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Legal Engineering in Israeli Law: Codification and Unification of the Law of Remedies

1. Introduction

Legal engineering is the process of designing, constructing and finally implementing means to influence the development of a legal system. In Israel, a relatively young legal system, the concepts of legal engineering and comparative law are deeply interconnected. This interconnection is best reflected in the area of private law. The development of this area of the law, almost since the very inception of the State of Israel, has been characterized by a careful and attentive examination of foreign legal regimes, national and supra-national alike. This was done with the explicit intention of benefiting from the wisdom and experience of older, but nevertheless modernized systems of law, before establishing original statutory arrangements. It seems no exaggeration to suggest that comparative legal thinking and research has been one of the most important factors responsible for the relatively smooth and successful transformation of Israeli private law, during the last 45 years or so, from a static, outdated and dependent collection of rules into an independent, sophisticated and dynamic legal system.

The field of remedies is an interesting example of legal engineering for a variety of reasons. First, due to its direct practical effects on litigation, the law of remedies is an area of law where changes in the formal legal infrastructure usually have an immediate effect on the operation of the legal system, and on the level of actual protection given individual rights.

Second, the subject of remedies is a fascinating and fertile field of research for the legal comparatist. This is so, due to the very distinct treatment of the subject by systems of the Common Law on the one hand, and Civilian systems on the other. Interesting in itself from a comparative perspective, acquaintance with this divergence of approaches is very helpful when attempting to comprehend – and appreciate – the structure and basic features of the Israeli law of civil remedies. The development of this area of law is also a vivid example of the interesting ways

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in which the study of comparative law may be of use to the legal engineers of a national system.

Finally, the law of remedies is today one of the few areas in which the forthcoming Reform of Israeli civil law is expected to bring about significant changes. The Israeli Draft Civil Code was promulgated in 2006 and is still awaiting parliamentary approval. The Draft contains a broad section dedicated exclusively to the treatment of civil remedies. The explicit intention of this particular section is to unify and harmonize, to the extent possible, the rules and principles governing the main remedies available at law for the violation of any kind of private right, regardless of its formal classification.

Part two presents a short overview of the approaches to the idea of "a law of remedies" in both the Common Law and the Civil Law. This introduction will be helpful in establishing my argument, that the Israeli law of remedies – both in its content and form – represents an interesting combination of foreign ideas and experiences.

Part three describes the current state of the law of remedies in Israel. I start by drawing a general picture of the development of Israeli private law. I argue that original legislation in the fields of private law has been guided by five general "legal engineering principles" or policies. These policies may be viewed as part of an Israeli "theory of legislation", and were clearly applied in designing the "Remedies Statute", an original statute that was enacted in 1970 and governs to date the award of remedies for breach of contract.

Finally, in part four, I discuss the recent efforts to codify and unify the Israeli law of remedies. The main features of this reform, I suggest, constitute a clear example of legal engineering, along the lines of the Israeli theory of legislation. In my view, this innovative project demonstrates how, even in the 21st century, legislation in the fields of core private law may still be required in order to facilitate the access to law as well as its just and effective administration.

2. The Law of Remedies – A Comparative Perspective

Legal remedies are means of protecting legal entitlements. The practical importance of designing satisfactory rules on remedies can not, therefore, be exaggerated. Indeed, a legal right that is not protected and enforced by the legal system can hardly be considered a right at all. For example, it seems meaningless to claim that one person has a contractual right (or duty) towards another person, if the

legal system does not provide an adequate remedy for the violation of such right or duty.[1]

However uncontroversial the last paragraph may seem to the modern lawyer, the interesting fact is that the very approach to the concept of "a law of remedies" varies substantially between the two major legal families of the western world.

In the Anglo-American legal tradition the concept of a 'legal remedy' and the distinction between wrongs and remedies are both deeply rooted in legal thought and legal discourse.[2] Although no consensus has been reached between authors as to the exact scope of the term 'remedy',[3] it seems fair to suggest that a "remedy" would commonly be defined by an Anglo-American lawyer as the legal response to the violation of a private right.[4] The set of rules governing the award of such remedies is what the Common Lawyer would call "the law of remedies".

This apparent conceptual unity is, however, largely misleading. In practice, a unified "law of remedies" for civil wrongs has never actually developed in Common Law systems. Indeed, the two main branches in which civil remedies are awarded,

1 As the famous Latin maxim commands: "*Ubi ius ibi remedium; Ubi remedium ibi ius*." Compare to the much more recent words of Lord Nicholls of Birkenhead: "A legal right is not more valuable in law than the remedy provided for its breach. It is therefore vital that remedies should match the wrong." Foreword, *Commercial Remedies - Current Issues and Problems* (A.S. BURROWS & E. PEEL eds., 2003).

2 From a very early stage, English Common Law has been characterized by a functional approach, in which remedies played a much more central role than abstract rights and duties. This was due, in large part, to the procedural system known as the "writs system", which governed English civil procedure for about 700 years and until the nineteenth century. For a summary of the development of the writs system see BAKER J.H., *An Introduction to English Legal History*, ch. 4, at 53-69 (4th ed., 2002). For an interesting examination of the stark difference between Anglo-American law and Continental legal thought in this respect see *e.g.* DAVID R., "A Law of Remedies and A Law of Rights" ch. 1 in *English Law and French Law* 1-15 (1980).

3 See *e.g.* WADDAMS S.M., "Remedies as A Legal Subject" 3 *Oxford J. Legal Stud.* 113, 113 (1983): "It is apparent from an examination of these books [on remedies] that the scope and meaning of this legal subject area [the law of remedies] is by no means settled. ...no authority has tried to define or delimit 'remedies'"; and compare more recently LAITHIER Y.M., "The French Law of Remedies for Breach of Contract" in *Comparative Remedies for Breach of Contract* 103, 106 (Oxford, 2005): "Admittedly, the often-used notion of *remedy* is seldom rigorously analyzed by Common Lawyers."; Citing BIRKS P., (ed.) *English Private Law* (Oxford, 2000) sec. 18.01. For an exceptionally thorough discussion of the various meanings of the term "remedy" see recently ZAKRZEWSKY R., *Remedies Reclassified* 9-22 (2005).

4 See *e.g.* the legal definition of the term according to *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1996): "Legal redress; the legal means of enforcing a right or redressing a wrong." Compare the definition of the *Oxford Dictionary of Law* (5thed. 2002): "Any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for their infringement."

namely the law of torts and the law of contracts, developed – and to a large extent are still developing today – quite apart from each other.[5]

However, during the second half of the last century, significant changes took place in the Anglo-American legal world. The last three decades witnessed an ever-increasing interest, mainly in the legal academia, in an integrated analysis of remedial problems all across the civil law, and especially across the 'remedy oriented' branches of contract and tort.[6] Courses on "remedies" have become

[5] This traditional dichotomy between the two fields was described by Professor Atiyah in these words: "For at least a hundred years - and in many respects for more like twice that time... the fundamental distinction has been between obligations which are voluntary assumed, and obligations which are imposed by law. The former constitute the law of contract, the latter fall within the purview of the law of tort [...] These broad distinctions reflected a set of values and ways of thought which also exercised a most profound influence on the conceptual pattern which was imposed on contract law itself." ATIYAH P.S., "Contract, Promises and the Law of Obligations" in *Essays on Contract* 10, 10 (Oxford, 1986). Another major factor barring the prospect of integrated analysis of remedial principles has been the waning – but still existing – traditional Anglo-American divide between law and equity. Equitable remedies continued to operate – even after the official merger of equity and Common Law – with no serious attempts to unify them with similar 'legal' remedies or to integrate them into a larger body of legal rules governing the award of remedies for civil wrongs. This holds true particularly for Australia, in which the final procedural merger of law and equity belated and was completed as late as 1972. The effects of this historical fact on the development of the law of remedies in Australia are discussed in DAVIS G. & TILBURY M. "The Law of Remedies in the Second Half of the Twentieth Century: An Australian Perspective" 41 *San Diego L. Rev.* 1711, 1718-1722 (2004).

[6] In 1993 this development was described by America's number one expert on remedies, in these words: "...the unified treatment of all remedies has become generally accepted, and the field has now generated a major body of literature...". DOBBS D.B., *Law of Remedies, Damages-Equity-Restitution* 2 (St. Paul, 2nd ed., 1993). Early works on remedies include: in England: LAWSON F.H., *Remedies of English Law* (1972), followed by the 1980 second edition; in the U.S. the main reference was DOBBS D.B., *A Handbook on the Law of Remedies* (1973), followed by the immense three volume 1993 *opus* cited above; and in Scotland: WALKER D.M., *The Law of Civil Remedies in Scotland* (1974). More recent works are: LAYCOCK D., *Modern American Remedies – Cases & Materials* (1985) followed by a second and third editions (1994 and 2002); in England: BURROWS A.S., *Remedies for Torts and Breach of Contract* (1987) followed by a second and a third edition (1994, 2004); HARRIS D., *Remedies in Contract and Tort* (1988) followed by a second edition, 2002 (with D. CAMPBELL & R. Halson); in Australia: TILBURY M.J., *Civil Remedies* (Sydney, 1990). This list is by no means exhaustive. It does not include an abundance of "Cases & Materials" textbooks that have been published during the last twenty years. See *e.g.* the list of American textbooks listed in DOBBS D.B., *supra*, at p. 2, footnote 6. In Canada see BERRYMAN, BLACK, CASSELS, PRATT, ROACH & WADDAMS, *Remedies: Cases & Materials* (5th ed., 2006) (1st ed. 1988); In Australia see KERCHER B., NOONE M., TILBURY M.J., *Remedies, Commentary and Materials* (2nd ed., 1993) (1st ed. 1983). This bibliography does not include the vast literature dedicated exclusively to monetary remedies ("Damages") or other specific kind or category of remedy (specific performance, injunctions, punitive damages, restitutionary remedies, etc.). Moreover, the literature on remedies is not restricted to private law. See *e.g.* LEWIS C., *Judicial Remedies in Public Law* (3rd ed., 2004); LEVINE D.I., *Remedies – Public and Private* (4th ed., 2006).

popular, and are now forming part of the curricula in many law schools, especially in the United States. A massive body of literature has been established, which highlights, in different contexts and from different perspectives, the various similarities – and the questionable distinctions – between principles of remedies in torts, contracts and other branches of civil law.[7] All these developments have turned the subject of remedies into a well recognized – though not as well organized – branch of legal knowledge.[8]

It is time to turn now to the state of affairs in Continental Europe. Remarkable as it may sound to the Common Lawyer, in most Civil Law systems the very notion of a remedy, as well as the basic distinction between rights and remedies – so fundamental to Anglo-American legal thought – are far from being entrenched in legal theory. This is most clearly reflected in the lack of any accepted parallel to the legal terms "remedy" and "law of remedies". For example, when a leading French scholar was

[7] For a representative bibliography see: FRIDMAN G.H.L., "The Interaction of Tort and Contract" 93 *L.Q.R.* 422 (1977); SULLIVAN T.J., "Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change" 61 *Minn. L. Rev.* 207 (1977); REITER, B.J., "Contracts, Torts, Relations and Reliance" in *Studies in Contract Law* 235 (REITER B.J. & SWAN J. eds., 1980); ALBANO J.M., "Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions" 22 *Boston College L. Rev.* 545 (1981); BURROWS A.S., "Contract, Tort and Restitution – A Satisfactory Division or Not?" 99 *L.Q.R.* 217 (1983); BISHOP W., "The Contract-Tort Boundary and the Economics of Insurance" 12 *J. Leg. Stud.* 241 (1983); SPEIDEL R.E., "The Borderland of Contract" 10 *N. Ky. L. Rev.* 163 (1983); Holyoak, J., "Tort and Contract after Junior Books" 99 *L.Q.R.* 591 (1983); LORENZ W. "Some Thoughts about Contract and Tort" in *Essays in Memory of Professor F.H. Lawson* 86 (1986); BARNETT R.E. & BECKER M.E., "Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentations" 15 *Hofstra L. Rev.* 443 (1987); COOKE, R., "Tort and Contract" in *Essays on Contract* 222 (P.D. FINN ed., 1987); MASON K.M., "Contract and Tort: Looking Across the Boundary from the Side of Contract" 61 *The Australian L.J.* 228 (1987); HEDLEY S., "Contract, Tort and Restitution; or, On Cutting the Legal System Down to Size" 8 *Leg. Stud.* 137 (1988); SWANTON J., "The Convergence of Tort and Contract" 12 *Sydney L. Rev.* 40 (1989); BLOM J., "Remedies in Tort and Contract: Where is the Difference?" ch. 16, in *Remedies, Issues and Perspectives* 395 (J. BERRYMAN ed., 1991); GALLIGAN T.C., "Contortions along the Boundary between Contracts and Torts" 69 *Tulane L. Rev.* 457 (1994); LOUBSER M.M., "Concurrence of Contract and Tort" in *Law in Motion* 327 (1st World Law Conference, 1996); Valuable collections containing several articles dealing with remedies lying in the borderline of contract and tort law are: *Wrongs and Remedies in the 21st Century* (Oxford, P. Birks ed. 1996); *Remedies: Issues and Perspectives* (Ontario, J. BERRYMAN ed., 1991). For earlier illuminating discussions see *e.g.* THORNTON P.W., "The Elastic Concept of Tort and Contract as Applied by the Courts of New York" 14 *Brooklin L. Rev.* 196 (1948); Prosser W.L., "The Borderland of Tort and Contract" in: *Selected Topics on the law of Torts 380* (1953); POULTON W.D.C., "Tort or Contract" 82 *L.Q.R.* 346 (1966).

[8] The paucity of rigorous systematic analysis led some scholars to doubt whether constructing a coherent and autonomous law of remedies was possible at all. See *e.g.* BIRKS P., "Rights, Wrongs and Remedies" 20 *Oxford J. Leg. Stud.* 1 (2000) (arguing that "remedies" is a vague and unstable concept that should be replaced by a terminology of rights). A remarkable effort to answer to the challenge and to provide a more coherent terminology was recently undertaken by Rafal Zakrzewsky in his book, *supra* note 3.

asked to present to the English reader a survey of the French law of remedies for breach of contract, he opened the discussion with the following observation:

> "...the French reporter is confronted with a terminological difficulty which, as always, reflects a more fundamental problem: what is a remedy?"[9]

It is therefore far from surprising to discover that civilian jurisprudence lacks a general theory of civil remedies. In a typical civilian legal textbook on the law of obligations, remedial questions are regularly treated jointly with or in close proximity to questions that under Anglo-American legal analysis would be viewed as relating to substantive law.[10] In light of such conventional methodology one may be tempted to conclude that the treatment of remedies in Civil Law systems is characterized by total segregation and disharmony.[11]

However, this initial impression is largely misleading. First, it should be noted that while the discussion of civil remedies is indeed scattered over the textbooks, many of these books cover both contractual and tort liability.

Second, and more importantly, in most Civil Law systems, considerable similarities exist between the remedial regimes that govern contractual and extra-contractual liability. Important civil codifications provide – to some extent or another – unified remedial arrangements.[12] In fact, despite the absence of any general theory of remedies, examination of these codes reveals that Civil Law has usually attained a significant degree of uniformity in the treatment of remedies.

To conclude, it seems that the treatment of remedial issues in both the Civil Law and the Common Law is characterized by an apparent tension between practice and theory. In the Common Law world, most contemporary experts dealing with

[9] TALLON D., Remedies (French Report) in *Contract Law Today – Anglo French Comparisons* 263 (D. Harris & D. Tallon eds., 1989). Similar problems arise with regard to German law. See *e.g.*, the complicated answer offered by "*Transblog*", a Weblog on German-English legal translation, to a question on how to translate the term "remedy" into German, at: www.margaret-marks.com/Transblawg/archives/000334.html (Oct. 2007). See also, more generally, DAVID R., *supra* note 2.

[10] See *e.g.* TERRE, F., SIMLER P., LEQUETTE Y., *Droit Civil – Les Obligations* (5e éd., 1993), who deal with the duty to make reparation in case of breach of contract under the heading of "*La responsabilitè contractuelle*", which includes also a discussion of both the elements of contractual responsibility and limitations on it. Id., at 404-494. The authors' thorough – but isolated – discussion of tort liability (*responsabilité civile*, pp. 495-666) represents the same mixture of substantive and remedial law.

[11] A sharp criticism of the disconcerting categorization used by conventional French scholarship in dealing with remedies for breach of contract, and recommendation to make use of the Common Law's approach was expressed in an influential article by TALLON D., "L'inexécution du contract: Pour une autre présentation" 1994 *Revue Trimestrielle de Droit Civil* 223 (1994).

[12] I discuss the continental arrangements *infra*, text to notes 37-38. For a more detailed survey see ADAR Y. & SHALEV G., "The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience" 23 *Tulane European and Civil Law Forum* 111, 115-131 (2008).

remedies seem to agree that there should be – and to a considerable extent there already is – a unified 'law of remedies'. Thus, on the theoretical level, there seems to be willingness to accept the law of remedies as an independent field of legal knowledge. On the practical level, however, Charles Wright's assertion, in a pioneering work on remedies written more than fifty years ago, that "the most important thing to say [about the law of remedies] is that there is no law of remedies"[13] seems to hold true even today.[14]

On the other side stands the Civilian tradition, in which the exactly opposite tension between theory and practice is observed: Here, on the theoretical level, there has usually been no general recognition of the existence of an integrated "law of remedies". However, in practice, there has been wide willingness on the part of legislators and courts to unify the remedial principles governing the consequences of breach of civil obligations.

As will be demonstrated in Part IV, the new Israeli Reform of the law of remedies takes inspiration from both traditions, by combining Anglo-American academic thought with Continental legislative experience.

3. Israeli Civil Law – Comparative Legal Engineering

3.1. A Theory of Civil Legislation – Some Guiding Principles

Israel is a relatively young legal system. The development of Israeli law, especially private law, has, since its very inception, been characterized by influences of both Common Law and Civil Law traditions.[15] In large part, this is due to a political decision made by the founders of the State of Israel.

[13] WRIGHT C.A., "The Law of Remedies as a Social Institution" 18 *Un. Det. L.J.* 376, 376 (1955).

[14] A similar conclusion was recently reached by Australia's number one remedies expert who described the state of the law of remedies in that country in these words: "...there is no consideration of the law of remedies as such in the authoritative sources of Australian law. However, there is increasing treatment of remedies as a legal subject in its own right in law schools across Australia. This, in turn, has generated an academic literature with texts and casebooks devoted to the subject. It is too early to say what the effect will be on the authoritative sources of the law, but this may form one of the leit-motifs of the twenty-first century." TILBURY M.J., & Davis G., *supra* note 5, at 1722.

[15] And to a lesser extent by Jewish law, which plays a central role mostly within Israeli Family law and the law of Succession. For discussions of the Israeli system as a mixed jurisdiction see *e.g.* TEDESCHI G. & ZEMACH Y.S., "Codification and Case Law in Israel" in *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions* 273 (J. DAINOW ed., 1974); SHALEV G. & HERMAN S., "A Source Study of Israel's Contract Codification" 35 *Louisiana L. Rev.* 1091 (special issue, 1975); RABELLO A.M., "An Introduction to the New Israeli Private Legislation: Harmonization of Common Law and Civil Law" 565 in *European Legal Traditions and Israel* (M.A. RABELLO ed., 1994). As regards public law, this dual influence is less clear.

The reinstatement of the Jewish State in 1948 roused the question how to react to the dramatic political change. The answer became evident very soon: the strategy to be adopted would be based on two apparently contradicting ideas: First, Israel should strive to develop an independent legal system, based on the values of Israeli society and free from subordination to the sources of law imposed by previous rulers (mainly the British Mandate and the Ottoman empire). Second, this process must be carried out not in a revolutionary way, but rather through a careful and continuous process of evolution. Such a process will prevent legal and political instability, and at the same time will enable the legislator to invest time and effort in preparatory works necessary for the establishment of original legislation.

And indeed, at least as far as private law is concerned, this legal engineering strategy was strictly adhered to. For more than 30 years, until its final abolition in 1984, provisions of the Ottoman Civil Code (known as the "Majalle") were still in force, and such was the case with another provision that dictated reliance on English precedents to fill gaps in the legislation.[16] Indeed, one important field, namely tort law, is governed to this very day by a mandatory act, and based almost completely upon the English Common Law principles and doctrines.

However, at the same time, from the late fifties and throughout the sixties and seventies, the Knesset began enacting a large number of statutes covering most areas of civil and commercial law. As of today, property law, the law of restitution, the law of succession and most of the law of contracts are all governed by original statutory arrangements.

Much has been written in Israel over the years on the gradual development of the Israeli civil legislation and on the vision of this 'piecemeal legislation' turning into an integrated civil code.[17] In this context, it will suffice to stress a few salient characteristics of this body of legislation. In my view, these features represent a set

For example, Israeli constitutional and administrative law has evolved almost completely as case law, and was heavily influenced by English, American and more recently also Canadian law.

16 The Palestine Order in Council [1922], sec. 46. This provision was abolished in 1980, by the statute on "The Elements of the Law" (1980), sec. 2.

17 See *e.g.* BARAK A., "Towards Codification of the Civil Law" 3 *Tel Aviv University Studies in Law* 5 (1973) (in Hebrew); YADIN U., "The Succession Law as Part of the Israeli Civil Law Legislation" 3 *Tel Aviv University Studies in Law* 26 (1973) (in Hebrew); BARAK A., "The Independence of the New Civil Codification: Risks and Opportunities" 7 *Mishpatim* (*Hebrew Un. L. Rev.*) 15 (1976) (in Hebrew) (hereinafter Barak, "Independence"); YADIN U., "Towards the Codification of the Civil Law in Israel" 6 *Tel Aviv University Studies in Law* 506 (1979) (in Hebrew); BARAK A. "The Codification of Civil Law and the Law of Torts" 24 *Isr. L. Rev.* 628 (1990); See also, more recently, RABELLO A.M., *supra* note 15; RABELLO A.M. & LERNER P., "The Project of the Israeli Civil Code: The Dilemma of Enacting A Code in A Mixed Jurisdiction" in *Liber Amicorum Guido Alpa – Private Law Beyond the National Systems* 771, 776-772 (2008).

of principles of legislation. Together, it is submitted, they may be viewed as establishing a "theory of legislation" lying behind most of Israeli statutory law, at least in the core fields of private law. As we shall see later, these principles play an important role in the consolidation of the proposed reform of law of remedies.[18]

3.1.1. Completeness

A salient feature of the Israeli civil legislation is that the numerous statutes were enacted along the years with the explicit intention of integrating them in due course into a single comprehensive civil code. Although they are independent from each other and cover different areas (land law, restitution, general contract law, agency, trust, lease, sale, guardianship, succession, etc.) their style carries significant similarities, which testify to their common role as building blocks in a future codification.[19] In this respect, Israeli civil legislation clearly follows traditional patterns of systematic European codification, rather than the typically peripheral character of private law reform in most Common Law systems.[20]

3.1.2. Simplicity

Simplicity is another feature of the Israeli legislation in the core fields of private law. The various statutes that have been enacted by the Israeli legislator are usually simple in terms of both their inner structure and their language. Most of them are comparatively short and manageable, a few of them containing less than a dozen articles.[21] The provisions themselves are usually phrased in a clear and concise language, which makes them accessible to judges, lawyers and law students.

3.1.3. Judicial Discretion

A further visible characteristic of Israeli civil legislation is the wide use of 'open-ended' terms such as "reasonable", "just", or "appropriate in the circumstances of the case". These terms, coupled with the typical reluctance of the legislator to provide definitions to basic legal terms, leave wide space for judicial creativity and discretion.[22]

[18] See *infra,* part four.

[19] "While a code as a single work does not exist, the different laws can be seen as a basis for a future code or as a component of the code." RABELLO A.M. & LERNER P. *supra* note 17, at 773.

[20] For a discussion of the continental influences on the Israeli legislation, especially in the area of contract law, see *e.g.*, SHALEV G. & HERMAN S., *supra* note 15, esp. at 1097-1101. See also, more generally, RABELLO A.M., *supra* note 15.

[21] Extreme examples are the statute dealing with Gifts (8 articles), and the one on Unjust Enrichment (7 articles). On this characteristic of the civil legislation see *e.g.* RABELLO A.M. & LERNER P. *supra* note 17, at 775: "The legislative style at the time was brief and concise. [...] Brevity to this day remains the chosen style."

[22] Compare SHALEV G., "Introduction to the Law of Contract" in *International Encyclopedia of Law – Israel* 23 (1995), stating that despite the fact that the new legislation changed the distribution of functions between the judiciary and the legislature, "...as a result of many broad

In this context one must mention the explicit recognition in Israeli Law of the duty of good faith and fair dealing in the performance of obligations and the enjoyment of rights. This principle has been liberally and frequently applied by the judiciary not only within contract law, where it is formally anchored, but in other branches of civil and commercial law as well. The formal adoption of the good faith principle has thus added a remarkable degree of flexibility to Israeli private law.[23]

3.1.4. Comparative Research

Another feature of the civil legislation discussed here is its heavy reliance on foreign legal sources. Continental codifications, Common Law judge-made doctrines, and international conventions were all referred to and examined during the preparatory works for each statute. These mixed influences – of both substance and style, are reflected in most of the civil legislation of Israel.[24]

3.1.5. Originality

Finally, the Israeli civil legislation is original. Inspired as it were by foreign institutions and doctrines, it did not attempt to imitate them. In many instances, though using a well-known concept or doctrine, the statute will offer a substantially different rule or principle. Often the solution will reflect an original mixture of continental and Common Law perceptions. At other instances it will reflect neither of the traditional approaches. In every case the main effort would be to design a rule that would be compatible with the contemporary values of Israeli society.[25]

It is time to turn now to the examination of the Israeli law of remedies, as it stands today. Here, a sharp distinction must be immediately drawn between remedies for breach of contract, and remedies for the commission of torts.

expressions, scattered throughout this legislation, ample scope has been left for judicial law-making."

[23] The role of good faith in Israeli contract law is explored by SHALEV, ibid., at pp. 37-39, 51-56. The principle of good faith was applied by the Supreme Court of Israel to other branches of private law, and even to public law contexts. For a critical exposition see SHALEV, G., "Good Faith in Public Law" 22 *Isr. L. Rev.* 127 (1983).

[24] For these influences see generally: RABELLO, A.M. & LERNER, P., *supra* note 17, at 782, and the sources cited therein, at note 52; SHALEV G., "Contract Law", ch. 6 in *Introduction to the Law of Israel* 113-114 (A. SHAPIRA & K.C. DEWITT-ARAR eds., 1995).

[25] On the independence of the Israeli legislation see, in general: SHALEV G., "From Common Law to Independence: Supreme Court Decisions on Contract Law in 1975" 2 *Tel Aviv University Studies in Law* 33, 33 (1976): "...Israeli contract law is now in a process of transforming from a Common Law system, both in substance and technique, into a system of independent and codified law." See also FRIEDMAN D., "The Independent Development of Israeli Law", 10 *Isr. L. Rev.* 515 (1975). See also BARAK, "Independence", *supra* note 17.

3.2. The Remedies Statute – Applying the Theory in the Field of Contract Remedies

Remedies for breach of contract are governed, in our legal system, by an original statute named the Contract Remedies Statute of 1970 (hereinafter the "Remedies Statute"). As far as technique and style are concerned, the Remedies Statue clearly reflects continental influence. By establishing a simple and systematic mechanism through which all contractual disputes over remedies should be resolved, it represents the legislator's intention of achieving coherence and completeness of the field of contractual remedies.

The Remedies Statute is comparatively short (25 articles) and is divided into three chapters. The first chapter ("General Provisions") contains only two articles, the first of which provides a set of definitions to some basic terms used by the statute, such as "Breach", "Damage" and the remedy of "Enforcement". Article 2 announces the entitlement of the aggrieved party to the basic remedies of Enforced Performance, Compensatory Damages and Termination, and clarifies the interrelation between them. The second chapter of the Statute elaborates on each of the three remedies mentioned in article 2 and sets the principles for their application. Finally, in the third chapter ("Miscellaneous") several important issues are discussed (in articles 17 to 20), such as rules on anticipatory breach,[26] frustration of the contract, and the self-help remedies of lien and set-off. The last five articles (21 to 25) are of secondary importance and deal mainly with matters of jurisdiction and procedure.

From a substantive point of view, the Remedies Statute reflects a true mixture of Civil and Common Law approaches. This is not surprising given that it was strongly inspired by the 1964 Hague Convention on the International Sale of Goods,[27] which in itself reflects a compromise between Common Law and Civil Law principles. For example, a Civil Law approach was clearly adopted with respect to the remedy of enforced performance. This remedy was defined in the statute as the first right of the aggrieved party, in stark contrast to its prior status as a secondary and equitable remedial right. On the other hand, the basic provisions

[26] For a discussion of this concept see SHALEV G., "Remedies on Anticipatory Breach" 8 *Isr. L. Rev.* 8 (1973).

[27] Convention relating to a Uniform Law on the International Sale of Goods (Hague, 1964). The official text of the ULIS convention is available at: www.unidroit.org/english/conventions/c-ulis.htm (25.11.08). This convention was later replaced by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), available at: www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (25.11.08).

governing the award of compensatory damages and the remedy of rescission strongly resemble traditional Common Law solutions.[28]

In retrospect, one may confidently affirm that the Remedies Statute has been very successful in achieving its purposes. Since its enactment almost 40 years ago, it has been the basis for awarding remedies in nearly every contractual dispute, commercial and non-commercial alike.[29] Indeed, as we shall soon see, the structure and style of this original statute serves today as the basis for the Remedies Section in the Israeli Draft Civil Code.

3.3. Remedies for Torts – A Deficient Common Law Framework

Turning now to the law of remedies for torts, the first thing to note is that unlike the areas of contracts and restitution, the whole area of tort law is governed to date by the Torts Act. This piece of legislation was enacted by the British Mandate prior to the establishment of the State of Israel, and was meant at the time to serve in the hand of the colonial judiciary as a statutory version of the English Common Law of Torts. Thus, unlike other areas where the influence of English law has gradually waned and disappeared, tort law has kept the particular characteristics of the English Common Law, albeit in a form of a static statutory scheme.[30]

Although it contains a separate chapter (Chapter 5) on "Remedies for Wrongs", the Torts Act is found lacking, especially with regard to damages, which are regulated under a single provision (art. 76). Furthermore, in certain contexts the remedial provisions of the Act do not conform to Common Law principles. This has led to contradictory interpretations and in a few cases has even brought the judiciary to ignore the relevant provisions, adopting instead a more traditional Common Law approach.[31]

[28] For English law's influence on the Remedies Statute see *e.g.*, SHALEV G. & HERMAN S., *supra* note 15, at 1101-1103. For a detailed overview of the provisions of the Remedies Statute see SHALEV G., *supra* note 22, at 100-123.

[29] The Remedies Statute is applied regularly in Labor disputes, and in cases involving consumer and standard form contracts.

[30] For an authoritative overview of the historical background of Israeli Tort Law see: GILEAD I., "The Evolvement of Israeli Tort Law from its Common Law Origins" in: *European Legal Traditions & Israel* 523 (A.M. RABELLO ed., 1994).

[31] For example, the remedy of injunction, according to the bare language of article 74, should be granted as of right, unless a number of conditions are fulfilled. However, the courts have generally ignored the language of the statute, adopting the Common Law restrictive approach to this remedy, and defining it as an equitable remedy, subject to the broad discretion of the court. Another example is article 76, which states in clear language that damage is not compensable unless it is both direct and flows naturally from the wrong. Notwithstanding, Israeli courts have usually regarded foreseeability as the only relevant requirement, thus completely ignoring the language of the statute.

All in all, therefore, the Israeli law of remedies for torts has developed in a very different way than the Israeli law of remedies for breach of contract. While the latter was subject to a simple unified set of statutory rules which clearly reflected a civilian approach, the former developed under a somewhat chaotic mixture of statutory and judge-made law, which was structured and interpreted according to Common Law principles.

Given these fundamental differences, it may be understandable that law schools and the legal literature in Israel have devoted little attention and energy to the comparative examination of civil remedies. It is therefore not difficult to see the dramatic nature of the recent proposal of the ministry of justice to legislate a civil code, and within it to unify the whole field of civil remedies. The remainder of the article will be dedicated to a brief presentation of this development.

4. Legal Engineering in the 21st Century – Codification and Unification of the Law of Remedies

"Remedies for Breach of an Obligation" – is the title of the section on remedies in the Israeli Draft Civil Code. The final draft was promulgated two years ago.[32] The object of this section, which forms the last section in the Book on "Obligations", is to create a unified and comprehensive statutory scheme for awarding remedies in all branches of private law (civil and commercial).

The intent of this innovative – and controversial – project is to create a unified law of civil remedies. This is evident from both the name of the section as well as from the fact that it applies to any civil wrong (torts, breaches of contract, and any other kind of civil wrong). The underlying theme behind this move is the idea that rules and principles that govern remedies should not base themselves on formal distinctions relating to the origin of the primary right violated (contract, tort, trust, property, etc.). Rather, they should be based on the specific purposes, policies and problems which are typical to each of the various forms of relief.

For example, the sub-section on compensatory damages, which is the most detailed part of the section, opens with a statement of a few general principles, which are applicable to the assessment of all kinds of wrongful damage (damage to property, bodily injury, non-pecuniary loss, pure economic loss). It then goes on to distinguish between various categories of damage, defines typical heads of damage within each category, and states the rules applicable to each of them. This

[32] A Hebrew version of the official draft civil code (from 20/6/06) is accessible at: www. justice. gov.il/NR/rdonlyres/DA9B2F1E-AC78-491A-83EA-38F691A4C53E/0/Hok.pdf (25.11.08). An earlier version was published by the Ministry of Justice in 2004, in order to enable the public to relate to the proposal before handing it over to Parliament.

is done with no reference at all to the traditional classification of the wrong from which the damage originated.[33]

In the same vein, the chapter adopts doctrines that were traditionally considered "tortuous" (like punitive damages) or "contractual" (like anticipatory breach or "*astreinte*" – the French deterrent injunction) and applies them more widely so that they can play a role, at least potentially, outside their traditional "homeland".

I believe that this law reform is a clear example of legal engineering, and also, a welcome one, for two reasons. First, on the substantive level, as I have explained elsewhere, I believe that unification of remedial rules is both possible and desirable.[34]

Second, and more importantly in the context of this article, this reform is a good example of legal engineering, since it reflects sensitivity to the theory of civil legislation which developed in Israel over the years. Indeed, the proposal seems to have been designed carefully, taking into account the five principles or policies discussed earlier:

First, in covering the whole field of remedies, the chapter fulfills the principle of completeness. By unifying and codifying the statutory, as well as much of the judge-made rules that developed over time, it creates a comprehensive infrastructure that will be relevant to the resolution of almost any civil dispute.

Second, although comparatively elaborate, the chapter is still manageable in size. It includes 54 articles, and preserves the basic structure – and many times also the simple language – of the Remedies Statute. Thus, the tenet of simplicity is also being abided by.

Third, while much more detailed than existing statutory law, especially in the area of damages, the new chapter still reflects the need for wide judicial discretion in the administration of remedies. For example, the court's authority to deny the remedy of enforced performance (which includes injunctions to prevent or redress a tort) has remained unfettered, as well as the authority to control, under certain conditions, the plaintiff's choice of the form of reparation. Furthermore, some remedies, such as punitive damages and the deterrent injunction ("*astreinte")*, are left wholly to the discretion of the court.

[33] For a detailed survey of the main innovations of the proposal see SHALEV G. & ADAR Y., "Remedies for Breach of an Obligation: A Look on the Remedies' Section of the New Israeli Civil Code" 6 *Kiryat Ha'Mishpat* (OAC L. Rev.) 185 (2006) (in Hebrew).

[34] I elaborate on the feasibility and desirability of the Israeli reform in ADAR Y., "Why Unify Contract and Tort Remedies? – A reply to Professor Dagan" 36 *Mishpatim* (*Hebrew Un. L. Rev.*) 357 (2006); ADAR Y., "Of the Honey and the Sting: Reflections on Remedies and the Draft Civil Code", 5 *Mishpat Ve'Asakim* (*IDC L. Rev.*) 347 (2006). Both articles were published in Hebrew.

Fourth, the proposal clearly reflects awareness and willingness to learn from foreign developments – in both the Common Law and the Civil Law systems, in the area of remedies.[35] Starting with Common Law influences, it seems that the very willingness to treat the whole area of remedies as an autonomous legal field was inspired by the wide support for this idea in Anglo-American legal scholarship.[36]

At the same time, civilian influence is also clearly present, and perhaps even more obvious. As noted above, although civilian tradition lacks any widely accepted general theory of remedies, the idea of unifying the treatment of civil remedies is far from being foreign to it. It is true, the most influential civil codifications, namely the Code Napoleon (1804) and the German BGB (1900) did not dedicate a separate part to the treatment of remedies, and did not use the concepts of either "Breach" or "Remedy". However, later codifications such as the 1899 Spanish *Código Civil* and the 1911 Swiss *Code Des Obligations* do reflect attempts to unify the rules concerning remedies for breach of obligations, and to certain extent even the rules for assessing damages in tort and contract. The move towards harmonization was followed partially by the Civil codes of Italy (1942) and Portugal (1967), which treat contractual and delictual liability separately, but nonetheless unify some of the rules on damages.[37] However, the most vigorous attempts to unify and codify the law of remedies are manifested in the new codifications of the Netherlands (1992) and the Canadian Province of Quebec (1994). Both of these codifications include detailed sections that unify most of the rules for awarding and assessing remedies. Also worth mentioning here is the 2002 reform of the BGB which simplified and reorganized the remedial provisions of the German code, recognizing a new concept of "breach of duty" (*Pflichtverletzung*) and a general principle of compensation for such a breach. These examples of unification clearly inspired the Israeli reform, and contributed to the confidence that such dramatic change of structure is not only theoretically desirable, but also practically feasible.[38]

[35] This is characteristic of Israeli codification as a whole. See *e.g.* RABELLO A.M. & LERNER P., *supra* note 17, at 782: "The ideas and concepts imported from different legal systems are clearly noted in the Israeli codification".

[36] See *supra*, text to notes 6-8.

[37] See correspondingly art. 1218-1229, 2056; art. 562-572.

[38] A final comparative remark must go to the recent efforts of leading European and Non-European scholars to unify and harmonize private law principles, and with it the area of remedies. These efforts are witnessed in the 1994 & 2004 Unidroit Principles for International Commercial Contracts (PICC) the 1995, 1999 & 2003 Principles of European Contract Law (PECL), the 2005 Principles of European Tort Law, all of which contain separate chapters dealing with remedies (these documents are available, correspondingly, at: www.unidroit.org/english/principles/contracts/main.htm (25.11.08); frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm (25.11.08); www.egtl.org (25.11.08); Yet, all of these important documents focus exclusively on either the contractual or the delictual sphere and as such do not attempt to unify civil remedies on a more general level.

Fifth and finally, the proposed reform is no doubt original. In Israeli terms, it is no less than a ground-breaking development. It represents a fundamental change in the formal structure of Israeli private law. By assembling the numerous remedial rules governing the award of remedies in the various fields of civil law together under one framework, the draft creates a "law of remedies", a distinct legal field previously not recognized in Israeli jurisprudence.

Furthermore, the proposal seems to be innovative even on an international scale. The main innovation is reflected in the fact that the draft defines the term "Obligation" in a very broad and non-traditional way. It provides that:

> "Within this chapter, a duty to refrain from committing a wrong shall be treated as an obligation."

One can see that in the draft, the term "Obligation" may encompass any legal duty correlative to a legal right, i.e., not only rights *in personam* (such as contractual duties, duties of restitution, or duties of compensation under tort law) but also rights *in rem* (such as the typical legal interests protected by tort law and property law). Under the new definition, any infringement of a legal right is considered a breach of an obligation and as such gives rise to the remedial rights provided for by the statute.[39]

To conclude, the remedies section in the Israeli Codification attempts to influence – and change – the way we think about private law. Its objective is to create a unified and comprehensive, but in the same time simple and manageable statutory scheme for awarding remedies in all branches of private law (civil and commercial). Only time will reveal to what extent, if at all, this project had been successful. I do believe, however, that it can facilitate the access to this complex area of the law, and improve our understanding of it. In the meantime, it may serve as an example of the way in which even in the 21st century legislation can improve and facilitate the access to the law and its administration, as well as our understanding of it.

Far from being perfect, I believe that the current reform of the Israeli law of remedies reflects a lucid example of legal engineering. I hope that the acquaintance

Such an attempt was made by the recent 2008 DCFR (Draft Common Frame of Reference, accessible at: http://www.law-net.eu/en_index.htm (25.11.08). This document does propose a unified chapter on "Remedies of Non-Performance" of any kind of obligation ((chapter 3 in Book III on "Obligations and Corresponding Rights"). However, this move towards unification is still partial, since the chapter does not cover the whole area of remedies for torts. This area is treated separately in a chapter 6 ("Remedies") of Book VI that deals with "Non-Contractual Liability". As will we shall see shortly, this is a point where the New Israeli Codification goes one step further, by formally uniting the remedies in contract and tort.

[39] It seems that this concept of "breach" is not dissimilar to the German concept of *Pflichtverletzung*, introduced by the new law reform of the law of obligations in Germany. See *supra* text preceding note 38.

with this legal experiment in the field of remedies may serve as a source of inspiration for efforts to advance, harmonize and reform contemporary private law.