banker, and legal practitioner.<sup>39</sup>

Many familiar rules of Anglo-American trust law appear in the 1979 Act only with regard to “trusts created by an instrument of endowment.” A key example is the requirement that where the settlor and trustee are different persons or entities, the trust’s initial assets must be transferred from settlor to trustee in order

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37. For beneficiaries’ rights under Indian trust law, see B.M. GANDHI, *EQUITY, TRUSTS AND SPECIFIC RELIEF* 372-77 (E. Book Co., 1983); for their rights under Scots law, see Kenneth Reid, *National Report for Scotland*, in *PRINCIPLES OF EUROPEAN TRUST LAW*, 67-84, 69-72 (D.J. Hayton et al., eds. 1999); for their rights under Chinese law, see Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at ¶¶ 18-26. See discussion of some of the 1979 Act’s unconventional features in Iris Rabinovich-Brun, *The Trust and Private International Law: an Israeli Perspective*, in *TOWARDS A NEW EUROPEAN IUS COMMUNE* 685, 688-94 (A. Gambaro & A. M. Rabello eds., 1999).

38. This regime is contained in §§ 17-24. Formal requirements regarding the creation of trusts “by an instrument of endowment” are contained in § 17 (a); see discussion in S. KEREM, *TRUSTS* 633-76 (4th ed. 2004); [hereinafter: KEREM, TRUSTS]. Friedman assumed that this part of the Act—its second Chapter—is principally intended to govern “donative trusts.” DANIEL FRIEDMAN, *THE LAW OF UNJUST ENRICHMENT* 893 n.338 (2d ed., 1998).

39. See discussion of this second, more general “trusts” regime as “a general framework applicable to any trust . . . [including] trust relationships governed by other legislation,” in KEREM, TRUSTS, *supra* note 38, at 142-43. Cf. RESTATEMENT (THIRD) OF TRUSTS § 5 (2011) (“[t]he following are not trusts: . . . (b) decedents’ estates; (c) guardianships and conservatorships; (d) receiverships and bankruptcy trusteeships; . . .”).

for the trust to be constituted. Applicable only to trusts created by an instrument of endowment, this fundamental rule does not apply where a trust is created “by contract with a trustee” or “by statute”—the two other ways in which a trust may be created under the 1979 Act.<sup>40</sup> Significantly, even where a trust is created by an instrument of endowment, only control of the property, not title, must be transferred.<sup>41</sup>

Many of the 1979 Act’s other fundamental provisions, such as the provisions governing the appointment of trustees,<sup>42</sup> the resignation and removal of trustees,<sup>43</sup> the modification and termination of the trust,<sup>44</sup> and the revocability of the trust,<sup>45</sup> as well as the provisions that empower the court to issue directions to the trustee<sup>46</sup> and allow the settlor or another to add to the trust property,<sup>47</sup> appear in the 1979 Act’s second chapter, entitled “[A] trust under an instrument of Endowment.” It is, thus, at best, unclear if they apply to trusts created in the other ways recognized by the 1979 Act—by contract or under statute.<sup>48</sup>

Both trust regimes in the 1979 Act appear to be strikingly shapeless. Even Lupoi’s original “shapeless trust,” the trust concept which appears in the Hague Convention, is not quite as vague as the trust concept under the 1979 Act. The Convention’s

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40. 1979 Act, § 2. Post-1979 cases eventually provided that the § 2 list of ways in which trusts may be created is not exhaustive. Application for Permission to Appeal 5715/95, *Weinstein v Fuchs* PD 54(5) 792 (2000). For the transfer requirement in American law, see RESTATEMENT (THIRD) OF TRUSTS § 10(a-b) (2011) (listing the “Methods of Creating a Trust” under American law; subsection (c), dealing with declarations of trust, is the major exception to the rule that for a trust to be created, title in the trust assets (such as actionable rights) must move from settlor to trustee; subsections (d) and (e) deal with cases, less material to our discussion, where rights created in the trustee were not earlier held by the settlor, as where the latter merely held a power of appointment over property). See also for the transfer requirement, UNIFORM TRUST CODE § 401(a) [hereinafter: UTC]; In English law, see *Knight v. Knight* (1840) 3 Beav 148, 173; *Milroyd v. Lord* (1862) 4 De G F & J 264, 274; and see PAOLO PANICO, INTERNATIONAL TRUST LAWS 16-27 (Oxford Univ. Press 2010).

41. See discussion in Avraham Alter, *Taxation of Ordinary Trusts in Israel*, at 38 n.86, Tel-Aviv University, Jan. 1985 [hereinafter: Alter, Dissertation].

42. 1979 Act, § 21.

43. *Id.* at § 22.

44. *Id.* at § 23.

45. *Id.* at § 18(b).

46. *Id.* at § 19.

47. *Id.* at § 18(a).

48. Kerem believed that they do not. KEREM, TRUSTS, *supra* note 38, at 139, 661-62 (listing differences between the regimes the 1979 Act applies to trusts created by an instrument of endowment and to trusts created by contract).

definition of a trust as “the legal relationships created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose” shares with the general definition of a trust in the 1979 Act the catch-all description of the trust as an unspecific “legal relationship.”<sup>49</sup> Like the part of the 1979 Act discussing trusts created by an instrument of endowment, the Convention is content to refer to assets being placed “under the control” of a trustee rather than requiring that title pass from the settlor, or that title pass at all.<sup>50</sup>

The 1979 Act applies to a broader set of arrangements than the Convention in that under the 1979 Act, if trusts are created other than by an instrument of endowment, trustees do not even need to have the trust property “under their control”; rather, they may merely “act in respect of” that property.<sup>51</sup> Unlike the 1979 Act, the Convention acknowledges that “title to the trust assets stand[ing] in the name of the trustee or *in the name of another person on behalf of the trustee*” is among the “characteristics” of a trust.<sup>52</sup> Israeli trustees, by contrast, can be reduced to “acting in respect of” property when the title to that property is not even vested in another on their behalf; nor do they have to obtain “control” over that property.

Further, the definition of the trust in the 1979 Act is even more “shapeless” than the definition in the Chinese Trust Act of 2001. The 1979 Act does not require, as the Chinese Trust Act does, that trustees necessarily administer or dispose of the trust property, or that they do so “in [the trustees] name.”<sup>53</sup> An Israeli

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49. The Convention, *supra* note 4, § 2. See LUPOI, TRUSTS, *supra* note 3, at 327-67 (critique of the convention); for further criticism of art. 2, see PRINCIPLES OF EUROPEAN TRUST LAW, *supra* note 30, at 38-40.

50. The Convention, *supra* note 4, § 2. Lupoi noted the “closeness” of the definition in the 1979 Act, § 1, to that in the Hague Convention. LUPOI, TRUSTS, *supra* note 3, at 279, 334. Lupoi described the Israeli definition as “the only legislative formulation which defines the relationship without indicating its source.” LUPOI, TRUSTS, *supra* note 3, at 305 n.228. The Israeli definition lost its exclusiveness in 2001, with the enactment of the Chinese Trust Law. Lupoi’s statement appears to have been correct when he made it: the original (Italian) version of his book appeared in 1994. See also Donovan Waters’ brief analysis of the 1979 Act in D.W.M. Waters, *The Institution of the Trust in Civil and Common Law*, 252 *Recueil des cours* 113, 376-78 (1995).

51. 1979 Act, § 1.

52. The Convention, *supra* note 4, at § 2 (emphasis added) (alterations added).

53. Chinese Trust Act, *supra* note 2, § 2 (alterations added); see discussion in Part I.

trustee may merely “act in respect of” the trust property, in the settlor’s name or in the name of any other person.

Title in the trust assets may thus, under the 1979 Act, remain in the settlor. Appropriately, the 1979 Act gives settlors of already-constituted trusts powers that traditional Anglo-American trust law does not give them, while stopping short of the panoply of powers the Chinese Trust Act grants settlors. The 1979 Act provides that a court, on the application of the settlor, may modify or strike out provisions of trusts created by an instrument of endowment.<sup>54</sup> Regardless of whether the trust is created by an instrument of endowment, under statute, or by contract, under the 1979 Act, settlors may always apply to a court in any matter concerning the trust. These provisions contrast with the English rule that once the trust has been launched and the trust property transferred to the trustee, settlors lack standing regarding the trust, absent express provision to the contrary.<sup>55</sup>

The 1979 Act thus provided not one, but two trust regimes: one a “shapeless,” generalized scheme of fiduciary duties, applicable to any fiduciary who must hold property or act in respect thereof; and the other a regime for donative trusts, complete with several features reminiscent of the trust regimes Caribbean Island jurisdictions offer nonresidents, such as the possibility of creating trusts for non-charitable purposes,<sup>56</sup> and even a statutory default spendthrift clause.<sup>57</sup> How did Israel’s

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54. 1979 Act, § 23(a). See discussion in Alter, Dissertation, *supra* note 41, at 33. Under traditional English trust law, once a trust has been created, its provisions may be modified by agreement between the trustees and beneficiaries, or, under the rule in *Saunders v. Vautier*, (1841) 115 Eng. Rep. 282 (M.R.), *aff’d* Cr. & Ph. 240, 41 Eng. Rep. 482 (L.C.), by agreement of the (ascertainable, *sui juris*) beneficiaries alone. See discussion of the English law of trust modification in GRAHAM MOFFAT, GERRY BEAN & REBECCA PROBERT, TRUSTS LAW: TEXT AND MATERIALS 323-55 (5th ed., 2009).

55. MOFFAT ET AL., *supra* note 54, 14.

56. Section 1 defines a trust as “a relationship to property by virtue of which a trustee is bound to hold the same or to act in respect thereof, in the interest of a beneficiary *or for some other purpose*.” Section 17 defines an “endowment” as “the dedication of property in favor of a beneficiary *or for some other purpose*.” Both sections leave the nature of the purpose referred to open. See Alter, Dissertation, *supra* note 41, at 32-33.

57. Section 20 provides that beneficiaries’ rights under a trust created by an instrument of endowment may not be transferred, charged or attached. A court may transfer, charge or attach a beneficiary’s entitlement under such a trust, absent an express exclusion of the statutory default spendthrift clause, only in order to satisfy

legislature come to formulate such a unique solution?

### **B. THE ROAD TO SHAPELESSNESS: GENESIS OF THE 1979 ACT**

Four days after the establishment of the State of Israel on May 14, 1948, its provisional government promulgated a “Law and Government Ordinance” providing that the normative order prevailing at the termination of the preceding British Mandate of Palestine (the Mandate) was to continue in force, subject to express modifications.<sup>58</sup> Israel thus inherited the Palestinian law of trusts as it stood on the termination of the Mandate. This treated each of four types of trust differently. Charitable trusts were governed by two Ordinances of 1924 and 1925, which followed, in codified form, the English law on the subject, as previously codified in the laws of colonial-era India and Ceylon.<sup>59</sup> Trusts created according to the religious legal tradition of one of Palestine’s several “recognized religious communities”—communities to which the Ottoman Empire granted a partial legal autonomy—were governed by the applicable legal tradition rather than by modern Ottoman or British-Colonial law. The religious community courts of the several communities enjoyed exclusive jurisdiction over the “creation and internal administration” of trusts created according to the religious legal

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maintenance, child support or taxes due from that beneficiary, or, “under special circumstances,” in order to collect other debts due from the him or her. One commentator believes this power of the court, as to debts other than maintenance or taxes, to run only to property the time to distribute which has come according to the terms of the trust. KEREM, TRUSTS, *supra* note 38, at 706-07. Compare the UTC § 502, which, while providing that spendthrift clauses are valid and enforceable—so long as they restrain both voluntary and involuntary alienation of a beneficiary’s entitlement—does not include a default statutory spendthrift clause, and § 503, which lists the exception creditors who may pierce an otherwise valid and enforceable spendthrift trust: while omitting the Israeli Act’s vague “special circumstances” exception, it includes, along with spouses and children with support or maintenance orders and the U.S. and State governments, “a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust.” UTC § 503(b). As the 1979 Act’s default statutory spendthrift clause does not apply to contractually-created trusts, the rights of beneficiaries under such trusts may be transferred, charged and attached, unless the contract provides otherwise.

58. *Law and Government Ordinance*, 2 OFFICIAL GAZETTE, May 19, 1948, App. A, p. 1, § 11.

59. An Ordinance to Regulate Charitable Trusts Established Otherwise than in Conformity with Religious Law, 1924, 1 *Legislation Of Palestine*, 1918-1925 (Norman Bentwich, compiler, 1926) 120; An Ordinance to Provide for the Constitution of the Office of Public Trustee of Charities, 1925. The Indian codification was the Indian Trusts Act, Act II of 1882; the Ceylon codification was the Trusts Ordinance of 1917.

traditions they, respectively, applied.<sup>60</sup>

The English law of constructive trusts was at least partly received into the law of Mandate Palestine by way of judicial decisions.<sup>61</sup> Express private trusts, however, were not a part of the law of Mandate Palestine, or so its courts declared in 1945–46, as the end of the Mandate was nearing.<sup>62</sup> Until this time, for nearly the entire duration of the Mandate, the applicability of express private trusts of the English type in Palestine was unclear, so far as the “law in books” was concerned. Key Mandate-era statutes, such as the Companies Ordinance of 1929 and the Income Tax Ordinance of 1941, repeatedly referred to the trust in contexts where the express private, rather than the charitable, type of trust seems to have been intended.<sup>63</sup>

While most of those statutory references to express private trusts appear to have been a result of Mandate-era draftsmen simply not having considered whether this type of trust was, in fact, applicable in Palestine,<sup>64</sup> they encouraged the use of such trusts in practice. Use of express private trusts increased rapidly from the early 1930s, focusing on the commercial uses of the trust, rather than on family trusts. Hundreds of express private trusts were used to acquire, manage, and sell real and personal property, tangible and intangible, for business, land-purchase, banking, and investment purposes. Most Palestinian trustees were companies incorporated especially for this purpose, often expressly named “trust company.” The late 1930s saw Palestine’s

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60. See the Palestine Order in Council, 1922, §§ 53(3) (concerning Rabbinical Courts), 54(3) (concerning Christian Ecclesiastical Courts), and 52 (concerning Shari’a courts).

61. See, e.g., CA 197/41 Ahmad Mahmud Mustafa Nijm et al. v. Husni Jabr ‘Ali Nijm et al., 2 Supreme Court Judgments (SCJ) 458, at 463 (1941).

62. CC 125/43 Malatzky v. Bawly, Selected Cases of the District Courts (SCDC) 265 (1945); LC 20/45 Albert Missri v. Itzhaq Raphael Eliashar, SCDC 180, 182 (1946) and CA 16-24/45 Bracha Ben-Ya’acov v. Joseph Forer 2 ALR 628 (1945) (reversed, on points irrelevant to present concerns, in PCA 30-32/47 Bracha Ben-Ya’acov v. Joseph Forer 2 Psakim 498 [1948]); EC 472/46 (Tel-Aviv) *In Re Estate of Ya’acov Blum* (unreported).

63. See references in the Companies Ordinance, No. 18 of 1929, OFFICIAL GAZETTE, May 15, 1929, 378, §§ 29(2), 77, 78(1) & (3), 79(1) & (3), 98(1)(b), 124, 128, 180; Income Tax Ordinance, No. 23 of 1941, PALESTINE GAZETTE, No. 1126, Aug. 22, 1941, §§ 21, 22(1), 27, 28(1), 29, 34.

64. See discussion in Adam Hofri-Winogradow, *Zionist Settlers and the English Private Trust in Mandate Palestine*, 30 L. & HIST. REV. (forthcoming 2012), text accompanying notes 31-38, 61-63.



first unit trusts.<sup>65</sup>

The Israeli legal system thus inherited a conundrum: a legal instrument the very applicability of which was denied by the courts, assumed by key statutes, and widely exploited by practitioners. This conundrum drew academic attention in the 1940s, as members of the Jewish Palestinian community's fast-growing legal profession argued about whether the private trust was part of the territory's legal system, and whether it should be part of the law of a future Jewish state. The same conundrum continued to draw both judicial and academic attention during the three decades that elapsed between Israel's establishment in 1948 and the promulgation of the 1979 Act.<sup>66</sup>

The Israeli Supreme Court's pre-1979 pronouncements on the reception of express private trusts in Israeli law combine into an ambiguous picture.<sup>67</sup> There was no binding decision to receive them. Considering the clear rejection of such a reception during the final years of the Mandate, the absence of a binding Israeli

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65. See discussion in Adam Hofri-Winogradow, *Zionist Settlers and the English Private Trust in Mandate Palestine*, 30 L. & HIST. REV. (forthcoming 2012), text accompanying notes at Part III.

66. Joshua Weisman referred to the contradictory statements of judges, scholars and other jurists regarding the positive status of express private trusts in Israeli law before the 1979 Act in his *Shortcomings in the Trust Law, 1979*, 15 ISRAEL L. REV. 372, 372-73 (1980).

67. The key decisions were CA 87/50 Liebman v. Lifshitz 6 PD 57, 89-90 (1952) (one judge of five holding a contract creating such a trust enforceable, as well as that the Mandate-era judicial decision not to receive the private trust should be re-examined); CA 158/54 De Bouton v. Bank HaMizrachi 10 PD 687, 690 (1956); CA 323/59 Ben Artzi v. Ben Artzi 15 PD 742, 745-46 (1961) (both holding contracts expressly creating private trusts to be enforceable); CA 136/50 Siebert v. Bayit VeNahala 8 PD 958, 969 (1954) (referring to an express private trust of land having been established as entirely possible, though it did not in fact take place); CA 362/58 Estate of Horowitz v. Co. for the Jewish Settlement of Palestine, 13 PD 1645 (1959) (using, at 1647, trust terminology freely when discussing transactions in land which took place under the Ottoman Empire, under the Mandate and after the establishment of Israel); CA 617/71 Eretz-Israel-Britain Bank Ltd. et al. v. Gutwirt, 26(2) PD 603 (1972) (discussing the practice of banks and trust companies holding funds on express private trusts as if it was a non-controversial part of the law of Israel); Further Hearing 1/76 Refek Electronics Ltd. v. Taxation Officer for Large Enterprises, 31(1) PD 681 (1977) (seemingly free use of express private trust terminology, focused on an analogy from the Common Investment Trust Funds context, such funds having been statutorily received in an Act of 1961 (see discussion in text to n 69 below), to the Provident Fund context); CA 9, 181/74 Insel v. Kugelmas, 29(1) PD 663, 666 (1974) (holding that the validity of private trusts has been repeatedly recognized already); CA 604/77 Moverman v. Segal 32(3) PD 85, 101A (1978) (holding that "English trust law is no part of our law").

change of course means that express private trusts, while statutorily received in some contexts, were, despite the occasional free judicial use of a trusts vocabulary, never judicially received in Israel outside of those specific contexts.<sup>68</sup> However, the list of specific contexts where express private trusts were statutorily received kept getting longer. The key instances of such reception between 1948 and 1979 were the Common Investment Trust Funds Act of 1961, enacted to encourage the Israeli unit trust industry,<sup>69</sup> and the Capital Gains on Real Property Taxation Act of 1963,<sup>70</sup> which, having subjected such gains to taxation on the “sale of rights in real property,”<sup>71</sup> exempted trustees’ transfer of such property to its beneficiaries from taxation.<sup>72</sup> Israel’s legal

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68. Shamgar CJ described the Courts’ pre-1979 approach in a 1990 decision: “Israeli courts did not then regard the private trust as an institution received in Israel; their doubts, however, referred to the creation of [express, A.H.] private trusts, not to the existence of rights in equity generally.” Civil Appeal 34/88 *Josephina Rutenberg Reis v Estate of Hanna Eberman* 44(1) PD 278, 285. Unlike express private trusts, constructive and resulting private trusts were judicially received, clearly and explicitly, soon after Israeli independence: *Liebman*, last note, 98-99 (Agranat J, 1952); CA 307/64 *Loan Company (in liquidation) v. Kadar, LTD* 18(4) PD 483, 491 (1964); CA 283/67 *Trs. in Bankr. of Rafikh & Borkin’s Assets v. State of Israel* 22(1) PD 124, 133, 139-40 (1968); CA 400/67 *Howard v. Melamed* 22 PD 100 (1968); CA 367/70 *Hochberg v. Shalgi* 25(2) PD 149, 153-54, 160, 161-62 (1971); CA 448/79 *Bronstein v Bronstein* 34(4) PD 714 (1980); CA 369/84 *Michael Beril v. Ran Bar Lev* (decided June 1988, published online: [www.nevo.co.il](http://www.nevo.co.il)) [Every decision referred to below as “published online” is available on this website, though not yet available in print].

69. Common Investment Trust Funds Act, 5721-1961, *Statutes* 336, 5 Apr., 1961, p. 84. The Act’s purpose was explained by Levi Eshkol, Minister of Finance, in the Knesset (Israel’s parliament): *Proceedings of the Knesset* (1961) 1122-24, 1262-63, Feb. 27 & Mar. 8, 1961. Though such funds have existed in Israel since 1936, the provision of an explicit, relatively detailed, statutory scheme governing them in the 1961 Act encouraged their use. See discussion by Alter, Dissertation, *supra* note 41, at 13, 169-191.

70. 405 *Statutes*, 1 Sept. 1963, p. 156.

71. *Id.*, § 6.

72. *Id.* § 69. This exemption was made conditional on trustees giving the taxation authorities notice of their holding real property for others rather than beneficially. Further pre-1979 statutes referring to express private trusts of various types were: the Estate Duty Act, 5709-1949, 22 *Statutes*, September 7, 1949, p. 187, § 3(b); the Israel Bar Act, 5721-1961, 347 *Statutes*, 22 June 1961, p. 178, §§ 88, 89D, 89H; the Act for the Protection of Deposited Property, 5725-1964, 441 *Statutes*, 8 Jan. 1965, p. 24, § 2; the Agency Act, 5765-1965, 462 *Statutes*, 23 July 1965, p. 220, § 10; see discussion in AHARON BARAK, THE AGENCY ACT, 5725-1965 423-24 (Gad Tedeschi ed., 1975) [hereinafter: BARAK, AGENCY (1975)] (noting that § 10 renders agents constructive trustees, then adding vaguely that the same section should not be construed as referring to “technical English trusteeship”). Barak’s second edition of 1996 propounds a similar position. AHARON BARAK, THE AGENCY ACT, 5725-1965 1121-24 (2d ed., 1996) [hereinafter: BARAK, AGENCY (1996)]; the Execution Act, 5727-

scholars followed the uncertain path charted by the courts regarding the reception of the express private trust into the local system. Different authors reached different conclusions. The debate, lively to begin with, settled by the early 1970s into a weary concession that the question was yet to be decided.<sup>73</sup>

It was against this background that Peter Elman of the Israeli Ministry of Justice, a barrister of the Middle Temple who received his legal education in England, started drafting a trusts bill some time in 1965. Elman's 1965 drafts—now in the Israeli state archives—followed English orthodoxy far more closely than the final Act of 1979: the trustee was clearly defined as owner of the trust property.<sup>74</sup> The drafting process started veering off the

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1967, 507 *Statutes*, 14 Aug. 1967, p. 116, §§ 24-26; the Securities Regulations (Form, Structure & Contents of the Prospectus) of 1969, 2417 *Regulations* (1969), p. 1794, §§ 10, 32, 33; and the Sales Act (Apartments) (Security for Purchasers), 5735-1974, 749 *Statutes*, 28 Nov. 1974, p. 14, § 2(3).

73. Shlomo Yifrach, *Borrowed Name*, 8 HAPRAKLIT 39, 41 (1952) (holding private trusts not to have been received); Mendel Scharf, *Does the Private Trust Exist in Israel?*, 8 HAPRAKLIT 238, 242 (1952) (holding that they have been received); GAD TEDESCHI, *STUDIES IN ISRAEL LAW* 168-69 (2d ed., 1959) (holding that they have been received); Ze'ev Zeltner, *Private Trusts in Israel*, 15 HAPRAKLIT 214, 224, 226-28, 233 (1959) (holding that while statutory references to express private trusts were undeniable, they should be abolished so that the local system become more harmonious; so long as not abolished they should be narrowly construed, and their use in practice should cease); GUALTIERO PROCACCIA, *THE CORPORATION—ITS ESSENCE AND CREATION* 8 (1965) (concluding that the negative view was still law, despite the existence of alternative views); LEAH DOUKHAN-LANDAU, *EQUITABLE RIGHTS TO LAND* 52-53 (Hebrew Univ., 1968) (holding private trusts not to have been received); Joshua Weisman, *Leah Doukhan-Landau—Equitable Rights to Land*, 1 MISHPATIM 475, 477-78 (1969) (questioning her view); MIRIAM BEN-PORAT, *ASSIGNMENT OF OBLIGATIONS ACT* 1969 12, 34 (Gad Tedeschi ed., 1972) (noting the point was still undecided); Meir Shamgar, *Explanatory Note to the Trusts Bill*, 23 *THE ACCOUNTANT* 197 (1973) (then the Attorney General, Shamgar noted, in a preface to an early published draft of the Trusts Bill, the future Act of 1979, that some have always disagreed with the negative view, and that statutory provisions recognizing private trusts in limited contexts have multiplied); BARAK, *AGENCY* (1975), *supra* note 72, at 423-24 (then Weisman's colleague at the Hebrew University Faculty of Law, Barak noted that the point was yet to be resolved). *See* later, retrospective discussions of the status of private trusts under pre-1979 Israeli law in Alter, *Dissertation*, *supra* note 41, at 18-19; ARIE LEIBOVICH, *TRUSTS AND TRUSTS TAXATION* 133-34 (Tel-Aviv, 2008) (both hold that the express private trust has not been generally received into the law of Israel before the Act).

74. Three of the first four drafts are in the Israeli State Archives (ISA), file GL—21349/10, declassified especially for this research project. Two of the three, both entitled “Draft Memorandum—Draft Act: Trust Act, 5726-1965,” are preliminary drafts, in the nature of brief summaries of major points of English trust law; both drafts run to 11 long sections. The third, marked “Trust Act—Fourth Draft,” is a much fuller draft of 54 sections in a rather more statutory style. Trustees are

well-trodden Anglo-American path once Meir Goldman, a jurist on the staff of the Ministry of the Interior and a trust skeptic, intervened. After reading Elman's first draft, Goldman both asked for an explanation of why private trusts must be a part of all developed, modern legal systems and advised that, concerns regarding the very reception of private trusts aside, the trustee need not own the trust property.<sup>75</sup> Later in the drafting process, Goldman turned into a determined opponent of the very enactment of a Trust Act, repeatedly reminding his superiors that private trusts are a tool of tax evasion and that the proposed Act will merely "benefit a small group of capitalists" as well as the lawyers and accountants who serve them.<sup>76</sup>

At least for a time, Goldman's objections convinced Uri Yadin, Head of Legislative Planning at the Ministry of Justice<sup>77</sup> and, had they not been firmly checked by the Attorney General, Meir Shamgar, they might have led to the discontinuation of the drafting effort. Shamgar, a staunch liberal, believed that despite the trust's use as a component in tax planning strategies, "in a free market society one must facilitate the creation of legal forms not inimical to the public interest and provide the citizen with a selection to choose from."<sup>78</sup>

Shamgar's support for the reception of private trusts generally into Israeli law by way of a special Act did not extend to an acceptance of Anglo-American trust law orthodoxy; he seems to have believed that Israel's new trust regime must be made to cohere with the then-recent Israeli legislation on private law topics such as contracts, agency, and succession, which followed

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described as owners of the trust property in § 1 of all three drafts. Elman's authorship of the two earliest drafts, and his having originated the idea of drafting a Trusts Act, are established by a letter by Meir Goldman of the Interior Ministry to D. Glass, Head of Legislation at the Ministry of Justice, of Dec. 24, 1967, in the ISA, same file; the final two of the 1965 drafts are dated—to April and October respectively—in a letter by Glass to the Minister of Justice, of Oct. 13, 1965, in the same file. For Elman's English background, see T. E. L., *Book Reviews*, 10 CAMBRIDGE L.J. 342 (1949).

75. Goldman letter, *supra* note 74.

76. See report by Goldman dated October 17, 1968, and his letter of March 23, 1972, to Attorney-General Shamgar, Elman and Eliezer Dembitz of the Ministry of Justice, both in the same file.

77. Having read Goldman's 1968 report (*supra* note 76), Yadin expressed, in a letter of March 19, 1972 to Attorney-General Shamgar and the members of a committee Shamgar appointed to finalize the draft Act (same file), doubts as to the need for a Trust Act.

78. Shamgar to Goldman, Apr. 3, 1972, same file.

civil law rather than Anglo-American models.<sup>79</sup> The difficulty of inserting a private trusts regime into the Israeli legal system while preserving systemic harmony was compounded by certain provisions of then-recent statutes, such as the provision of the Land Act of 1969, entitled “Abolition of Equitable Rights,” which provided that all rights in real property must have a statutory basis.<sup>80</sup>

The drafters could have harmonized the new Trusts Act with the aforementioned provision of the Land Act either by providing an explicit statutory basis for beneficiaries’ equitable rights in trust property or by defining beneficiaries’ rights in the manner of Indian, Scottish, and (then-future) Chinese trust law, as obligatory, in personam rights vis-à-vis their trustees rather than equitable rights in the trust property.<sup>81</sup> Instead, in suggesting amendments to the drafts of 1965, Shamgar chose to take Goldman’s hint and radically extend the definition of a trust. He suggested in June of 1970 that the trust be defined as “the obligation of a person holding property by way of ownership, license, or in any other legal way, to hold that property or act thereon for the benefit of another.”<sup>82</sup> The drafters incorporated the Attorney General’s suggestion in the next full draft of the Act, the first to be published and circulated outside the Ministry of Justice.<sup>83</sup> This draft of 1972 defined a trust as “a relationship between persons according to which one of them must hold or act on an asset for the benefit of another,” leaving those persons’ rights in the trust property unspecified.<sup>84</sup> Though the details of this definition were to be finessed, modified, and much disputed as the bill made its way through the remaining phases of its fourteen-year enactment process, the drafters never reversed course on their decision to follow Shamgar’s suggestion and

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79. See the Contracts (General Part) Act, 5733-1973, 694 *Statutes*, Apr. 19, 1973, p. 118; Contracts (Remedies for Breach) Act, 5731-1970, 610 *Statutes*, Dec. 24, 1970, p. 16; Agency Act, 5725-1965, 462 *Statutes*, July 23, 1965, p. 220; Succession Act, 5725-1965, 446 *Statutes*, 10 Feb. 1965, p. 65.

80. Land Act, 5729-1969, 575 *Statutes*, July 27, 1969, § 161.

81. For beneficiaries’ rights under Indian, Scottish and Chinese trust law, see sources cited *supra* note 37.

82. Shamgar’s suggested amendments were enclosed with his letter to Elman of June 7, 1970, ISA, file GL-21349/10. The quote is from his amendment to § 1 of the preceding draft.

83. Published as an appendix to Shamgar, *supra* note 73; also published in 28 HAPRAKLIT 262-71 (1972).

84. 1972 draft, § 1.

abandon the traditional Anglo-American requirement that trustees own the trust property. Israel's shapeless trust was born.

Weaving its way through the formal (blue book) bill of 1974,<sup>85</sup> the Knesset Legislation Committee, and three readings before the Knesset plenum, the draft Act's noncommittal approach to both trustees' and beneficiaries' rights in the trust property seems to have survived partly by slipping through the cracks. Some of the key persons concerned with shepherding the Act through the enactment process seem not to have fully or consistently grasped how far its definition of the trust strayed from the conventional Anglo-American model.

The draft of 1972, the first to feature the noncommittal approach, was prefaced, when published that year in the organ of the Israeli Accounting Society, with an introduction, bylined by Shamgar, which emphasized the distinction between trusts and other fiduciary relationships, defined trusts as based, *int. al.*, on the trustee's ownership of the trust assets and described the draft Act as concerned with such trusts rather than with other fiduciary relationships.<sup>86</sup> This introduction to the 1972 bill appears to have been derived from a letter Elman sent Shamgar earlier that year, which reflected Elman's conventionally English understanding of the trust concept.<sup>87</sup> When used as an introduction to the 1972 bill, the text sharply contradicted the bill's definition of a trust, which did not require that the trustee own the trust assets. A similar inconsistency plagued the later, Parliamentary, stages of the enactment process. While Yitzhak Berman, chair of the special Knesset subcommittee tasked with preparing the Act for its final two readings, clearly understood, when the bill was in subcommittee, that it applied, for example, to a putative scenario of a settlor transferring ownership in the trust assets to a beneficiary while passing control of those assets to a trustee, he later, when presenting the Act to the full

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85. Trusts Act, 5735-1974, 1146 *Bills*, 5 Nov., 1974, p. 23 [hereinafter Trusts bill].

86. Shamgar, *Explanatory Note*, *supra* note 73, at 197.

87. The text printed in *The Accountant* was clearly derived from a cover letter Shamgar sent on April 9, 1972, along with the 1972 draft, to the judiciary, the legal advisers to different government Ministries and the government secretary. Much of the latter text, including the sharp distinction between trusts and other fiduciary relationships, was, in turn, derived from a cover letter Elman sent Shamgar on March 14, 1972, when submitting the 1972 draft, the work of a committee Elman headed, to the Attorney-General. Both letters are in ISA, file GL-21349/10.

Legislation Committee, and again when presenting it to the Knesset plenum, referred to the trustee's ownership of the trust assets as a fundamental characteristic of the trust concept.<sup>88</sup>

The Trust Act's noncommittal approach to the trust concept had two clear champions: Meir Aranne, legal advisor to the Prime Minister's Office, who advocated it during the internal drafting process;<sup>89</sup> and Shlomo Kerem, then lately CEO of the trust company subsidiary of Bank HaPoalim, a major Israeli bank, who did so during the Parliamentary phase of the enactment process.<sup>90</sup> Kerem had a singularly flexible, wide-ranging view of the trust phenomenon, untroubled by dogmatic scruples, encompassing the Anglo-American trust, escrow situations, civil law equivalents such as fideicommissa, and even trust-like practices employed absent any awareness that they form a type of trust, such as the registration of land as owned by strawmen or straw companies rather than by the true owners, common in the Ottoman Empire as a consequence of its exclusion of foreign subjects from owning land within its borders.<sup>91</sup>

Aranne and Kerem's approach reflected many Israeli lawyers' casual use of the term "trust," extending to any fiduciary situation involving property. This use of the term seems to have

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88. See, respectively, protocol of the Trusts Act Subcommittee meeting held November 23, 1978, p. 4; protocol of the Knesset Legislation Committee meeting held May 23, 1979, p. 12 (both in the Knesset Archives, as are all the protocols of those two committees cited in the following notes); *Proceedings of the Knesset* (1979) 3701-02, July 24, 1979.

89. See Aranne's response of May 3, 1972, to Shamgar's circulation of the 1972 draft: ISA, file GL-21349/10. Aranne was strongly supportive of the flexible definition of the trust in the first section of that draft. See *supra* note 84 and accompanying text.

90. Details on Kerem's career derive from an interview with Shlomo Kerem, May 1, 2011 [hereinafter: Kerem Interview]. He served as CEO of the trust company subsidiary of Bank Ha'Poalim between 1974-76. According to Ayala Procaccia, who served at the time as Legal Assistant to the Attorney General and was involved in the Act's drafting process, Uri Yadin, the mastermind behind Israeli private law's civilian tendency during the 1960s and 1970s, also supported the open-ended definition, perhaps out of an apprehension that attempting a more precise definition would lead to the adoption of the English approach. Interview with Ayala Procaccia, July 10, 2011.

91. Kerem expressed his view in his *Trust Law in Israel*, 31 HAPRAKLIT 233, 238-39 (1977); he repeated it early during the first Legislation Committee session dedicated to the draft Trust Act, held January 16, 1978; see session protocol, pp. 2-3. Kerem seems to have attended nearly all of the 18 sessions the committee and the special subcommittee created for the purpose dedicated to the draft Act; he rarely tired from advocating, meeting after meeting, his expansive view of the subject.

developed as a result of the local legal profession having, during the Mandate, become acquainted with much of English trust practice, which even then used the trust form and concept in myriad contexts, including, but not limited to, traditional donative trusts.<sup>92</sup> The absence, between 1948 and 1979, of any positive source of Israeli law regulating what may, and what may not, be called a trust outside of the charitable arena, permitted Israeli lawyers to use the term “trust” as a name for any fiduciary situation involving property.

The Act’s bifurcation of the trust regime it offers into provisions applicable to any trust, however created, and provisions applicable to “trusts created by an instrument of endowment” alone first appeared in discussion at the Knesset Legislation Committee. The “blue book” bill of 1974 offered, despite its vague definition of the trust concept, a single trust regime, intended for donative trusts, both private and charitable.<sup>93</sup> Bifurcation was largely a result of Shlomo Kerem’s intervention in the legislative process. He repeatedly emphasized before the committee his expansive view of both the trust concept and trust practice: trusts were extremely common, he said, from assets lawyers held on deposit for their clients to the money one leaves with one’s neighbors when going abroad, asking them to take care of the children.<sup>94</sup> Kerem convinced Yadin, who at first objected to his approach, saying it “turns the trust into an hundred-story building,”<sup>95</sup> that, as most Israeli trusts were such casual trust situations rather than formal donative endowments, the Act must apply to the former as well as to the latter.<sup>96</sup> Kerem argued that if restricted to donative trusts for incompetents and spendthrifts, the Act was superfluous, as there were few such trusts in Israel, and those few could be satisfactorily constructed by way of the existing law.<sup>97</sup> Prompted by Kerem, Yadin soon

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92. For the varied nature of English trusts practice during the 1930s, see L. C. B. G., *Fixed and Flexible Trusts*, 1 MODERN L. REV. (1937); see also John Langbein, *The Secret Life of the Trust: the Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 167-77 (1997-98) (on non-donative trusts in the United States).

93. Trusts Bill, *supra* note 85; Comments by Yadin, protocol of the Knesset Legislation Committee meeting held January 16, 1978, p. 8.

94. Comments by Kerem, in protocol, *supra* note 93 pp. 2-3.

95. Comment by Yadin, in protocol of the Knesset Legislation Committee meeting held February 8, 1978, p. 10.

96. Yadin was won over at the Knesset Legislation Committee meeting held March 6, 1978; see his comments in the protocol of that meeting, p. 10.

97. Comment by Kerem, in protocol of the Knesset Legislation Committee



produced a new draft, the first to distinguish between provisions applicable to any trust, however created, and provisions applicable to donative endowments alone.<sup>98</sup>

### C. RESPONSES TO THE 1979 ISRAELI TRUST REGIME: COURTS, PRACTITIONERS AND ACADEMICS

Significantly for our examination of the efficacy of shapeless trust regimes, the reception of the 1979 Israeli Act, especially of those of its features that contradict Anglo-American trust orthodoxy, has been mixed. In brief, the *courts*, having only fairly recently started to produce a sizable body of case law on the thirty-year-old Act, now read it literally, acknowledging that it does not require that title in the trust assets vest in the trustee. While the 1979 Act has seen use in practice, some *practitioners*, especially those creating sophisticated family and tax-planning trusts, continue the pre-1979 practice of using other legal systems' trust regimes, though this practice appears to have nothing to do with the "shapelessness" of the Act's trust regime. The Act has met, however, with significant *academic* criticism focused on its deviation from Anglo-American orthodoxy.

#### 1. THE COURTS' RESPONSE

More than legal practitioners, who often can, so far as trusts are concerned, choose a foreign trust regime of their liking, or academics, who can criticize the local law as they wish, it has been the *courts* that, at length, have recently started to breathe life into the Israeli shapeless trust regime. While reasoned judicial discussions of that regime have long been few and far between, they have seen a modest renaissance in the last decade or so. That judicial consideration of the 1979 Act has been slow to appear is a consequence of the long life of many trusts; of the time problems take to develop, come to light, and be litigated; of limitation periods only starting to run, in trust cases, once beneficiaries are aware of trustees' breach;<sup>99</sup> and of the tendency

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meeting held February 8, 1978, p. 10-11.

98. The draft, dated March 21, 1978, is in the Knesset Archives.

99. For this rule in Israeli law see CA 5964/03 Estate of the Late Edward Aridor v. Petah-Tikva Municipality (2006) 60(4) PD 437, at 467 and the older cases cited there. In England, see the Limitation Act, 1980, c. 58, § 21(1), providing that no limitation period shall apply to a beneficiary's action in respect of the trustee's fraud or fraudulent breach of trust, or to recover trust property which the trustee has converted to his use. In the U.S., see UTC § 1005, providing that

a beneficiary may not commence a proceeding against a trustee for breach of

of many Israeli practitioners to frequently employ trust regimes other than that of the 1979 Act.

Many of the early post-1979 cases dealt with trusts subject to pre-1979 law.<sup>100</sup> Cases applying the 1979 Act started to appear in the mid-1980s. Most direct judicial discussion of the 1979 Act's innovations has focused on the shapelessness of its trust model: its seeming omission of the traditional Anglo-American requirement that title in the trust assets vest in the trustee. Israeli courts have, until recently, tended to ask themselves whether the 1979 Act really meant to let go of this requirement. Several decisions sought refuge in indecision, refusing to pick a side.<sup>101</sup> Those that did take a position, however, tended to follow the Act's vague definition of the trust as "a relationship to property by which a trustee is bound to hold the same or act in respect thereof," holding that trustees under Israeli law do not necessarily have title in the trust assets.<sup>102</sup> Thus, they recognized

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trust more than one year after the date the beneficiary . . . was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

100. CA 34/88 *Josephina Rutenberg Reis v. Estate of Hanna Eberman* 44(1) PD 278; CA 410/87 *Estate of the Late Mrs. Liberman v. Junger* 45(3) PD 749 (1991); CA 369/84 *Michael Beril v. Ran Bar Lev* [decided June 1988, published online]; CA 414/87 *Assessing Officer for Large Factories v. Kiryat Nordau Development Company Ltd.*, 46(5) PD 387 (1992); CC (Tel-Aviv) 688/87 "Ramatayim," *Coop. Ltd. v. Popular Housing Ltd.* District Court Decisions 510 (1988(2)); App. (Beer-Sheva) 48/88 *Ben Gurion University of the Negev v. Beer-Sheva Municipality District Court Decisions* 353 (1992(3)).

101. CA 654/82 *Medit'n Car Agency Ltd. v. C. D. Chayut, Adv.* 39(3) PD 80 (1985); CA 3829/91 *Wallace v. Gat* 48(1) PD 808 (1994); CA 8068/01 *Ayalon Ins. Corp. Ltd. v. Ex'r of the Late Chaya Ofelger* 59(2) PD 349 (2005); CA 9225/01 *Zayman v. Komeran* [decided December 13, 2006, published online]. This last decision was a draw. Procaccia, J., chose the broader, "shapeless" view, writing, "the trust is a duty imposed on a person given control over an asset, so that he may use that control in order to achieve a certain purpose." See ¶ 9 of her opinion. Barak, C.J., adhered to the Anglo-American trust model, identifying the trustee's ownership of the trust assets as a sine qua non of trusts and sharply distinguishing trusts from other fiduciary relations. See ¶¶ 3-4 of his opinion (repeating a view he expressed in BARAK, AGENCY (1975), *supra* note 72, at 1121-22)). Grunis, J., refused to join either of his colleagues on the point of principle, ensuring the draw.

102. App. (Tel-Aviv) 12844/86 *El Al v. Balas*, District Court Decisions 45, 50 (1989(1)); CA 4660/94 *Attorney-General v. Moshe Lishitzki* 55(1) PD 88, 108, 124-25, 129 (1999) (both the majority and minority opinions seem to reject the restriction of trusteeship to scenarios where title in the trust assets is in the trustee, with Cheshin, J., emphasizing in his majority opinion both that Israeli courts should be wary of adopting the details of foreign trust regimes, and that there was in the instant case no need to formally decide the question whether the Israeli trust concept was so restricted); CA 1631/02 *Gorban et al. v. Tshuva Yitzchak Assoc. for Solving the Housing Shortage* [decided July 31, 2003, published online]; CA 6406/03

and gave effect to the Israeli trust regime's shapelessness.

Two 2009 district court decisions and one 2011 Supreme Court decision seem to represent a watershed in Israeli decisional law on express private trusts, both in their depth and their fully conscious endorsement of the 1979 Act's shapeless trust regime. The three decisions contain by far the longest, most elaborate discussions of this legal institution and the law governing it yet penned by Israel's judiciary.<sup>103</sup> All three decisions enforced beneficiaries' rights: one vis-à-vis the breaching trustee,<sup>104</sup> the other two (addressing the same case at the trial and appellate levels) vis-à-vis the trustee's personal creditors, annulling an attachment of what was proven to be a trust asset.<sup>105</sup> All three conceived of the trust quite independently of Anglo-American trust orthodoxy. The first district court decision followed the literal meaning of the 1979 definition, noting that trustees can be given the necessary control over trust assets either by receiving title in those assets or by being permitted to act thereon.<sup>106</sup> The other district court decision identified beneficiaries as the sole owners of trust property, describing even trustees registered as titleholders as mere nominees.<sup>107</sup> Interestingly, this understanding of the 1979 Act, though not obvious on the face of the statutory text, is reminiscent of at least one Chinese court's understanding of the 2001 Chinese Trust Act. The Chinese court took the position that where ownership of the trust assets has been transferred to a trustee, either the settlor, the beneficiary,

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Endowment Trustees of the Sephardi Cmty. in the Holy City of Sephad & Meiron v. Kamus [decided June 16, 2005, published online] (deciding, in ¶ 6, that trusts created by an instrument of endowment could leave the settlor as the registered owner of the trust property); App. (Tel-Aviv) 548/06 Yigal Arnon v. Shlomo Pyotrkovski [decided March 1, 2009; published online]; Bankr. (Jerusalem) 4044/07 Hoffmann v. The Official Receiver—Jerusalem Dist. [decided June 24, 2009; published online]; CA 5955/09 Ya'acov Amster, Receiver, v. Marsha Tauber Tov [decided July 19, 2011, published online].

103. The three are *Arnon*, *Hoffman*, and *Amster* respectively. *Id.* *Arnon* involved a celebrated dispute between two of Israel's top lawyers, one of whom, Pyotrkovski, held stock on bare trust for Arnon, so that the stock would not be included in the wealth pool Arnon was then dividing between himself and the wife he was in the process of divorcing. When large dividends beckoned, Pyotrkovski forgot that he held some of his stock on trust.

104. *Arnon*, ¶¶ 36-39.

105. *Hoffmann*, ¶¶ 42-43.

106. *Arnon*, ¶ 18.

107. *Hoffmann*, ¶¶ 13, 28.

or both are the substantive owners of those assets.<sup>108</sup>

Both the Chinese and Israeli courts gave shape to what the statutes they applied left shapeless. They assimilated their systems' trust regimes into those systems' general civilian frameworks of private law by reading the trust as a type of agency, nomineehip, or, in the Israeli case, a Dutch or South African *bewind*. The Chinese court was excused from choosing between settlor and beneficiary by their being one and the same in the case before it. The recent Israeli Supreme Court decision followed both the letter of the 1979 Act and the majority of earlier decisions in holding that Israeli law does not currently require, as a condition for the creation of a trust, that trustees be given title in the trust property.<sup>109</sup>

## 2. THE PRACTITIONERS' RESPONSE

Trustees', accountants', and legal practitioners' responses to the 1979 Act's innovations, including the shapelessness of its fundamental framework, have been lukewarm. The uncertainty, until 1979, regarding the private trust's very availability under Israeli law made local practitioners, who were nevertheless acting as trustees in myriad factual contexts, subject some of the express trusts they created to foreign legal systems under which private trusts were clearly available. Sometimes foreign trustees were used. While the 1979 Act removed all doubt regarding the existence of the express private trust as part of the local legal system, practitioners continued and continue to use foreign legal systems' trust regimes side by side with the local regime. They

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108. Ho, *China: Trust Law and Practice*, *supra* note 7, at 126 (discussing Beijing Haidian Sci. & Tech. Dev. Co. v. Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi (First Instance Civil Cases, Chongqing High People's Court, 19 March 2007)).

109. *Amster*, ¶ 6. Even while consolidating Israeli law's independent approach to trustees' rights in the trust property, *Hoffmann* and *Amster* drew the local system into closer conformity with Anglo-American trust orthodoxy regarding the vulnerability of trusts to trustees' non-trust creditors. Rejecting earlier case law, which construed the 1979 Act to say that where the existence of a trust was not noted on a public register, third parties having no actual or constructive knowledge of the trust could acquire the trust property free of trust (CA 654/82 Medit'n Car Agency Ltd. v. C. D. Chayut, Adv. 39(3) PD 80 (1985); CA 371/89 Orit (Shechter) Ford v. Chaim Shechter, 46(1) PD 149 (1992)), the two recent decisions held that even in such a scenario, trustees' non-trust creditors could not reach trust property (*Hoffmann*, ¶ 28; *Amster*, ¶¶ 7-13). See discussion, prior to the recent decisions, in Nili Cohen, *A Minor's Contract for Purchasing a Flat, Confronted by a Creditor of the Seller's*, 41 HAPRAKLIT 161, 176-79 (1993); MIGUEL DEUTSCH, PROPERTY, vol. 4, §§ 25.20-25. (Bursi, 2007).

typically use the local trust regime to facilitate nominee arrangements and trusts for disabled family members, while using foreign trust regimes for more complex family trusts, and in situations where practitioners and their clients are interested in bypassing elements of Israel's fiscal or regulatory regime, such as taxation and (until 2003) exchange control.<sup>110</sup>

Alon Kaplan, a leading Israeli trust practitioner and President of the local branch of the Society of Trusts and Estates Practitioners (STEP), explained why Israeli professionals prefer foreign trust regimes to the 1979 Act when creating elaborate family and business trusts:

Israeli professionals tend to use foreign law trust structures for organizing private and business affairs where an Anglo-Saxon type of trust is required. Sometimes, the continental foundation entity is also used. One can identify several reasons for the above usage:

... The legal structures available under the Trust Law 1979 are mostly insufficient. The establishment of a trust which would "skip" generations, often available under foreign trust structures, is not available in Israel. Therefore there is a need for probate of the will in order to achieve the settlor's goal of creating a trust that will exist for a number of generations.<sup>111</sup>

Israeli practitioners have thus found that despite the existence of the 1979 Act, the "Anglo-Saxon type of trust" is still sometimes "required." In private communication, Kaplan made clear that the key difficulty in local law, which results in the continuing use of foreign trust regimes, is not the shapelessness

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110. This paragraph is based on interviews with three experienced Israeli trust practitioners, active in the trusts field since the 1960s. Kerem Interview, *supra* note 90; Interviews with Adv. Alon Kaplan, January 10, 2010, and May 11, 2011; Interview with Meir Minervi, CEO of the trust company subsidiary of Bank Leumi, a leading Israeli bank, between 1981-88, May 5, 2011. For Israeli exchange control and its end on January 1, 2003, see Micha Michaely, *Liberalization of the Israeli Foreign Currency Market, 1950-2002*, in *THE BANK OF ISRAEL: FIFTY YEARS' STRIVING FOR MONETARY CONTROL* 79 (Nissan Levitan & Haim Barkai eds., Jerusalem, 2004).

111. Alon Kaplan, *The Use of Trusts and Offshore Structures in Israel and Major Changes in Israeli International Taxation*, 8.9 *TR. & TRUSTEES* 14 (2002). See also Alon Kaplan et al., *Israel Launches Trust Tax Amnesty*, 10.5 *TR. & TRUSTEES* 21 (2004). Similar sentiments were expressed by another leading Israeli trusts practitioner, Michael Shine, in an interview held May 12, 2011 [hereinafter: Shine Interview].

of Israel's trust regime, but rather Israel's anti-perpetuity policy, which is apparently both strict and effective, despite the absence of an explicit rule against perpetuities in the 1979 Act.<sup>112</sup> The nub of this policy lies in the provision of the Succession Act that gifts that are to reach their recipients on or after the donor's death are void, unless made by will under the Succession Act.<sup>113</sup> Thus, multi-generational family trusts must be testamentary to be valid. Wills must be probated, however, and the personnel of the Israeli Public Custodian, who are involved in the administration of every estate,<sup>114</sup> have been known to be unsympathetic towards attempts to create trusts.<sup>115</sup>

The Succession Act places strict limits on multi-generational bequests; testators may only bequeath their property to persons alive at their death or born within 300 days afterwards.<sup>116</sup> Though subject to this restriction, one may bequeath one's property to a series of successive donees, the same Act provides that each donee may consume the full value of the inherited asset, thereby eliminating the value the donor meant later donees of the same asset to receive.<sup>117</sup> These restrictions are strictly enforced by Public Custodian personnel. Israeli practitioners creating complex family trusts thus seem to avoid Israel's *trust* regime due to the perpetuity-unfriendly character of its *succession* regime, which prevents even the extent of perpetuity permitted under the traditional rule against perpetuities, not to mention the boundless extent now permitted by perpetuity-

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112. Communication with author, May 22, 2011. For Joshua Weisman's criticism of the absence of an explicit rule against perpetuities from the 1979 Act, see Weisman, *supra* note 66, at 381-89.

113. Succession Act, *supra* note 79, § 8(b).

114. Following reform of the Succession Act in 1998 (§ 65A, inserted in the Succession Act (Amendment No. 7), 5758-1998, 1670 *Statutes*, June 30, 1998, p. 240), probate is now granted by Succession Registrars, who are appointed from among Public Custodian personnel. Additionally, executors, where appointed, must submit an inventory of the estate (Succession Act, *supra* note 79, § 84) as well as periodical accounts (Succession Act, *supra* note 79, § 86) to the Public Custodian.

115. Alon Kaplan, Communication with author, May 22, 2011. Kaplan pointed out another reason for some Israeli practitioners' preference for foreign trust regimes: "[w]hen a trust is organized and exists under the laws of Israel and the trustees are Israeli domiciled, the tax authorities may take the position that the income of such a trust should be reported and may become taxable." Kaplan, *supra* note 111, at 14. When trusts are used to minimize liability to taxation, their creators would probably find avoiding the local legal system attractive whether that system follows the hegemonic Anglo-American trust model or not.

116. Succession Act, *supra* note 79, § 3.

117. *Id.* § 42(a), (b) and (d).

friendly jurisdictions.<sup>118</sup> Those practitioners do not generally object to the local trust regime permitting title to the trust assets to be elsewhere than in the trustee.

### 3. THE ACADEMIC RESPONSE

Academic criticism of the 1979 Act started before its enactment. Ze'ev Zeltner, a judge and contract law Professor at Tel-Aviv University, attacked the 1974 bill in a scathing article published in 1976. As the draft Act did not require that trust property be transferred to the trustee, the institution it introduced, wrote Zeltner, would seem to “have nothing in common with the English trust.”<sup>119</sup> Believing the split ownership trust model to be the only model properly called a trust, Zeltner wrote that where such transfer is not required, “the trustee would simply appear to be an administrator of the settlor’s property.”<sup>120</sup>

Zeltner’s identification of the traditional Anglo-American trust model as the only true trust model made him doubt the wisdom of receiving the trust at all, considering that Israel’s private law legislation of the 1960s and 1970s had conformed to civil law models by abolishing equitable rights in property and granting non-party beneficiaries of contracts standing to sue for their entitlements.<sup>121</sup> The German-educated Zeltner opined that Israel’s statutory reception of the trust in specific contexts could be harmonized with its civil law-oriented private law much as other civil law systems have occasionally had cause to approximate the trust concept using civil law vocabulary.<sup>122</sup>

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118. For the classical rule against perpetuities, see JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (Roland Gray ed., 4th ed., 1942); for its recent decline in many U.S. and offshore jurisdictions, see Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 *UCLA L. REV.* 1303 (2003); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *YALE L.J.* 356 (2005); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 *CARDOZO L. REV.* 2097 (2003); LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 125-39 (2009); RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 76-85 (2010); Mark L. Ascher, *Book Review: But I Thought the Earth Belonged to the Living*, 89 *TEXAS L. REV.* 1149 (2011).

119. Ze'ev Zeltner, *The Trusts Bill, 1974*, 2 *TEL AVIV UNIV. STUD. IN L.* 88, 88 n.3 (1976).

120. *Id.*

121. *Id.* at 88, 95-96.

122. *Id.* at 97. For an example of a civil law court expressing a trust using conventional civilian concepts see *Harrison v. Credit Suisse* (1970) BGE 96 II 79ss,

Zeltner's strong identification of the trust concept with the Anglo-American trust made him prefer an approximation of the trust by way of contract, agency, gifts, and succession mechanisms to the draft Act's departure from the hegemonic trust model.

The next to critique the draft Act in print was a banker, Ze'ev Brochstein of the Banks Union, expressing that body's reaction to the draft Act.<sup>123</sup> Brochstein focused on the draft's omission of a requirement that title in the trust assets be transferred to the trustee. Noting that the legislature emphasized the managerial aspects of the trust relationship, ignoring its temporal aspects and their consequences regarding the distribution of property rights in the trust assets, Brochstein suggested that this single-minded focus be reconsidered.<sup>124</sup> Though his criticism of the draft Act was far milder than Zeltner's, Brochstein's outlook, too, was based on an identification of the trust with its hegemonic, traditional Anglo-American version. Puzzling over the causes of the Israeli legislature's unconventional approach, he noted the local system's then-recent turn to a civilian, unitary ownership outlook, adding that unitary ownership systems such as Japan, South Africa, Quebec, and Louisiana did manage to fully import the English trust model.<sup>125</sup>

Enacted amid such inauspicious augurs, the 1979 Act was met, almost immediately upon becoming effective, with further critical scholarship. Joshua Weisman, the Hebrew University of Jerusalem's distinguished property law expert, entitled his article on the new statute "Shortcomings in the Trust Act."<sup>126</sup> Joining Zeltner and Brochstein in his belief that the traditional Anglo-American split ownership trust model was the crux of the trust, Weisman, who acquired a part of his legal education in King's College, London, rejected the possibility of a looser model such as that envisaged in the Act. A loose definition of the trust having

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where the Swiss Federal Court "gave effect to the 'trust' created by Mr Harrison by comparing it to a contract *sui generis* with elements of a mandate agreement, a contract for the benefit of third parties and a gift." See Filippo Nosedà, *The Hague Trusts Convention—25 Years on*, in TRUSTS IN PRIME JURISDICTIONS 25-27 (Alon Kaplan ed., 3d ed. 2010). An excellent recent example of a civil law approximation of the trust institution is the San Marino *affidamento fiduciario*, *supra* note 1 & *infra* note 163.

123. Ze'ev Brochstein, *The Trust Bill, 5735-1974 and its Influence on the Israeli Banking System*, 18 BANKING Q. 63 (1977).

124. *Id.* at 71.

125. *Id.* at 66.

126. Weisman, *supra* note 66.



nevertheless entered the statute book, Weisman suggested that it be read to require that title in the trust assets be transferred to the trustee.<sup>127</sup>

Less critical of the Act, but no less attached to the hegemonic trust model, was Nili Cohen of Tel-Aviv University. Identifying split ownership as “the most significant characteristic of the trust,”<sup>128</sup> she noted that beneficiaries’ rights under the 1979 Act can, despite their having been left undefined, be presumed to have *in rem* characteristics, as there was no particular point in its enactment were those rights merely *in personam*.<sup>129</sup> Cohen’s strict distinction between trusts, meaning split ownership trusts, on the one hand, and other fiduciary relationships involving property on the other, made her strain to conclude that the 1979 Act applies to the latter as well as to the former.<sup>130</sup> That conclusion would have been easier to attain had she adopted the more relaxed approach to the trust concept evident in the 1979 Act itself.

Other academics proved less attached to the hegemonic trust model: Gualtiero Procaccia and Daniel Friedman of Tel-Aviv University both read the Act to permit the creation of trusts where title in the trust assets was not in the trustee.<sup>131</sup> Friedman rejoiced in the 1979 Act’s liberal approach, noting that the protection it extends to beneficiaries of all fiduciary relationships involving property will remedy the difficulties created by the abolition of equitable rights in land in the Land Act of 1969.<sup>132</sup>

Most partial to the wider reading of the Act was Shlomo Kerem, who, though a practitioner rather than an academic, published a *Kommentar* on the 1979 Act as part of Israel’s leading *Kommentar* series.<sup>133</sup> In each of four editions, Kerem

127. Weisman, *supra* note 66 at 378-81.

128. NILI COHEN, INTERFERENCE IN CONTRACTUAL RELATIONS 34 (Ramot, 1982).

129. *Id.* at 56 n.49.

130. *Id.* at 102-03.

131. Gualtiero Procaccia, *The Agent as Trustee*, 34 HAPRAKLIT 479, 482 (1982); DANIEL FRIEDMAN, THE LAW OF UNJUST ENRICHMENT 332-33 (Tel-Aviv, 1982).

132. FRIEDMAN, *supra* note 131, at 334. By his next edition of 1998 he retreated to a less distinct position, noting that it is unclear whether the Act requires, as a precondition for the creation of a trust, that title in the trust assets be transferred to the trustee. DANIEL FRIEDMAN, THE LAW OF UNJUST ENRICHMENT 535-36 (2d ed. 1998). He still hinted, however, that the wider reading of the Act is preferable. *Id.* at 154 n.60.

133. S. KEREM, TRUSTS (Gad Tedeschi ed., 1983) [hereinafter: KEREM, TRUSTS 1ST

insisted that the term “trust,” as used in the 1979 Act, means any fiduciary relationship involving property.<sup>134</sup> He further insisted that every trustee, in that wider sense, is subject both to the 1979 Act and to a more specific, often statutory, legal framework, such as the law regulating executors, guardians, or corporate directors<sup>135</sup> and that beneficiaries under the 1979 Act have no rights in the trust property, such rights having been rendered superfluous by the Act’s granting beneficiaries a right of action vis-à-vis their trustees.<sup>136</sup>

Taking an intermediate position between the two camps, Avraham Alter acknowledged, in an extensive doctoral thesis largely concerned with the taxation of trusts, that the 1979 Act applies both to trusts on the Anglo-American model and to other fiduciary relationships concerning property. He insisted, however, that the Act did grant beneficiaries of both Anglo-American and other trusts rights in the trust property.<sup>137</sup> Because Alter’s dissertation remained unpublished and Kerem’s treatise is practitioner-oriented, Weisman’s scathing 1980 attack on the 1979 Act remained the most extensive purely academic treatment of the Act in print.

#### D. SHAPELESSNESS ABOLISHED? THE DRAFT CIVIL CODE OF ISRAEL

Just as Israel’s courts have finally started to more thoroughly apply and interpret the 1979 Act, fully acknowledging its noncommittal approach to the location of title in the trust assets, Israel’s shapeless trust may soon be swept away. In June of 2011, after twenty-five years of drafting, the Israeli draft Civil Code was published in formal “blue book” form; if enacted, the

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ED.]; KEREM, TRUSTS, *supra* note 38.

134. KEREM, TRUSTS 1ST ED., *supra* note 133, at 20; KEREM, TRUSTS, *supra* note 38, at 37-39.

135. KEREM, TRUSTS 1ST ED., *supra* note 133, at 28, 61; KEREM, TRUSTS, *supra* note 38, at 42.

136. KEREM, TRUSTS 1ST ED., *supra* note 133, at 26, 50; KEREM, TRUSTS, *supra* note 38, at 80-84; *see also* S. Kerem, *Guaranteeing Trust Assets and the Beneficiary’s Rights*, 35 HAPRAKLIT 52 (1984).

137. Alter, *Dissertation*, *supra* note 41, at 22-62; Avraham Alter, *The Cestui que Trust’s Right in the Trust Property*, 35 HAPRAKLIT 307 (1984). Following Alter’s unpublished dissertation and his article of 1984, the quantity of Israeli academic treatments of trust law questions started declining rapidly, excepting Kerem’s later editions. For a few later treatments, *see* Cohen, *supra* note 109; DEUTSCH, *supra* note 109; Rabinovich-Brun, *supra* note 37.

code will replace the private law legislation of the 1960s, 1970s, and 1980s, including the 1979 Act.<sup>138</sup> The trusts chapter of the code<sup>139</sup> moves Israeli trust law much closer to Anglo-American orthodoxy; it redefines a trustee as “the owner of property, who must act regarding it for the benefit of a person or another purpose,”<sup>140</sup> and combines the two trust regimes of the 1979 Act into one, extending those provisions that only apply, under the 1979 Act, to trusts created by an instrument of endowment, to every type of trust.<sup>141</sup> If and when the draft code is enacted, Israel shall have retreated from its shapeless trust model to a more traditional model.<sup>142</sup>

Responses to the Israeli shapeless trust appear, then, to have followed the same pattern that responses to the Chinese shapeless trust seem to be following: the Chinese courts have largely accepted the local trust regime’s deviation from Anglo-American trust orthodoxy,<sup>143</sup> while many academics<sup>144</sup> have remained attached to the hegemonic trust model, which requires, in its English, American, Commonwealth, and civilian versions, that title in the trust assets be vested in the trustees.<sup>145</sup> The draft Israeli Civil Code’s return to the hegemonic trust model is another expression of that continuing attachment: the draft was composed by a committee of (mostly) professors, who, during the very first committee meeting dedicated to the trusts chapter of the code, expressed their unanimous opinion that trustees must

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138. Civil Law Act, 5771-2011, 595 *Bills*, June 15, 2011, p. 699.

139. Consisting of §§ 563-593.

140. *Id.*, § 563.

141. *See also* MIGUEL DEUTSCH, *THE CIVIL CODE INTERPRETED* 138-40 (Bursi, 2005) (on the trusts chapter of the draft code).

142. The trusts chapter of the draft code still bears some signs of its civil law environment: the common law split ownership trust model is absent, and, as in the 1979 Act (§ 3(b)), trust creditors have direct access to the trust assets (§ 568).

143. *See* Ho, *China: Trust Law and Practice*, *supra* note 7, at 126-27 (Chinese courts); *see supra* notes 102-09 and accompanying text (Israeli courts).

144. Including academics-turned-judges, such as Prof., later Chief Justice, Barak. *See* CA 9225/01 *Zayman v. Komeran* [decided December 13, 2006, published online]. For China, *see* Lusina Ho’s publications cited in *supra* notes 7-8; for Israel, *see* my discussion of the academic response at *supra* notes 119-37.

145. In future research, I hope to study Chinese practitioners’ responses to the Chinese Act and compare them with the responses of Israeli practitioners. For civilian versions of the dominant trust model, *see, e.g.*, Kenneth Reid, *National Report for Scotland*, *supra* note 37 (the Scottish regime) *Barrière & Crocq*, *supra* note 1 (the French regime).

be clearly declared to own the trust assets.<sup>146</sup> By contrast, the 1979 Act was largely drafted by Ministry of Justice personnel, with later interventions by bar representatives and politicians.

#### IV. SHOULD SHAPELESS TRUSTS HAVE A FUTURE?

What are the lessons of Israel's experience with the world's first shapeless trust regime for the efficacy of such trust regimes elsewhere?<sup>147</sup> The key lesson seems to be that such regimes are workable; for Israel's courts have, at length, come to accept and apply the 1979 Act's shapeless trust regime, without reading the hegemonic trust model into that Act.<sup>148</sup> The Israeli shapeless trust was born as a result of two phenomena, one socio-legal, the other doctrinal. The former was Israeli legal professionals' casual use of the term "trust," extending to any fiduciary situation involving property, a use facilitated by the absence, until 1979, of any positive source of law delineating the limits of the trust label. The latter was a conscious attempt on the part of some of the 1979 Act's many drafters to domesticate the trust into Israel's then-recent system of private law, which has been modeled on the civil law systems of continental Europe.

Many of the views and preferences of the Israeli shapeless trust's most persistent advocate, practitioner Shlomo Kerem, make a notably snug fit with civilian trust regimes such as those

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146. Protocol of Codification Committee Meeting no. 81, held January 27, 1994 (Ministry of Justice archives). At the second committee meeting dedicated to trusts, held February 8, 1994, Shlomo Kerem made a last stand for the looser trust model evident in the 1979 Act, to little avail. See Protocol of Meeting no. 82 (Ministry of Justice archives).

147. One commentator believed that

the lesson to be drawn . . . is that in today's increasingly integrated international system, it is ever more difficult to insulate one's legal system. We can define legal institutions as we wish for internal purposes, but if we want them to be recognized on the international level, it is best to bring into account the customary international definitions and requirements. In the case of the trust, this does not mean that Israel must adopt the customary concept of trust lock, stock and barrel, but it does mean that the internal debate on this issue should take it into account.

Rabinovich-Brun, *supra* note 37, at 689-90. The "customary concept of trust" was brought into account by the drafters of both the Israeli and Chinese Acts, and again by the drafters of the draft Civil Code of Israel, with various results. The international recognition of shapeless—or other—local trust regimes is beyond the ambit of the present article.

148. Barak, C.J., attempted such a reading in his brief remarks in CA 9225/01 *Zayman v. Komeran* [decided December 13, 2006, published online]. Most recent case law reads the 1979 Act literally, recognizing the shapelessness of its definition of the trust. See *supra* note 101.

of Luxembourg or France. Like the latter regimes, which both post-date the 1979 Act, Kerem focused on the trust's functions as a commercial and investment vehicle; like them, he disregarded the constructive trust.<sup>149</sup> A similar domestication effort may be apparent in the Chinese Trust Act of 2001. Some Israeli and Chinese courts have reinforced that effort by effectively absorbing into their respective regimes governing agency, nomineehip, and mandate even those trusts in which title to the assets is vested in the trustee. They achieved this effect by declaring that even with respect to such trusts, the settlor or beneficiary, who may be one and the same, is the substantive owner of the trust assets.<sup>150</sup>

As noted above, some Israeli practitioners' habit of using foreign trust regimes adhering to Anglo-American trust orthodoxy rather than the Israeli regime does not appear to be attributable to any distaste for the shapelessness of the local regime. That habit, born decades ago as a result of Israel's not having formally received, until 1979, any private trust regime of general application, was sustained largely as a result of Israel's highly effective perpetuities regime. As the draft code softens the perpetuities regime applicable to *inter vivos* trusts, exempting them from probate and merely positing a 100-year perpetuities period,<sup>151</sup> we may expect the local trust regime—no longer “shapeless”—to be increasingly used by practitioners if and when the draft code is enacted into law. It may well be a mistake, however, to attribute such an increase, if it materializes, to the code's adherence to orthodox Anglo-American principles regarding the location of title in the trust assets.

Given that neither Israeli courts nor practitioners now

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149. For Kerem's views, see sources cited in *supra* note 91. For the French *fiducie* of 2007, see sources cited in *supra* note 1. For the Luxembourgish *fiducie* regime, installed in 1983 and improved in 2003, see Règlement grand-ducal du 19 juillet 1983, Mém. 29.7.1983, n.59, p. 2; Law of 27 July 2003; and see discussion in André Prüm, *National Report for Luxembourg*, in PRINCIPLES OF EUROPEAN TRUST LAW 239-55 (D.J. Hayton et al., eds. 1999).

150. Beijing Haidian Sci. & Tech. Dev. Co. v. Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsì (First Instance Civil Cases, Chongqing High People's Court, 19 March 2007); Yanxin Co Ltd v. Huabao Trust & Inv. Co. Ltd, Shanghai High People's Court, March 16, 2005, Decision No 226 of 2004; both discussed in Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at 5-8; Bankr. (Jerusalem) 4044/07 Hoffmann v. The Official Receiver—Jerusalem Dist.[decided June 24, 2009; published online]; see *supra* notes 107-109 and accompanying text.

151. § 702(b) of the draft Code excepts trusts from the rule, stated in sub-section (a), that undertakings to transfer one's property on or after one's death are void; the 100-year perpetuity period is stated, as regards trusts, in § 588(b).

generally object to the Israeli trust regime's shapelessness, its impending demise in the draft code is striking. The protocols of the codification committee reveal that the change of course was a result of academic opinion. Academic lawyers appear to have disapproved of the shapelessness of Israel's 1979 trust regime more than their practicing and adjudicating brethren. Such disapproval is evident, for example, in the similar suggestions of Joshua Weisman and Lusina Ho, each of them a key academic trusts expert in his or her respective jurisdiction, that the Trust Acts of 1979 and 2001 respectively be construed so as to require the vesting of title to the trust assets in the trustee. Both Weisman and Ho disapproved of the shapelessness of their respective jurisdictions' trust regimes.<sup>152</sup>

Considering the state of academic opinion on shapeless trust regimes, it is appropriate to close the present study with a preliminary examination of their advantages and disadvantages. Let me begin with the latter.

#### A. ADDRESSING THE DIFFICULTIES POSED BY SHAPELESS TRUST REGIMES

As discussed in Part I, recent literature on the Chinese Trust Act has exposed three difficulties raised by that Act's facilitation of trusts where the settlor, despite having appointed a trustee, retains title in the trust assets. One such difficulty is non-owner trustees' "tiresome burden of proving [their] powers to the satisfaction of third parties,"<sup>153</sup> a difficulty applicable to *bewind*-type arrangements, whose beneficiaries own the assets as well. However, shouldering the burden of obtaining and brandishing a power of attorney should not be impossible, given that United States law, for example, provides, by statute, both rules protecting persons who in good faith accept and rely upon acknowledged powers of attorney and rules mandating the acceptance of such powers.<sup>154</sup>

The second difficulty, or group of difficulties, which has been raised is what happens to the assets when owner-settlors or – beneficiaries die or are dissolved, when the identity of all or some owner–beneficiaries is disputed, or when trusts whose assets are

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152. Weisman, *supra* note 66, at 378-81; Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at 5.

153. *See supra* note 22 and accompanying text.

154. *See* Uniform Power of Attorney Act, 2006, §§ 119 & 120 respectively.

owned by their beneficiaries go through periods when no living, identified, or identifiable beneficiaries exist.<sup>155</sup> These difficulties do not appear insurmountable, at least if a jurisdiction's trust model is "shapeless," since that model allows any of the trust's three stakeholders—settlor, trustee, or beneficiary—to own the trust assets. The workability of trusts where the settlors or beneficiaries own the assets would require that arrangements governing several aspects of those trusts' functioning be supplied, either by statute, case law, or the trust instrument. The workability of trusts where trustees own the assets requires no less. While rules requisite for the smooth operation of conventional trusts have already been developed, the extension of the trust concept to trusts where settlors or beneficiaries own the assets would require that new rules be supplied.

The problem of owner-settlors and owner-beneficiaries passing away or being dissolved is less likely to arise in short-term trusts, such as many commercial and investment trusts. In cases where it is more likely to arise, settlors' or beneficiaries' ownership of the trust assets could presumably pass according to the rules of law usually applicable to the devolution of a deceased or dissolved right-holder's property, namely the law of inheritance and company liquidation. Unless otherwise provided in the trust instrument, the segregated trust fund would survive the settlor or beneficiary's death or dissolution: his, her, or its executor, administrator, heirs, or liquidator would hold the trust fund in trust for the relevant beneficiaries or purpose, trust assets being answerable to trust debts alone. Another alternative is ownership of the trust assets being vested in a fluctuating group of beneficiaries; much as the law provides a means for the appointment of new trustees when none remain, the law or trust instrument could similarly provide for the appointment of new owner-beneficiaries, in a manner tracking the settlor's express or implied intentions. Where the primary motivation behind the creation of a trust is avoiding probate or minimizing a settlor's exposure to creditors (assuming that "asset protection trusts" are allowed), trustees, a beneficiary other than the settlor, or beneficiaries as a class, could serve as owner of the trust assets. Where the temporary non-existence of any beneficiaries, or disputes as to their identity, are realistic possibilities, title in the trust assets could be granted to either the settlor, the trustee, or,

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155. *See supra* note 23-25 and accompanying text.

again, “the beneficiaries of X trust” as a class, which could have zero members for a while. It thus appears that all three points of the trust triangle could serve as owners of the trust assets, depending on the type of trust envisioned, its goals, its lifespan, and the circumstances likely to occur during its existence.

The final difficulty raised in recent literature regarding the retention of title in the trust assets by their settlors is that under current Chinese law, such settlors owe no fiduciary duties and could thus act in breach of trust, leaving the beneficiaries largely defenseless.<sup>156</sup> While the current Chinese Trust Act may not be perfect and could require amendment to, *int. al.*, impose fiduciary or other duties on settlors who retain ownership of the trust assets, the Chinese Trust Act’s current imperfections could hardly serve as arguments for rejecting the very idea of trusts where settlors retain title in the trust assets. Unlike settlors who have declared that they themselves hold assets on trust, settlors who merely retain title in the trust assets, having appointed another as trustee, could be subjected to duties sufficient to protect the trust and its assets without being granted powers to either manage or dispose of the trust assets. The very lack of such powers could provide some of the necessary protection.

It seems, then, that the difficulties raised in recent literature are insufficient to cast trusts where the settlors or beneficiaries retain ownership of the trust assets without acting as trustees as definitely inferior to traditional trusts. Nor do the difficulties raised suffice for similarly condemning the Chinese–Israeli shapeless trust model. Trusts are created for various purposes. Different trust models could suit different circumstances. For example, property held in revocable trusts is already seen by American law as if it was still held by its settlor, at least as regards the rights of that settlor’s spouse, relatives, and creditors.<sup>157</sup> The step from such a presumption to facilitating settlors’ actual retention of title in trust property does not appear impossible. It may be that allowing the settlor to retain title to the trust assets would frustrate the purpose of trusts created in order to avoid probate or minimize the estate tax burden. The fact, however, that such trust designs defeat the purpose of *some* trusts does not mean that they would never be useful.

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156. See *supra* note 26 and accompanying text.

157. RESTATEMENT (THIRD) OF TRUSTS § 25(2) & cmt. a.



### B. THE ADVANTAGES OF SHAPELESS TRUST REGIMES

Shapeless trust regimes may have some advantages over the traditional trust model. One is that such regimes make the duties the law of trusts imposes on trustees and the effective remedies it gives beneficiaries applicable in fiduciary situations involving non-owner asset managers, which are conventionally analyzed as agency, nomineehip, or, under civil law systems, mandate situations. The application to such asset managers of the trustee's duties, such as the duties of prudence, loyalty, impartiality, full and prompt accounting and reporting, and refraining from conflicts of interest and duty,<sup>158</sup> seems desirable, considering the significant risk of such managers' succumbing to the temptation of preferring self-interest over their clients' interests. Such an application may not, however, work a significant transformation in the duties and liabilities to which such managers are in fact subject, since legislation has already in many jurisdictions applied similar duties to such managers, independently of their being subjected to trustees' duties, as such.<sup>159</sup> Further, in so far as some or all of those duties may be disappplied by contract or trust deed, and are so disappplied in practice by way of exemption clauses, their extension to additional classes of asset managers is likely to be even less consequential.

A further advantage, which is perhaps of more consequence, is that shapeless trusts may help introduce the trust mechanism to potential settlors unaccustomed to it, who may be deterred by the prospect of giving away title in their property. Many property owners outside of the traditional Anglo-Saxon sphere of trust practice would be very much deterred by such a prospect. Professor Ho wrote that drafters' fears of such a deterrent effect may have been the driving force behind the Chinese Trust Act's omission of a requirement that title to trust assets vest in the trustee,<sup>160</sup> and Kaplan has confessed that such deterrence is very much a reality among potential Israeli and Jewish settlors.<sup>161</sup>

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158. Restatement (Third) of Trusts §§77, 78, 79, 82, 83.

159. See, e.g., the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 to 21 (U.S.); An Act for the Regulation of Investment Advice, Marketing and Management, 5755-1995, 1539 *Statutes*, August 10, 1995, p. 416, §§ 11-27C (Israel).

160. Ho, *Trusts in China: Property or Contract?*, *supra* note 8, at 5.

161. Kaplan, Communication with author, *supra* note 112. Cf. Lupoi's comment, in a communication to the author of August 12, 2011, that "many settlors, even in civil law countries" prefer title to the trust assets to pass away from them, so that

Experience has demonstrated that an important condition for the successful reception of an imported legal institution is that it adapt to local circumstances in the importing jurisdiction, such as the fears and expectations of potential users.<sup>162</sup>

Offshore jurisdictions, purportedly adhering to the traditional Anglo-American trust model, have developed “settlor-reserved powers” so as to successfully market trust services to potential settlors fearful of or uninterested in letting go of their property. Some offshore jurisdictions, while vesting title to the trust assets in the trustee, permit the settlor to retain a panoply of both administrative and dispositive powers, providing explicitly by statute that such reservation shall not invalidate a trust.<sup>163</sup> The Chinese and Israeli “shapeless trusts,” by leaving actual power to administer and dispose of trust assets in the hands of trustees, functionally adhere, more closely than those offshore regimes, to the traditional trust model. So long as adequate protective measures are in place to ensure that settlors do not use their retained ownership to interfere with trustees’ ability to execute their functions, the “settlor title retention trust”

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those assets are unambiguously excluded from their estates, while “those who wish to retain control over trust assets are not “populations foreign to traditional Anglo-Saxon trust culture [quoting from the final sentence of the Introduction to the present article] but Englishmen and Americans.” *Id.* While many users of offshore jurisdictions’ settlor-reserved powers legislation are residents of traditional trust jurisdictions, and some settlors resident in civil law jurisdictions, such as Italy, prefer the traditional Anglo-American trust model, it still seems to be the case, according to Ho and Kaplan, that many potential settlors outside traditional trust jurisdictions are deterred by the prospect of parting with title to their property.

162. Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167-68 (2003).

163. *See, e.g.*, the Trusts (Jersey) Law 1984, § 9A, inserted by the Trusts (Amendment No. 4) (Jersey) Law 2006, which provides, *inter alia*, that the reservation by a settlor of powers to revoke, vary or amend the trust, of powers to pay trust income or capital, or of powers to give the trustee binding directions regarding management of the trust assets, “shall not affect the validity of the trust nor delay the trust taking effect.” The Trusts (Guernsey) Law 2007, § 15(1), improves on the Jersey model by providing that even should a settlor reserve powers of all those types, the trust shall not thereby be invalidated. *See* discussion in Panico, *supra* note 40, at 63-77. Another approach to the problem posed by prospective settlors unwilling to fully let go of their property has been adopted by San Marino. Its recent statutory regime governing contractual trust equivalents (*affidamento fiduciario*), while providing that appropriated assets must be transferred to the fiduciary (Law of 1 March, 2010, *supra* note 1, art. 1(2)), further provides that settlors may reserve, or grant to a third party, powers to remove the fiduciary’s entire contractual position as such—rights, duties and entitlements—and assign it to another (art. 5(1)(c); *see* discussion in Lupoi, *supra* note 1, 54-55).

can be seen as a relatively direct means of making trusts palatable to a wider circle of potential settlors. In addition, the “settlor title retention trust” involves less injury to the separation of enjoyment and control—one of the foundational ideas behind trusts—than the alternatives developed by offshore jurisdictions for the same purpose.

## V. CONCLUSION

To conclude, the schematic division of labor envisioned by the traditional trust model, with the settlor having nothing to do with the trust once constituted, the trustee serving as its exclusive manager, and beneficiaries passively enjoying their entitlements, has for hundreds of years been and is now being challenged by both the real-life functioning of actual trusts and innovative trust regimes developed by various jurisdictions. Settlers can, if they wish, find ways to influence their trustees’ conduct, whether that influence is formalized in the trust instrument or not and whether or not it is in keeping with the trust’s governing law or other relevant legal frameworks. Beneficiaries, similarly, sometimes try to influence trustees’ decisions. Given the fundamentally facilitative nature of trust law and the increasing variety of trust regimes worldwide, many of which apply to populations unfamiliar with traditional Anglo-Saxon trust culture, it may be that there are few reasons to insist on the continuing exclusivity of the traditional trust paradigm, granting title in the trust assets to the trustees. Other models, including “settlor title retention trusts,” may have their uses. Although these non-traditional models raise doctrinal questions—for example, how are trusts where beneficiaries own the assets to cope with the traditional doctrine of merger?<sup>164</sup>—it seems that the cautious, permissive Chinese and Israeli approach, “shapeless” though it may be, could, if each of the trust models it permits is allowed to develop according to its internal logic, have some potential after all.

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164. See RESTATEMENT (THIRD) OF TRUSTS § 69.