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A CIVIL CODE FOR A MIXED JURISDICTION: SOME REMARKS ABOUT THE ISRAELI APPROACH TO CODIFICATION

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Introduction. I. *The Path to Codification*. II. *The Draft from a Comparative Perspective*. 1. What Type of Code is the Proposed Code? 2. Is the Israeli Proposal a "modern" Code? III. *The Theory of Juridical Acts*. IV. *Transplants and Mentality*. V. *Conclusion*.

To Prof. Aharon Barak with gratitude for his significant contribution to Israeli Private Law

INTRODUCTION

The theory of legal transplants is well known.[1] The concept of legal transplants and harmonization is linked to the development of the law, the manner in which the law evolved, and the relationship between the transplanted law and the existing legal culture in the country. Legal transplants also refer to foreign sources, historical influences, and coincidence transplants (the adoption of ideas due to a particular evolution that are similar to the evolution of another country without any specific contact between the two legal cultures). Israeli law is an interesting laboratory for the theory of transplants in all of the senses mentioned above and shows signs of technical reception from other legal cultures, adoption of cultural patterns from other legal traditions, and indication of principles linked to a particular evolution.

The aim of this Article is to examine the reception of foreign ideas in Israel within civil codification. The Draft of the Civil Code[2] provides an

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[1] Watson, A., *Legal Transplants -An Approach to Comparative Law*, 2nd ed., 1993. See also, Sacco, R., "La Circolazione del Modello Giuridico Francese", *Rivista di Diritto Civile*, num. 41, 1995, pp. 513-523; Nelken, D., "Legal Transplants and Beyond: of Disciplines and Methaphors", *Comparative Law in 21st Century*, num. 19, A. Harding and E. Örücü eds., 2002; Grande, E., "Comparazione dinamica e sistema giuridico statunitense:analisi di una circolazione incrociata di modelli", *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, num. 29, 2000, p. 174.

[2] The final version of draft was completed in 2006 and has not been formally past the first reading of the Israeli Parliament. Only after passing the first reading in the Parliament (at the time of writing this article, it was not still clear when it would be done) will it be considered by the "Law and Constitution Commission" of the Israeli Parliament.

opportunity to ask and answer seminal questions linked to the transplant theory and the manner in which foreign ideas are received and re-elaborated in a new legal jurisdiction. However, it is not enough to understand the specific transplant. It is also necessary to understand the relationship between the Israeli legislation and the dialogue that exists between the legislator, the Israeli judiciary, and the ensuing case law.

Section I discusses the evolution of Israeli private law and notes various scholars' opinions of codification. Section II analyses the Draft from a comparative and historical perspective. Section III details the authors' reticence about certain solutions adopted by the Code. The last section of the Article refers to the mindset pertaining to codification and questions the influence of codification on the legal scholarship existing in that country. It is unlikely that the Code will affect attitudes of Israeli jurists, who have usually been more comfortable with the common law tradition. Notwithstanding the authors' reserves about the Code, the codification process is depicted herein as a positive phenomenon, and the authors' suggest that understanding legal transplants is a step towards achieving harmonization of legal systems.

I. THE PATH TO CODIFICATION

Israeli civil law lacks a formal code and is ruled by a series of laws. The legislation of civil laws[3] began with the enactment of the Capacity and Guardianship Law in 1962 and continued with other laws adopted in different areas of civil law, e.g., Agency Law, 1965; Sale Law, 1968; Gift Law, 1968; Land Law (1969) Contracts (Remedies for Breach of Contract) Law, 1970; Contract, (General Part) Law, 1973; Trust Law, 1979; etc. This type of step-by-step legislation or "codification by installment" replaced the Ottoman Law, in place prior to the British Mandate period. From the outset, the initial civil legislation[4] was to be the basis for the new Israeli civil code.

The Code contains over twenty different civil laws beginning with those enacted in the 1960s until the present day.[5] Not only does it

[3] See, Yadin, U., "Is Codification an Outmoded Form of Legislation?", *In Memoriam Uri Yadin*, A. Barak and T. Spanic eds., 1990, p. 389.

[4] An English translation of new Israeli statutes in the field of contract law, property law and succession law can be found in *European legal traditions and israel* 565, A. M. Rabello (ed.), 1994, p. 583.

[5] See especially, Rabello, A. M. and Sebba, L., "Continuity and Discontinuity of Law in Times of Social Revolution", *Israeli Reports to the XIV International Congress of Comparative Law*, 1994, p. 1; Rabello, A. M., "Toward the Codification of Israeli Private Law: Several Aspects in a Comparative Perspective", *Israel Among the Nations: International and Comparative Law Perspectives on Israel`s 50 Anniversary*, A. E. Kellermann *et al.* (eds.), 1998, p. 291; Rabello, A. M., "Working towards Codification of Israeli Private Law: Between Common and Civil Law", *Developments in Austrian and Israeli Private Law*, H. Hausmaninger *et al.* eds., 1999, p. 291; Rabello, A. M., "Israele tra common law e civil law, verso la codificazione del suo diritto

incorporate all existing civil laws under one "umbrella," it abolishes the old laws as well. The Codification Commission[6] presided over by Aharon Barak,[7] was charged with preparing the Code. Yet, since the draft was based upon existing contract and property laws, the Codification Commission did not begin from scratch.

The number of scholars that took part and the different opinions expressed over such a long period of time, made consensus among commission members difficult to achieve.[8] Some members elected for solutions found in the case law, others for solutions found in other codes. At times when a question was debated in light of Jewish legal principles, there were members who did not understand the fine differences contained in the traditional texts of Jewish law, and therefore due to misconceptions and lack of knowledge rejected this path. Additionally others rejected the continental law style for additional reasons.[9]

The Code has over 900 articles, making it the longest law in Israeli civil law, but nevertheless, in comparison with other codes, it is short. The Code includes four sections: Principles of the Civil Code, Legal Acts, Obligations, and Property. At a later stage, the Code will include the

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contrattuale", *Io comparo, tu compari, egli compara: che cosa, come, perche*?, Valentina Bertorello (ed.), 2003, P. 253; Rabello, A. M., "L'influence du Code Civil sur la nouvelle législation israélienne en marche vers sa codification", *Le Code Civil 1804-2004, Livre du Bicentenaire*, 2004, p. 549; see also, Grimaldi, M., *L'exportation du Code Civil*, *Pouvoirs*, num. 80, 2003, p. 107.

[6] A commission composed of scholars from mainly Jerusalem and Tel Aviv Universities also received the support of visiting scholars; each visiting scholar presented his opinion and knowledge in the area of his expertise and the discussion within the Commission was accompanied by the work of experts from the Ministry of the Justice. The Commission met from time to time and without a definitive time frame.

[7] See Barak, A., "A Preface to the Draft Civil Code in Israel", *Mishpatim*, I ff, 2006, p. 36 [in Hebrew]. Aharon Barak is one of the outstanding jurists in Israel. He is a law professor and Former President of the Israeli Supreme Court. As head of the Codification Commission, he was also a de facto law maker. Yet, it is appointments such as Barak's that may nevertheless bring about questions regarding the division of tasks between the academy judicature and legislation. The retirement of Barak from the Supreme Court (in 2007) marks a new period in Israeli legal evolution.

[8] Prof. Barak Erez has criticized the fact that the Code was prepared only by jurists without the intervention of social or political groups like banks, consumer organizations, insurance companies, commercial organizations, and so on. Barak-Erez, Daphne, "The New Civil Code: between the Professional Community and Society", *Bar Ilan Law Studies*, num. 24, 2008, p. 413. This criticism should be evaluated in the light of the objectives of the Code and the fact that a code is technical in nature and affords jurists a dominant task in its preparation. Nevertheless, an ideological view is the basis of every law and therefore codification cannot be reduced to a mere academic exercise.

[9] An example of such was the analysis between donor renunciation of a right against the donee and the donor's remission of an obligation of the donee toward him (see the Gift Law, 5728-1968). See, Rabello, "An Introduction to the New Israeli Private Legislation: Harmonization of Common Law and Civil Law", *op. cit.*, supra note 4.

Succession Law, 1965; the Law of Limitation of Claims, 1958,[10] and Private International Law.[11] Subcommittees are presently working on these additions. Family law will not be included in the Code due to the traditional division of Israeli law.[12] At this time, the approval of the Code and the date of its approval are unknown. It is not clear if the Code will receive strong political support; since a complete consensus is not expected, the political environment at the time the Code is to be passed is expected to play a role in its enactment.[13] In despite of this uncertainty or perhaps precisely due to it, it is worth noting some particular features of the codification process.

The original name of the Draft was "Patrimonial Law Act" but as pointed out previously, the Commission decided to include the Succession Law as well. Thus the name "Civil Code" became relevant, even despite the fact that family law in general was not included in the Code.[14] The final proposed name is "The Patrimonial Law Act, The Civil Code".[15]

The legislative style of the Code resembles the brief and concise method used in modern Israeli lawmaking.[16] The Gift Law, 1968, for example, was called the "telegram of lawmakers."[17] The Unjust Enrichment

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[10] This has been deleted from the Original Draft of the Code.

[11] Wasserstein Fassberg, C., "Problems in the Codification of Private International Law in Israel", *European Legal Traditions and Israel*, *op. cit.*, supra note 4, p. 531; Levontin, A., *Choice of Law: A model statute with Section by Section Commentary*, (2004).

[12] During the Ottoman Era and the British Mandate, and also after the establishment of the State of Israel, family law has been treated separately from the other branches of Israeli law. However, this is not the place to discuss the merits and problems of such an arrangement. Jewish law is indeed in force today as a part of the law of the state and is applied by Rabbinical tribunals, subject however to the supervision of the High Court of Justice (HCJ), but only regarding matters of personal status, particularly marriage and divorce. In these matters every citizen is subject to his or her personal law: Jews—to Jewish law, Muslim Arabs—to Islamic law, Christians—to their specific branch of Christian law, and so on. S*ee* Section 51 of the Palestine Order in Council, 1922, 3 Law of Palestine 2569; Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953; Tedeschi, G., *Personal Status* and *Status Personnel,* 15 MCGILL L. J. 452 (1969); Englard, I., "The Status of the Council of the Chief Rabbinate and the Review Authority of the High Court of Justice", *HaPraklit*, num 22, 1965, p. 68 [in Hebrew], see text to note 24.

[13] See, Cabrillac, R., *Les Codifications*, 2002, p. 79 (discussing the political will to enforce codes).

[14] *See* the observations of Yadin, U. From Piecemeal Legislation to a Modern Code (the Israeli Experience), *In memoriam Uri Yadin*, *op cit.*, *supra* note 3, p. 379. In addition to those statutes a number of subjects belonging to family law or to the category called matters of personal status were also statutorily regulated, such as Adoption, Succession, Guardianship, Maintenance and Marital Property Relations. In these matters religious law which had been applicable previously was thereby replaced by secular legislation. As we have seen Marriage and Divorce are part of the personal status of the citizen.

[15] Chok Dinei Mamonot, (Hakodeks Haezhrachi), June 2006).

[16] Barak, A., "The Civil Code Interpretation in Israel", *Israel among the Nations: International and Comparative Law Perspectives on Israel's 50 Anniversary*, 1998, p. 15.

[17] See, Tedeschi, G., "About the Gift Law", 1 *Mishpatim*, 1969, p. 639 (in Hebrew); Rabello, A. M., *The Gift Law*, 2. ed,, 1996, 23, 5728-1968 (in Hebrew).

Law, 1979 was also characterized as a short law—especially when compared with continental models. Brevity to this day remains the chosen style, as is the case with the Code,[18] perhaps due to the fact that the Israeli juridical community was already used to a concise style. However, in retrospect, perhaps the concise style of Israeli laws enabled the courts to broaden their judicial discretion.[19]

II. THE DRAFT FROM A COMPARATIVE PERSPECTIVE

The Code, either due to its style or its content's includes aspects that can be of interest for the foreign (non Israeli) lawyer.[20] Unlike other legal systems that have grown from a tradition of hundreds of years of development—the evolution of the Israeli legal system has been developed in a short span of time[21] and incorporates a series of legal influences.

From the very inception of the State of Israel, the status of the Jewish law[22] was not clear.[23] However, it was the general conviction that any state which proclaimed itself a Jewish state—regardless of the wide, ambiguous meaning this concept presents)—should be ruled by Jewish law. With that said, Jewish law had, as matter of fact, a relative influence on Israeli law and is present only in questions of personal status—ruled according to the religious law of different communities in Israel.[24] After it was discussed

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[18] See, Neubauer, R., "Notes on the Nature of two Hebrew Codes", *Mishpatim*, 2006, 36, 875, 904, (in Hebrew).

[19] *Cf.* Deutch, M., "On the Codification Vision and the Property Chapter in the Code", *Mishpatim*, 2006, 36, 289, 295, (in Hebrew).

[20]See, *The Draft Civil Code for Israel in Comparative Perspective*, K. Siehr, R. Zimmeramann (eds.), 2008.

[21] From 1948, the date of the establishment of the State.

[22] See, Elon, M., "The Sources and Nature of Jewish Law and its Application in the State of Israel", *Isr. L. Rev.*, num. 4, 1969, p. 80; *The Principles of Jewish Law*, M. Elon (ed.), 1975; B. Lifshitz, B., "Israeli Law and Jewish Law-—Interaction and Independence", *Isr. L. Rev.*, num. 24, 199, p. 507, and see the comment of Shochetman, E., "Israeli Law and Jewish Law—Interaction and Independence: A Commentary (In response to Prof. B. Lifshitz)", *Isr. L. Rev.*, num. 24, 1990, p. 525; Sinclair, D., "Jewish Law in the State of Israel", *An Introduction to the History and Sources of Jewish Law*, B. S. Jackson *et al.* (eds.), 1966, p. 397; Rabello, A.M., *Introduzione al Diritto Ebraico*, 2002.

[23] See, Likhovsky, A., *The Invention of Hebrew Law in Mandatory Palestine,* Am. J. Comp. L., num. 46, 1998, p. 339.

[24] See, Rabello, A. M., and Sebba, L., "Continuity and Discontinuity of Law in Times of Social Revolution", *Israeli Reports to the XIV International Congress of Comparative Law*, num. 1, 1994. In most cases, traditional Jewish law has made a *formal* contribution to the new legislation (for example, the inclusion of legal terms and expression such as *shelucho shel adam kemoto* (a person's agent has the same status as that person himself); but according to the *communis opinio* these terms and expressions are to be interpreted according to their present context. So, even if these laws used terminology which derived from traditional Jewish law, in fact the contribution of Jewish law in this context was largely nominal, since the traditional terms were in general not interpreted according to their traditional meaning, but as though

whether to add Jewish law to Israeli law; the discussion continued to determining the effect of continental versus common law.

Yet, Israeli law historically searched for pragmatic solutions and thus had produced a legislation that was a hybrid of adopted and sometimes contradictory solutions in an attempt to find the best choice. This pragmatic choice[25]—has lead to its definition as a mixed legal system and is reflected in the interweaving of rules with roots in the continental tradition with rules with roots in the common law tradition and the interpretation of continental model rules according to common law sources and vice versa. With that said, while in general, laws are usually interpreted according to common law—it should be noted that the source of the law is not always known, and it may be unclear whether the source is continental or common law. Yet, with harmonization—the direction in which the world's legal systems are heading—it is perhaps insignificant what the source of the law is.

The result of this combination of legal sources is that many laws are enacted according to the continental style but understood in light of the common law ideas. There are many examples regarding this approach. For example, the rules managing set-off under contract law were, to a great extent, derived from the Bürgerliches Gesetzbuch (BGB),[26] one of the clearest examples of German influence on Israeli law. But other cases of set off—particularly in the case of bankruptcy—are derived according to the English mode. The subject of set off offers intriguing information on the manner of transplants. However, the source of the transplant is only relevant as a comparative note.[27]

The decision regarding what laws are to be included in or excluded from the Code has a pragmatic aspect as well. Certain subjects, such as consumer protection, the status of charities, etc., are not intentionally part of the Code in order to avoid adding too many laws.[28] Certainly, as noted, the Code does not intend to legislate on matters concerning marriage and

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they were contemporary secular legal terms. *See also* the observations of Shilo, S., "Influences of the European Legal Tradition on Jewish Law", *European Legal Traditions and Israel*, *op. cit.*, supra note 5, p. 27. Regarding the question of the use of the model of Jewish law codification (like the Maimonidean codification) as a source of inspiration for the Israeli lawmaker, see the lecture given by Hacohen, A., *et al.*, "Symposium: the New Israeli Code", *L. and Bus.*, 2006, pp. 11, 92, (in Hebrew).

[25] See, Barak, Aharon, "Introduction to the Israeli Draft Civil Code", *The Draft Civil Code for Israel in Comparative Perspective*, Siehr, K., Zimmermann, R. (eds.), 2008, pp. 1, 13.

[26] Sec. 387 ff.

[27] See, Lerner, Shalom, *The Law of Set-Off*, Tel Aviv, 2009 (in Hebrew).

[28] Barak-Erez, Daphne, "The New Civil Code: between the Professional Community and Society", *Bar Ilan Law Studies*, num. 24, 2008, 413, 422. Prof. Barak-Erez pointed out also the question of labor contract which is outside the code. There are certainly those who defend the idea that the question of labor law should not be part of civil legislation

divorce, which are sensitive issues that are adjudicated either in religious or family courts.[29]

a. What Type of Code is the Proposed Code?

The Code is by and large based upon existing Israeli legislation and was inspired by European models of codes, particularly German and Italian codes. Moreover, the work of the Commission was also accompanied by references to foreign texts. Some Israeli scholars believe codification removes the common law influence from Israeli law and considers the Code a means to import continental law.[30] But the Israeli Code is certainly not a code "à la française" or "à la germanique," and the Israeli process of codification cannot be compared with the French code revolution or with the process of the codification in Germany.

Other scholars conclude that the Israeli codification is closely associated with common law and consequently opine that the model of the U.S. Uniform Commercial Code (U.C.C.) can be a useful reference for understanding this process.[31] However, we do not accept this approach. The very aim of American codification—which looks for a "coded solution" to the diversity of law due to the disparate local legislation created by the federal structure of the country[32]—is different from the aim of Israeli codification.

The Code should be viewed in the light of the process of convergence of legal systems[33] and is similar to projects like UNIDROIT[34] and the Principles of European Contract Law.[35] The influence of

[29] See Rabello, A. M., *Introduzione al Diritto Ebraico: fonti, matrimonio e divorzio, bioetica*, 2002, p. 93. See also supra note 12.
[30] See Nevo, S. and Procaccia, Uriel, "Revolution! On the New Civil Code", *L. and Bus.*, num. 4, 2006, p. 95 (in Hebrew).
[31] See Mautner, M., "A Common Law Code", 36(2) *Mishpatim*, 2006, p. 199 (in Hebrew).
[32] This structure was the impetus behind the creation of the U.C.C.—born out of a need to create internal harmony within this fragmented system.
[33] See, Lerner, P., "A Proposito dell`Armonizzazione, del Diritto Comparato e delle loro connessioni", *Rivista Trimestrale di Diritto e Procedura Civile*, num. 59, 2005, p. 489. See also, Berger, K., "European Private Law, Lex Mercatoria and Globalization", *Towards a European Civil Code*, A. Hartkamp *et al.* (eds.), 2004, p. 43; In general see Gambaro, A., "Western Legal Tradition", *The New Palgrave Dictionary of Economics and the Law,* London, 1998; Idem, "Common law e civil law: evoluzione e metodi di confront", *Rivista trinmstrale di diritto e procedura civile*, supplemento, 7 ff, 2009, p. 63.
[34] See Bonell, M. J., "The Unidroit Principles and Transnational Law", *Rev. Dr Unif* , num. 199, 2000-2, available at *www.unidroit.org/English/publications/review/articles/2000-2-bonell-e.pdf* (last visited December 27, 2009); Stefan Vogenauer and Jan Kleinheisterkamp (eds.), *Commentary on the Unidroit Principles of International Commercial Contracts* (*PICC*), Oxford, 2009.
[35]See, Castronovo, C., "I <Principi di Diritto Europeo dei Contratti> e l'idea di Codice", 1 *Rivista del Diritto commerciale e delle obbligazioni*, 1995, p. 21; Castronovo, C., "Il Diritto europeo

harmonization upon codification and the relationship between Israeli law and the projects of harmonization,[36] particularly UNIDROIT, have been discussed by us previously,[37] and therefore further discussion on these subjects is not continued at this time. However, it is sufficient to ascertain that harmonization projects play a specific role in the new codification and serves as point of inspiration for the work of codification.[38] The Code can be examined by noting comparative experiences of codification in other mixed legal jurisdictions,[39] particularly that in the state of Louisiana and in Québec.[40] The very character of a mixed jurisdiction is clearly perceived in the Code's introduction—which notes the requirement of good faith, the principle of *de minimis*, and the concept that a malefactor will not benefit from his wrongdoing—are all principles of continental law. However, at the same time, the introduction houses a section containing definitions of terms used in the Code[41], which is clearly a remnant of common law and at odds with the technique used in continental codes.

Nevertheless the temptation to compare Israel with other mixed jurisdictions should not be misleading. First, today all legal systems have

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delle obbligazioni e dei contratti: Codice o Restatement?", *Europa e Diritto Privato*, 1998, p. 1019.

[36] Mautner, "A Common Law", supra note 31; from the Comparative point of view see, Bonell, M. J., "Harmonization of Law between Civil and Common Law Jurisdictions: the 1968 Brusselles Jurisdiction and Judgments Convention- An Example to follow", *Italian National Reports to the 13 International Congress of Comparative Law*, 1990, p. 69; Wiegand, W. "Reception of American Law in Europe", *AM. J. COMP. L.*, num. 39, 1991, p. 229; Barnes, W., "Contemplating a Civil Law Paradigm for a Future International Commercial Law", *La. L. Rev.*, num. 65, 2005, p. 677.

[37] See, Rabello, A. M. and Lerner, P., "The Unidroit Principles of International Commercial Contracts and Israeli Contract Law", *Unif. L. Rev.*, num. 8, 2003, p. 601.

[38] From the comparative point of view see, Bonell, supra note 34; Wiegand, W., supra note 36; Sjerman, W., "The Fate and the Future of Codification in America", *Am. J. Legal Hist.*, num. 40, 1996, p. 407; Markesinis, B., *The Coming together of the Common Law and Civil Law*, 2000; M. Eisenberg, "The Unification of Law", *The Common Core of European Private Law,* M. Bussani and U. Mattei (eds.), 2002; Steiner, E., "Codification in England: The Need to Move from an Ideological to a Functional Approach: a Bridge to Far?", *Statute L. Rev.*, num. 25(3) , 2004, p. 209; Joerges, C., "The Challenges of Europeanization in the realm of Private Law; A Plea for a New Legal Discipline", *Duke J. Comp. and Int'l L.*, num. 14, 2004, p. 149.

[39] Regarding the Israeli legal system as a *mixed legal jurisdiction*, see Barak, "The Civil Code", supra note 16, p. 473, 482; Rabello, A. M., "Working towards Codification of Israeli Private Law: Hebrew, Common Law and Civil Law", *Developments in Austrian and Israeli Private Law*, supra note 5, pp. 291, 300; Lerner, P., "Legal History of Israel: its Place in Law Studies", *Israeli Reports to the 15th International Congress of Comparative Law*, 1999; Rabello, A. M. and Lerner, P., "Comparative Law and Legal Education In Israel", *Israeli Reports to the 16th International Congress of Comparative Law*, 2006.

[40] Regarding the civil code of Québec of 1994 see, Blouin, M., "Le Nouveau Code Civil du Québec de 1994", *La Codification*,169 (B. Beigneir ed., 1996); M. Cantin Cumyn, "Les Innovations du Code Civil du Québec, un premier bilan", *Cahiers de Droit*, num. 46, 2005, p. 463.

[41] See text to note 60.

undergone some degree of mixing.[42] However, even if we refer to mixed legal systems in the traditional meaning of intermingling continental and common law, the differences between Israel and between Louisiana and Québec are very clear. Louisiana and Québec are not independent states but states or provinces within countries that are ruled according to common law. This is certainly not the case with Israel. In both countries codification is linked to historical reasons framed within the need to preserve a specific cultural identity. Moreover particularly in Québec, the code is accompanied by the existence of a French legal culture (based on the French language) within the scholarship, an element that is lacking in Israel, as will be explained herein. The Israeli Code does not intend to change basic patterns of the Israeli legal culture that have a strong common law flavour.

Accordingly the Code should be seen as a *sui generis* model that is difficult to classify according to the definitions of other codes.[43] The Code certainly is a code *à la Israelienne* and as such reflects particularities incorporated from Israeli legal culture and includes all of its contradictions and drawbacks.

b. Is the Israeli Proposal a "modern" Code?

While the founding fathers of Israeli legislation viewed codification as a gateway to highlighting their understanding of the law—according to the manner taught in European Universities—the new generation of Israeli scholars show ambivalence to the Code in particular and to the codification tradition in general. Thus, it is difficult to imagine that they view codification as a central principal of law as do their continental colleagues.[44] However, it is noteworthy that the Code has also produced a rippling effect, and scholars have suddenly shown interest in the process of codification. Presently, codification challenges those Israeli scholars who are interested in understanding the particularities of enacting a code in the twenty-first century.[45]

In the nineteenth century codification was recognized as a means to modernize the legal system and attain national unity. While codification today is not similar to codification in the nineteenth century, it is interesting

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[42] See Snyder, David, "Contract regulation with and without the State. Ruminations on Rules and their Sources", *Am. J. Comp. L.*, num. 58, 2008, pp. 723, 725.

[43] *See* I. Canor, *On Law and Culture: the Codification Process in the Israeli Legal System and the European Union . Mutual Lessons*, 4 L. AND BUS. 499 (2006) [in Hebrew].

[44] But see, Irti, N., *L'età della decodificazione*, Milano, 1979 and, of the same *author L'età della decodificazione "L'età della decodificazione" vent'anni dopo*, 1999.

[45] See Kreitner, R., "The Code and Legal Science: Revisiting the Roots of Codification", *Mishpatim*, num. 36, 2006, p. 327 (in Hebrew); Mautner, *A Common Law, cit.*, supra note 31, p. 221.

to see Israeli scholars pay attention to Portalis ideas on codification, the polemic between Savigny and Thibaut, interest in the anti-code attitude of Savigny, and the polemic in New York between Field and Carter.[46] But this presumed parallelism between nineteenth century codification and the process in Israel should be carefully analyzed since conclusions are not univocal.

Due to the enactment of two paradigmatic codes, French and German, the nineteenth century is termed the century of codification,[47] which can be examined in light of the concept of rationalism[48] and the influence of the historical school of law.[49] The nineteenth century created "models" of codification and certainly, as noted by Professor Sacco, modern codes are less original than that of the French or German civil codes.[50] However codification is not an obsolete form for developing a legal system.[51] The recent trend of codification in East Europe shows the vitality of codification and the relative new Code of Holland not only proves the relevance of codification, but it also affirms that a continental civil code can incorporate institutions of French and German law as well as concepts traditionally understood as part of common law.[52]

In the past Israeli scholars have suggested that codification is a manifestation of modernization,[53] and even recently, authors have been

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[46] See Nevo and Procaccia, *Revolution!*, *op. cit.*, supra note 30, p. 104. Regarding the European scholarship ever the XIX century see, e.g., Benhoer, H. P., "Jurisprudence and Codification in Nineteenth Century", *European Legal Traditions and Israel*, *cit.*, supra note 5, p. 55; Reimann, Mathias, "The Historical School Against Codification: Savigny, Carter and the Defeat of The New York Code", *Amer. Journal of Comp. law*, num. 37, 1989, p. 95.

[47] See, Cabrillac, *Les Codifications*, *op. cit.*, supra note 13, p. 33; Coing, H., *Europäisches Privatrecht*, 2nd ed. 1989, p. 17. See also, the foreword and the discussion on Codes and Constitution, § IX.

[48] See Glenn, H. P., *Legal Traditions of the World*, 2d ed., 2004, p. 136.

[49] See, e.g., Zimmermann, R., *The New German Law of Obligations*, 2005, p. 8; Zimmermann, R., Savigny Legacy Legal History, Comparative Law and the Emergence of the European Legal System, *L. Q. Rev.*, num. 112, 1996, p. 576; Castronovo, C., "Savigny, i moderni e la Codificazione Europea", *Europa e il Diritto Privato*, 2001, p. 219.

[50] See, Sacco, R., "Il Problema della Riforma (la Conclusione del Contratto)", *Rivista di Diritto Civile*, num. 52, 2006, pp.199 and 200.

[51] See Yadin, *op. cit.*, supra note 3; for a study of codification in American context see Bodenheimer, E., "Is Codification an Outmoded Form of Legislation?", *Am. J. Com. L.*, num. 30, 1982, p. 15; see generally, Sacco, R., "Codificare: modo superato di legiferare?", *Riv. Dir. Civ.*, 1983, p. 117. The central topic of *the 11 International Congress of Comparative Law* was "is codification an outmoded form of legislation?".

[52]For example the code of Holland included the anticipatory breach that is a common law principle. See, Tallon, D., "Le Nouveau Code Civil des Pays-Bas NBV", *La Codification*, *op. cit.*, supra note 40, p. 181.

[53] Letter of Daphna and Eyal Zamir to Sh. Herman, in Herman, Sh., "The Fate and Future of Codifcation in America", *European Legal Traditions and Israel*, *op. cit.*, supra note 5, p. 89.

known to refer to the Code in terms of "modernism".[54] While, the relationship between modernization and codification was understandable in the 1970s in light of the necessity to replace the redundant Ottoman law, as the second decade of the twenty-first century draws near, modernization can hardly be accepted as a catch-all justification for codification. Agreeably, every reform is a type of modernization—and from this perspective it is evident why the last comprehensive reform of the BGB was "modernisierung"[55]—however, why, if at all, is there presently a need to "modernize" the Israeli civil legal system. Critics argue that codification is not needed in Israel and that the civil system, with all its drawbacks, is a system that judges and lawyers have become accustomed to.[56] With that said, the fact that the Israeli legal community has managed with a "quasi" codified framework should not lead to the conclusion that implementing the Code lacks justification. While the reasons for the Israeli legal system having managed to function until now without a code are understandable, this assumption should not counter the benefits of codification.

Some critics of codification have noted that technological developments such as the Internet and large legal databases with search engines have made codification superfluous.[57] We reject this type of approach. It is true that today codification is integrated with various systems of electronic actualization of law (like the French work of *codification a droit contant*) and that every lawyer and judge should pay due attention to the evolution of jurisprudence via search engines. Yet, this development does not make codification useless; rather it compels a more sophisticated use of legal resources. The Code should interact with electronic resources (especially regarding judicial decisions). The answer to this claim is that the digital, World Wide Web does not in itself make codes dispensable but rather allows their more efficient use by judges, lawyers, and scholars.

Should the Code be understood as a "post-modernism" concept?[58] Modernization is a technical concept; whereas modernism is invested with

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[54] See, Yovel, J., "Contract Law in the Third Millennium: neo classical and relational contract theories in the new Israeli Civil Code", *L. and Bus.*, num 4, 2006, pp. 241, 245 (in Hebrew).

[55] Gesetz zur Modernisierung des Schuldrechts (26-11-2001*)* amending the BGB which came into force on 2-1-2002. See, Zimmermann, R., *The New German Law of Obligations*, 2005, p. 30.

[56] This is the idea forwarded by Prof. Proccaccia in Seidman and Shaham, *supra* note 24, at 47.

[57] *See* Nir Kedar, *The Cultural Roots of Civil Codification in Israel*, 7 L. AND BUS.169, 173 ff (2007) [in Hebrew].

[58] Regarding post-modernism in law see Jayme, E., "Oservazioni per una Teoría Postmoderna della Comparazione Giuridica", *Rivista di Diritto Civile*, num 43 (1), 1997, pp. 813-829; Zaccaria, A., "Il Diritto Privato Europeo nell`Epoca del Postmodernismo", *Mélanges Franz Sturm*, J. Gerbens *et al.* (eds.), t. 2,1999, pp. 1311-33; Peters, A. and Schkenk, H., "Comparative law beyond Post-Modernism", *Int'l and Comp. L.Q.*, num. 49, 2000, p. 800-834; Delyanni Deimitriau, CH., "Les Mutations des Prémises Philosophiques du Droit Comparé",

an ideological character—the consequence of the "post modernism" that precisely challenges, although not rejects, modernism. Modernization can be understood as the adaptation, alteration, renewal, or substitution of statutes to adapt to new necessities or social, economic or doctrinarian developments. Postmodernism in law stresses the local and the national culture of the legislation and reacts against "imported" foreign models. It strives to accept cultural identity, pluralism, and eclectic styles, which are all characteristics of the evolution of Israeli legislation. However, support of codification does not counter postmodernism because the Code is certainly not defined as an "imported code" since by and large with all its shortcomings it is a natural consequence of the new Israeli legal tradition

Does the Draft pave the way to an analysis of "post modern" codification? While the question is challenging, the discussion about the postmodern approach to law is certainly beyond the scope of this article and the authors who do not see themselves as specialist in postmodernism theory. Perhaps the crux of the question is not the "modernity" of the Code but whether, and how well, do the particular solutions, which are included in the code, respond to the accepted rules in place.

III. THE THEORY OF JURIDICAL ACTS

The introduction of the General Principles of Law and Juridical Act is an example of the Code's mixed approach to cardinal questions of private law. Chapter one of *Part one* introduces the basic principles that guide the Code (good faith, etc.).[59] Chapter two lists the definitions used in the Code.[60] *Part two* discusses Legal Acts and includes three chapters: Chapter one provides the general provisions; chapter two lays out the legal capacity to undertake legal actions; and chapter three discusses acts of a legal agent.[61]

The introductory chapter of the Code "Principles of the Civil Code" (or "Principles of Patrimonial Law" (*hekronot dinei mamonot*), is similar to other introductions found in civil codes and serves as a general basis for the interpretation of the whole code.[62] Following the model of the French Code,

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De Tous Horizons. Melanges Xavier Blanc Jouvan, E. Picard *et al.* (eds.), 2005, pp. 25, 37; Palmer, V. V., "From Lerotholi to Lando", *De Tous Horizons Melanges Xavier Blanc Jouvan Jouvan*, E. Picard *et al.* (eds.), 2005, p. 265; Mattei, U., "The Comparative Jurisprudence of Schlesinger and Sacco: a Study in legal Influence", *Rethinking the Masters of Comparative Law A.*, Riles (ed.), 2001, pp. 238, 253; Mattei, U. and di Robilant, A., "The Art and Science of Critical Scholarship. Postmodernism and International Style in the Legal Architecture of Europe", *Tul. L. Rev.*, num. 75, 2001, pp. 1053, 1079.

[59] Code, *op. cit.*, supra note 4, arts. 1-5;

[60] *Ibidem*, art. 6.

[61] *Ibidem*, arts. 17-32 and 33-47 respectively.

[62] On problems of interpretation see Barak, Aharon, "Interpretation of the Civil Code Israeli Style", *Essays in memory of Professor Guido Tedeschi. A Collection of Essays on Jurisprudence and Civil*

most codes include an introduction composed of interpretative principles, the date the code enters into force, and basic rules of international private law. The preliminary title (Titre Préliminaire[63]) is always a source of discussion and controversy, especially because its influence is not limited to matters in civil codes but also other fields of law as well and herein is the section that refers to "*de minimis*," noting that a complaint shall not be filed for a deed of little importance, about which a reasonable person would not complain." Yet, why should *de minimis* be included in the preliminary title? Or perhaps the principle should not be changed and should be recognized by jurisprudence as a rector principle? However, these questions are only likely to be answered after the Code has been in force for several years.

As we have pointed out before, the fact that section six includes definitions (such as "adult," "breach," "land law," "act," "property," and so on) is uncommon in other continental models. Nevertheless this is not ground to devalue the Code: While codes are not text books and should refrain from illustrating definitions therein, a clear and clean conceptual background is not necessary at odds with good legislative technique.[64] More troublesome is the next chapter discussing legal acts.

The concept of a juridical act (or a legal act) is certainly not new in Israeli law and appears today in Section 61 of the Contract Law (General Part) 1973.[65] But unlike the present legal situation, the Commission has developed a complete chapter that is principally based upon the distinction between unilateral and bilateral juridical acts. The draft includes special reference to the unilateral acts, those that are the result of a unilateral declaration of will. Nevertheless the draft does not include the unilateral promise as a source of obligation.

The chapter on juridical acts includes sections regulating the legal capacity to realize legal acts, presently in the Capacity and Guardianship Law, 1962. In fact, the Code severs the rules on legal capacity (included in the chapter on juridical acts) from the rules related to guardianship that will remain in a separate law. Another subject included in the chapter on juridical act is "agency." Again this is reminiscent of the German model that

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Law, A. Barak, A. *et al.*, (eds.), 1995, 115 ff. (in Hebrew); Barak, A., *Purposive Interpretation in Law*, 2005; Deutch, Miguel, *Interpretation of the Civil Code*, 2005, at 29, p. 35 ff.(in Hebrew); see also Alpa, G., *Trattato di Diritto Civile. Storia, fonti, interpretazione*, vol. 1, 2000.

[63] See, Hannoun, Ch. "Archaïsme et Post-modernité du Titre Préliminaire du Code Civil", *Le Titre Préliminaire du Code Civil*, 2003, p. 5; Wolodkiewicz, W., "*Livre préliminaire— Titre préliminaire* dans le Projet et dans le texte définitif du Code Napoléon", *Revue Historique de Droit Fran*çais *et Etrager*, 2005, 441 ff.

[64] See the case of Louisiana Code, which contains also definitions.

[65] "(b) The provisions of this law will, as far as is appropriate and mutatis mutandis, apply also to legal acts other than contracts and to obligations that do not arise out of a contract".

places the rules regarding representation in the general part of codes. The agency law also includes rules relating to the contractual relationship between principal and agents.[66] However, the Code reflects a certain change in this conception and does not include the contract of mandate; it is also unlikely that in the German model, the relationship between the principal and the agent are regulated in a special chapter included in the title of obligations which refer to the "obligations of confidence". It should be noted that the Code includes in this part the duty of confidence between principal and agent as well as between trustor and trustee.

The chapter on juridical acts seems at first glance to be influenced by German law. The BGB contains a chapter on juridical act (Rechtgeschäft), a consequence of the inclusion of legal patterns developed by the Pandectistic School in the German Code. However, the juridical act has also become an accepted concept throughout the continental world and is used in countries where the code lacks a general part.[67] It appears in the draft of the Common Framework of Reference, which is presumed the bases for future European codification.[68]

The two first chapters of the Draft (and particularly the section on juridical acts) may find certain similarities—although in a more streamlined way—to the idea of general part of the German model. But a clear distinction should be made. The BGB includes in its general part analytical legal definitions and concepts (*begriffs*) that serve as the basis for the whole code and adopts the aim of the Pandectistic School, which aims to express rules with a very high level of abstraction. The BGB general part houses general rules (juridical acts, declaration of will, contracts, and agency); the rest of the code is divided between specific areas of the civil code, i.e., rules of contract, obligation, property, etc. This is certainly not the manner adopted by the Israeli Commission, which in fact limited the general part to three topics: juridical act, legal capacity, and agency.

One of the Code's aims was to construct legal theory by redefining the conceptual approach.[69] Accordingly, the inclusion of a chapter on

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[66] "Although the Agency Law of 1965 and the corresponding chapter of the code deal both with the agent's power to represent the principal toward third parties and the internal relationship between agent and principal, it seems that the former aspect if more important and therefore agency will be treated not among the special kinds of contracts (as in several continental codes) but as the extension of the individual's capacity to perform legal acts…". Yadin, *From Piecemeal Legislation, op. cit*, supra note 14, p. 383.

[67] See, IRTI, N., *Letture bettiane sul negozio giuridico*, 1991.

[68] See the critics to the way the juridical act appears in the CFR in Vaquer, Antoni, "Farewell to Windscheid. Legal Concepts Present and Absent from the Draft Common Framework of Reference", *Eur. Rev. Priv. L.*, num. 487, 2009, p. 491 ff.

[69] See, Deutch, Miguel*, op. cit*, supra note 62, p. 27.

juridical acts can certainly be understood as part of a plan to conceptually redefine Israeli law. Professor Mautner considers this approach—a conceptual refinement of law—unnecessary. He bases his opinion on the fact that Israeli court decisions are by and large based upon the interpretation of interests and values associated with the case and not on the basis of conceptual analysis.[70] However the legislative style is not at odds with different trends of juridical adjudication. The fact that the Code includes a clear-cut conceptualist approach does not amount to curtailing the courts` power in adopting different interpretations of the law within the limits of judicial discretion. This discussion in not new and has found expression in Germany. Particularly the Pandectistic School of Concepts was relinquished allowing the courts to adopt the interest or values of jurisprudence in a more flexible manner. For those who fear an approach that is overly-influenced by the "Pandectistic approach to law," it is clear that a chapter on juridical acts will not make the Israeli Code conceptually closer to the German one and is not likely to make Israeli scholarship too dependent upon German doctrine.

As it is possible to see from these brief notes about the juridical act, the Code includes many solutions that at best could be defined as controversial. Some are based on a certain misunderstanding about the very nature of the institution; others will need cautious application by the courts. However, even this criticism is not reason to jeopardize the draft and relinquish the idea of codification, but to adopt a compressive analysis based also on comparative law.

IV. TRANSPLANTS AND MENTALITY

Does the legislation of the Code alter the mentality of the legal system promoting a code mentality? The question of "mentality" or "mind set" was raised in the past in the context of harmonization of law. Professor Legrand argued that it is impossible to merge legal systems, such as common law and continental law, due to the discontinuity in the mind sets of each legal system.[71] However, convergence between the systems is a reality. Moreover, consequently in a world of convergence of legal ideas, the meaning of mentality should be understood in a different context. Assuming that the mentality of the legal community relates to the understanding and

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[70] Mautner, *op. cit*, supra note 31 at 245.

[71] See, Legrand, P., "European Legal Systems are not Converging", *Int. and Comp. L. Q.*, num. 45, 1996, p. 52. Comp. Smits, J., "On Successful Legal Transplants in a Future Ius Commune Europeaum", *Comparative Law in the 21st Century*, A. Harding and E. Oruçü (eds.), num. 137, 2002, p. 143; see also, *The Code Napoléon and the Common Law World*, B. Schwartz (ed.), 1956; Deutsch, M., "The Structure of the New Israeli Civil Code- a Proposal", *Mishpatim*, num. 29, 1998, pp. 587 and 588 (in Hebrew).

analysis of legal phenomena,[72] it could be argued that the "code mentality" can hardly be achieved only through enacting a code. It would need to be accompanied by a change in the pattern of judges and academics as well and this change is not expected in Israel in the near future.

Codification may be perceived as a drawback in the status quo[73] and therefore jurists, generally conservatives, perceive codification as a change in the legal mentality. Scholars tend to identify legal institutions according to what they understand, and to their intellectual preferences. There may be certain scholars within Israel, who have different theoretical backgrounds, seem to fear that change will deplete the research from the reserves they have grown to be accustomed. These fears are certainly not unique to Israel. After the enactment of the BGB, some German scholars also raised the question about the future of scholarship that may be fettered by codification. These fears, however, did not materialize.[74] And the same may be expected in Israel.

One of the questions raised in regard to codification is how is the old law disregarded and the Code introduced.[75] In the continental legal culture, codification meant a break with the past.[76] Thus for example, Section 7 of the Law of 30 ventôse year XII, voided all existing law enacted before the code and marked a strong departure and break away from the ancient legal regime. However, the ancient law did not disappear; rather it was incorporated into the code or absorbed into the doctrines that preceded the code. Examples throughout history are various;[77] consequently it is easy to understand why Professor Reinhard Zimmermann convincingly shows that, notwithstanding the enactment of the BGB, Roman law remained as an

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[72] It may be assumed that mentality is a different way of recognizing a legal tradition. See, Mattei and Robinant, *The Art and Science*, *op. cit*, supra note 58, p. 1071.

[73] See, Mattei, U., "The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments", *Hastings Int'l and Comp. L. Rev.* num. 21, 1997, pp. 883, 885.

[74] See, Siehr, K., "The Draft Civil Code for Israel: Concluding Remarks", *The Draft Civil Code for Israel in Comparative Perspective*, K. Siehr, and R. Zimmermann (eds.), 2008, pp. 237, 242.

[75] See, *Cabrillac, Codifications*, *op. cit*, supra note 13, p. 90 ff.

[76] Although "code" oriented, the very style of the new laws permitted the development of jurisprudence according to common law patterns. Moreover, common law principles are noticeable in legislation such as the Remedies for Breach of Contract Law, 1970 and the enactment of the Trust Law, 1979. Tort Law continued to be ruled by the Tort Ordinance, 1947 enacted according to common law patterns. Additionally, large areas of private law, i.e., bankruptcy, bill of exchange, and corporations are framed in laws that resemble a codificative style, but are clearly biased by common law ideas.

[77] The Italian Civil Code (1942) is not very different from the Italian private law tradition. Compare for example the case of the codification in Louisiana and the continuation of the Custom of Paris and of *Las Siete Partidas* established in 1817 by the Louisiana Supreme Court in *Cottin* vs.*Cottin;* see, Herman, S., *The Louisiana Civil Code: A European Legacy for the United States*, 1993; Rabello, A. M., "Sulla Codificazione in Louisiana", *International Survey of Roman Law*, num. 25, Index, 1997, p. 111 ff. and the bibliography therein.

intellectual basis for German law.[78] While every reform creates a tension when departing from the old law—otherwise there is no justification in the reform—it relies upon a certain degree of continuation that is based either on the very letter of the law or on the reaction of the courts and academics to the reform. This is true in the Israeli case as well; the Code is more a continuation than a rupture. This can be perceived both in the content of the Code and in its purported impact upon judicial discretion

Presently, as pointed out earlier, the different laws that cover the field of obligations, contracts, and property are the very basis for the codification. In our view the proposed Code should be understood (and accordingly evaluated) as an example of what is known as re-codification, that is the existence of a previous coded structure (in the Israeli case—a piecemeal codification) is replaced by a new one via structural changes or the reenactment of the law.[79] Re-codification[80] is used to explain the relinquishing of an old code and the enacting of a new one or one that is amended throughout. It replaces the old structure, the piecemeal codification, with a new one; the integrated codification, which far from changing basic characteristics of the Israeli system represents a refined mixed character that inspires the Israeli legal system.

The enactment of the Code will not create a deep change in the patterns—not theoretical or practical—within the Israeli academy and judges. We certainly endorse the conclusion of Prof. Nili Cohen that the proposed code is not intended to create Israeli private law "de novo".[81] Although "code" oriented, the very style of the Israeli laws, particularly contract and property law,[82] permitted the development of jurisprudence according to common law patterns. For years, the development of civil law was controlled by the judges; presently, the legislator needs to assume necessary responsibility and enlarge their share in its development. The

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[78] See, Zimmermann, R., Roman Law, *Contemporary Law, European law*, 2000, p. 53 ff.
[79] There are also cases—like the reform of the Louisiana Civil Code which could be defined as "piecemeal recodification." See, Gruning, D., "Mapping Society through Law- Louisiana Civil Law Recodified", *Tul. Eur. and Civ. L.F.*, num. 19, 2004, pp. 1, 3 ff.
[80] See, Aubé, G., *Le Code Civil du Québec: source d'inspiration pour la recodification du Droit Civil argentin*, available at *www.chairedunotariat.qc.ca/fr/conferences/mois/092004/entractev13n12.pdf* (last visited December 27th, 2009); C. Castronovo, "Decodificazione, delegificazione, ricodificazione", in 2 Atti del Convegno *I Cinquant'anni del Codice Civile*, 1993, p. 488 ff.; Gambaro, A., "The Italian System of Private Law", available at *http://appinter.csm.it/incontri/relaz/6608.pdf* , last visited December 27th, 2009; Alpa, G., *Fulvio Maroi avvocato e docente umanista*, in *www.unidroit.org/english/publications/review/articles/2000-2.htm*, last visited December 27, 2009.
[81] See Cohen, N., "The Four C`s: Coherence, Clarification, Continuity, Change, The Draft Civil Code for Israel in Comparative Perspective", K. Siehr, and R. Zimmeramann (eds.), 2008, pp. 51, 54.
[82] See text to notes 13 ff.

change in the relationship between the legal agents—the role of the law maker vis-à-vis the judges—does not mean a radical change in the rule. Regardless of the legal system, continental or common law, law does not exist by itself and judges are afforded interpretative tools.[83] Therefore, in no legal system is it possible to obliterate the task of the courts.

The Code may produce changes in interpretation as well as the station of judicial discretion,[84] but by and large the task of the jurisprudence will not be radically changed and will remain as central as it is today.[85] Codification does not intend to hamper judicial discretion, a necessary element of all legal systems.

The transplantation of one legal system from one country to other is usually followed by the study of this system in local schools of law and is moreover, supported by research of scholars. Even though Israeli legalists have "imported" a legal system into Israel, it was not supported by the forthcoming generation of scholars, who were alien to the continental tradition and received their legal education in British and American universities.[86] The major difference between Israel and European countries should be stressed: The continental law tradition "pre-existed" codification and received expression in the universities. In France, the Napoleon Code was based on Roman law and on the work of Pothier.[87] The BGB, as was noted, is clearly influenced by the Pandectistic School and by the work of Windscheid.[88] The Israeli academy of the first years, based on "founding

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83 Sacco, "Legal Formants: a Dynamic Approach of Comparative Law", *Amer. J. Comp. L. 1*, num. 39, 1991, p. 25.

84 See, Deutch, *op. cit*, supra note 19.

85 See, Mautner, *op. cit*, supra note 31, p. 234.

86 However as we have pointed before the Israel scholarship has produced a series of commentaries of the private law roughly following the continental style.

87 Robert Joseph Pothier (1699-1772) is a descendent of a long line of judges, and himself served as a judge and teacher. He possessed an ethical outlook concerning the social function of the law. Moreover, he championed the cause of separating law from politics; his position enabled the usage of his works as the jurisprudential basis of the Napoleonic code, also after the French Revolution. Many scholars today claim that the actual codification process commenced with the work of Pothier. He systematically arranged and modernized the Justianian codification of Roman law, which he viewed as obligatory law. The Latin sources are translated into French, and the work itself was widely translated. See, Arnaud, A. J., *Les Origines Doctrinales du Code Civil Français*, 1969; Maillet, J., "The historical significance of French codifications", *Tul. L. Rev.*, num. 44, 1970, p. 681 ff.; Tarello, G., *Le ideologie della Codificazione nel secolo XVIII* (s.d.); Robinson, O. G. *et al.*, *An Introduction to European Legal History*, 1985; Kingsley, M., *French Liberal Thought in the Eighteenth Century*, 1963, 151, 167 ff.; Gordley, J., "Myths of the French Civil Code", *Am. J. Comp. L.* num., 42, 1994, p. 459 ff.; Humbert, M., "The Concept of Equity in the Corpus Iuris Civilis and its interpretation by Pothier", *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions*, A.M. Rabello (ed.), 1997, 29 ff.

88 See, Pugliese, G., "I Pandettisti tra tradizione romanistica e moderne scienze del Diritto", *La formazione storica del diritto moderno in Europa*, num. 1, 1977, p. 29.; Benöhr, P., "Jurisprudence and Codification in Nineteenth Century Germany", *European Legal Traditions and Israel*, *op. cit*,

fathers", who came from Europe, was familiar with the civil law tradition. These founding fathers intended to transfer this tradition to the future generations, the founding fathers of Israeli private law came from continental law countries and as such this was the system they knew and supported. However, the opening of the Faculty of Law in the Hebrew University of Jerusalem in 1949, and afterwards in Tel Aviv University, did not contribute to the consolidation of a clear cut continental oriented tradition since the system taught was nevertheless based on the common law.

Today most of the Israeli doctrine is not akin to the idea of codification in the European style since the contemporary Israeli academic community is distant from the continental model and akin to American sources and scholarship.[89] The legal education presently taught at Israeli universities and colleges is very different from the legal education studied by the "founding fathers" of the Israeli legal system. Additionally most students and scholars were not able—due to lack of knowledge of the French, Italian or German languages—read civil law material. Even today American Universities are seen as the ideal forum for post-graduate studies and academic exchange.

This is clear regarding the preference for an interdisciplinary theoretical approach in lieu of the more continental dogmatic approach that has characterized the continental academy. Nevertheless, over recent years (if you use last/past you need to specify time period, i.e in the last 3 years) some voices have been heard against this trend and claim a more even approach that is open to other trends.[90] It is not an outrageous expectation, suppose the Code is approved, Israeli scholars will shift towards a more dogmatic-continental style of understanding law. Let us remember that even today, without a formal code, although common law is intellectually oriented, the role of legal scholarship is purportedly continental regarding its influence on the jurisprudence and on the legislator and is evident in the choice of articles and books cited in the jurisprudence and the influence of doctrinal material by the Ministry of Justice. Israeli scholars have published commentaries on most of the important laws in the private field[91] in the very

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supra note 5, p. 55 ff; It is interesting to compare the French codex with the German BGB which, apparently, is based upon the "law of the professors" (*Professorenrecht*) that is formalistic and removed from the common population (*Pandektenrecht*). See, Stein, P., *Legal Institutions. the Development of Dispute Settlement*, 1984, p. 100; Glendon M. A., *et al.*, *Comparative-Legal Traditions*, 1985, p. 53; David, R. and Jauffret Spinosi, C., *Les grands systèmes de droit contemporains*, 1992.

[89] See, Barak-Erez, D., "Codification and Legal Culture in Comparative Perspective", *Tul. Eur. and Civ. L.F.* num. 13, 1998, pp. 125, 136; see also, Wiegand, W., "Reception of American Law in Europe", *Am. J. Comp. L.*, num. 39, 1991, p. 229.

[90] Zandberg, Haim, "The Americanization of Legal Education in Israel", *HaMishpat*, num. 27, 2009, p. 52 (in Hebrew).

[91] See, e.g., the commentaries on Laws relating to Contracts, founded by G. Tedeschi: Shalev, G., *Contract Law, General Part*, 2005 (in Hebrew); Zamir, E., *Sale Law*, 1987 (in Hebrew); Rener,

style of the continental law.[92] Thus, will the enactment of the Code lead Israeli scholars to pay more attention to continental models and not rely only upon common law and particularly American legal sources, as occurs today.

It is hardly conceivable that the Code will produce a "revolution" in legal education and fulfill the role that codes play in the continental system, but nevertheless it could strengthen certain patterns lacking in Israeli scholarship and strengthen the comparative nature of the scholarship. However, if this comparative approach is adopted by the Israeli academy it will be indeed a real revolution…

V. CONCLUSION

Some lessons could be achieved form the Israeli experience in codification, either regarding the evolution and characteristic of Israeli legal culture or the status and limitation of comparative law. First, the adoption of foreign models is not an obstacle for the development of a national legal culture but an essential part of an open-minded mentality. The question is deeper and the very pith of the transplant theory: to what extent should law be understood as a local phenomenon or as a transnational one? The Code affords an interesting example of the contradictions and difficulties of harmonization not only in the law but also in the legal dialogue between different legal traditions.

The Israel Code may suffer the destiny of other codification projects that have remained an academic exercise. We certainly hope that this will not happen. But even in this case the Code may serve as a stimulating framework to analyze reception and legal culture. It should be understood in a broad context that includes the comparative experience and particularly the Israeli legal evolution.

Even mindful of the criticism lodged at the Code, we still support the enactment of the Code. The skeptical attitude on the part of the Israeli jurisprudence toward codification, the serious questions regarding the necessity of the Code, and the dialogue between the Code and the jurisprudence, are not reasons to prevent the enactment of an instrument that can contribute to a clearer definition of institutes and provide an enlarged basis for the development of Israeli private law.

S., *Bailing Law*, 1998, (in Hebrew); Veler, S., *Insurance law*, vol. 1 2005 and vol. 2 2007, (in Hebrew); Rabello, A. M., *Gift Law*, 2nd ed., 1996, (in Hebrew); also a series of commentaries of the *Basic Laws* have been published through the years under the edition of Y. Zamir.

[92] Some years ago a short commentary to the law of contract was published in a similar style to *Commentario Breve al Codice Civile*. See, Rabello, A. M., *et al.*, *Brief Commentary on Laws Relating to Private Law*, 2nd ed., 1996, (in Hebrew). Updates of this project have momentary been interrupted (perhaps in prevision of the adaptation of the Code).

The Israeli experience highlights the fact that different formats may have different approaches and that the adoption of models is linked to prejudice, preference, and convenience. The task of legal scholarship is to find a way to overcome these differences. While a critical approach is always necessary, the Israeli legal community should be aware that these criticisms should not lead to discussions entrenched in "ideological" considerations. There are no codes free of mistakes, insofar as there is no system, without a code, that is free of them.

The discussion should focus on asking substantial questions that may improve the Code, while avoiding a too conservative approach that may frustrate the opportunity to improve and update the law. Those who are skeptical about the need for codification should be receptive to understanding the phenomenon of codification, not as an outdated form of law-making but rather as a vital and flexible instrument to create a more fluid and organized civil law.[93]

[93]See Irti, N., *Crisi mondiale e diritto europeo, in Rivista trimestrale di diritto e procedura civile*, 2009, p. 243 ff.