Codification and Legal Culture: In Comparative Perspective

Daphne Barak-Erez*

I. CODIFICATION AND LEGAL REFORM

In modern legal systems, legal reforms are introduced through legislation. When the legislative reform is comprehensive and professes to encompass an entire legal field, it is customarily defined as "codification," and its "product" as a "code." The new code tends to be accompanied by hopes that once liberated from the constraints of the "old" law, a fresh start will be possible. The new code will supposedly be clear, rational and systematic. In this article, I intend to cast doubt on the realism of these expectations about new codes, and ask whether codification does indeed have the potential to transform legal systems and "liberate" them from old traditions.

The codification "test-case" addressed in this article, relatively in great detail, is the transformation of Israeli civil law (mainly, contract law) during the sixties and the beginning of the seventies.[1] A generation has elapsed since the statutory reform of what is customarily described in Israel as the codification of civil law, and the extent and significance of the resulting changes can already be evaluated. My aim is not only to understand the development of Israeli law as such, however, but to evaluate the role of codification

* Faculty of Law, Tel-Aviv University.

1. In the course of time, the Knesset (Israeli Parliament) has enacted statutes that define the basic principles of Contract Law: Contracts Law (General Part) 1973 and Contracts Law (Remedies for Breach of Contract) 1970, as well as many specific laws applicable to various contracts, including Agency Law, 1965; Bailees Law, 1967; Guarantee Law, 1967; Gift Law, 1968; Sale Law, 1968; and many others, which together form a new statutory scheme for this field.

and legal culture in legal reform, as a whole.[2] Comparative legal research emphasizes the importance of the legal culture, as well as that of cultural background in general. But, most discussions focus on the relevance of cultural differences in comparisons between systems with strikingly different cultural backgrounds - Western legal systems as opposed to non-Western ones (Asian, Islamic and African).[3] In this Article, I intend to stress the importance of the underlying legal culture even when analyzing reforms within the frame of the so-called Western legal world (the Israeli codification purportedly implied a shift from the prevailing English influences toward the adoption of continental, Romano-Germanic influences as sources of inspiration).

II. THE LEGACY OF CODIFICATION

A discussion of current codification requires some acquaintance with the history of this development. Originally, codification was part of the history of European law, following the tradition of Roman law and the model of the Codex Justinianus (6th century A.D.). Roman law was the model for the study of law in Europe even after the decline of the Roman empire, and European law thus inherited a tradition of legal thought based on organised and systematic texts.[4] Yet, modern codification in Europe was not only the result of ancient tradition, but also of historical and political developments beginning in the eighteenth century. Culturally, the codification movement was a product of the Enlightenment, which emphasized rational and scientific thinking, and aimed to create rational, organised, and systematic legal texts. Politically, the French Revolution played a significant role in the rise of modern codification. Its ideology mandated legal reform aimed at creating an egalitarian normative order, which abolishes differences between legal subjects based on social status, property, etc. The accomplishment of these goals was understood to necessitate a new legal code, simple and systematic. This aspiration was fulfilled in 1804, through the legislation of the Code Civil, also known as Code Napoleon. This code proved successful due to its clear drafting and its effective "promotion" via

---

2. In this sense, I support the use of comparative law not only in the traditional sense of doctrinal comparison, but also as a source of insights for understanding the relationship between law and culture. For a survey of new approaches to comparative law, see Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221 (1999).

3. *See* M. Van Hoeke & M. Warrington, *Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law*, 47 I.C.L.Q. 495 (1998).

4. *See* J.H. MERRYMAN THE CIVIL LAW TRADITION 7-14 (1969); R. DAVID & J.E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 36-52 (3d ed. 1985).

the Napoleonic wars. Yet, even after the French withdrawal from conquered lands, the Code Civil was not necessarily abolished, as it was considered useful, and was also perceived as bearing the egalitarian message of the French Revolution. Another branch of European codification developed in Germany, based on the scientific study of the Roman law then prevalent in the country. The result of this tradition was the German Civil Code (B.G.B.), valid since 1900. It suggests a version of codification slightly different from the French one—more detailed and more scientifically oriented. A further catalyst of the codification movement in several countries was the rise of nation-states, which had begun before the nineteenth century but gathered strength during it. Codification was considered an important dimension of a national, unified legal system.[5]

Against this background, both ancient and modern codification can unquestionably be regarded as a continental phenomenon. Later, however, the discussion of codification extended beyond European systems. Occasionally, initiatives emerged to incorporate the achievements of codification into systems originating in the English tradition of common law. As is well-known, English law is based on a totally different method of study and decision. The English common law tradition is based on precedents, which develop dynamically, and do not necessarily create a closed and systematic corpus. Thus, answers to legal questions are devised by learning related precedents and applying them to the new case at hand. In other words, the tradition of codification has been a rival, or at least an alternative, to the common law tradition. Therefore, for many years, codification was given no foothold in English law, although it had some prominent advocates, like Bentham, who criticized the inefficiency, the lack of clarity and the cost of a method of decision based on a huge and unorganised set of precedents.[6] Tradition, however, proved more powerful than its critics. Generally speaking, English jurists were suspicious of, and even hostile to, suggestions to codify English law. The majority of them resisted and feared deserting tradition for a reform that might fail, and tended to be skeptical regarding the potential of codification to simplify decision

---

5. *See* J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 262-65, 311-13, 320-25 (1992); Merryman, *supra* note 4, at 27-34; DAVID & BRIERLEY, *supra* note 4, at 63-67; R.L. Warthen, *The Non-Emergence of the Anglo-American Law Code*, 6 (1/2) LEG. REF. SERV. Q. 129, 134-36 (1986). For a more elaborate discussion of major continental codes, see K. ZWEIGERT & H. KÖTZ, INTRODUCTION TO COMPARATIVE LAW (3d ed. 1998), especially the Code Civil (at 85-118) and the B.G.B. (at 143-56).

6. D. Alfange, *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58 (1969).

making. This debate was renewed with the legislation of the Law Commissions Act 1965, which was aimed at law reform, including reform through codification. In its first years, the Law Commission began working on an English contract code, but this project was later abandoned and the Law Commission started to work on the concrete reform of several doctrines.[7]

The prospects of codification were ostensibly better in the United States, on the assumption that newer legal systems are more "open" to external influence. Contrary to expectations, however, tradition was deeply entrenched in American legal culture. Suggestions to codify American law were usually strongly resisted and, in any event, failed to bring about any significant changes in American law. Some states did legislate "codes," but these tended to be only consolidations of existing legal principles rather than codifications in the continental sense.[8] In the few cases where state codes went beyond a mere compilation of current legal rules, they did not lead to significant changes. On the contrary, they surrendered to legal tradition, in the sense that they were interpreted so that they were absorbed into American common law.[9] At least during the nineteenth century, codification remained a marginal phenomenon in American law. In the twentieth century, the question of codification was raised anew, because the number of precedents had turned into a more serious practical obstacle for efficient decisionmaking. This problem called for a solution, although not necessarily in the form of "pure" codification, and one of the answers was the Restatement project,

---

7. For the codificatory debate in England, see M. Kerr, *Law Reform in Changing Times*, 96 L.Q.R. 515 (1980); Warthen, *supra* note 5, at 136-46; H.R. Hahlo, *Here Lies the Common Law: Rest in Peace*, 30 M.L.R. 241 (1967); L.C.B. Gower, *A Comment*, 30 M.L.R. 259 (1967); A.L. Daimond, *Codification of the Law of Contract*, 31 M.L.R. 361 (1968); H.R. Hahlo, *Codifying the Common Law: Protracted Gestation*, 38 M.L.R. 23 (1975).

8. For the marginality of state codifications in the United States, see Warthen, *supra* note 5, at 146-50. Louisiana, under strong French influence, is an exception. *See* R. Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law*, 56 TUL. L. REV. 477 (1982); V.V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221 (1988).

9. An interesting example in this context is the model code prepared by Dudley Field for the State of New York. This code faced very strong opposition in New York, and was not enacted there, although it was adopted in several other states. For the history of the Field Code, see Warthen, *supra* note 5, at 150-53; R. Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799 (1986). Among other states, the Field Code was enacted in California and was considered a very important contribution to the development of law in California at the time. *See* L. Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994). California courts later adopted the view that the code is merely a compilation of common law precedents, and it was eventually mergedinto common law tradition. *See* I. Englard, Li v. Yellow Cab Co.—*A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4 (1977).

which consolidated and systematised the principles of American common law. Unlike "real" codificatory legislation, the Restatement was not binding law and lacked any formal normative status, but the quality of the product, together with considerations of convenience made the Restatement a leading source for the development of common law.[10] Another American project of this century, the Uniform Commercial Code (U.C.C.), could be viewed as a codification in the original sense of this term as well, but again with some reservations. The U.C.C. parted ways with common law tradition and tried to create a complete normative scheme (which was intended to have also the additional advantage of unifying state laws).[11] However, even the U.C.C. did not lead to significant changes in American legal culture. Its formal normative status was contingent on its enactment in the various states. The vast majority of the states did indeed adopt the U.C.C. by legislation but, from this point onward, it was binding as state legislation, and every jurisdiction developed different interpretations of the unified text.[12] In addition, like previous American codes, the U.C.C. was also interpreted in light of the common law tradition, and thereby lost some of its uniqueness.[13]

III. CONDITIONS FOR CODIFICATION

This "brief history" suggests some conclusions that may be relevant in any discussion about the prospects of future codifications. More specifically, one conclusion is that the success of codification in bringing about legal reform is contingent on both "internal" and "external" conditions. The internal conditions are the legal features of the legal text—mainly, its being systematic and broad in scope. But these features are not enough, and they need to be supported by external conditions as well, mainly by the history of the legal system and the underlying cultural background.[14] Modern codification

10. *See* Warthen, *supra* note 5, at 154-55. Although the *Restatement* is not a code in the original sense, some writers use the term codification in relation to it, probably because of the systematic organisation of the *Restatement*, which is usually characteristic of codifications. *See* J.B. Kelly, *The Codification of Contract Law in the Twentieth Century*, 88 DICK. L. REV. 289 (1984).

11. S. Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125 (1982).

12. Warthen, *supra* note 5, at 153-54.

13. W.D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231 (1995).

14. For a broader discussion of the historical and cultural backgrounds that support codification, see M. Damaska, *On Circumstances Favoring Codification*, 52 REVISTA JURIDICA DE

succeeded in Europe because of the legacy of Roman law, and also due to certain political developments. In contrast, it did not become a central force for change when the legal community did not support codification, even when a new law was legislated in codified form. In this context, the most crucial support is that of the judiciary, although assuming that judges are trained within a broader legal community, judicial openness is one more trait of the local legal culture.

IV. THE SO-CALLED CODIFICATION OF ISRAELI CONTRACT LAW

As noted, Israeli contract law was legislated during the sixties and the beginning of the seventies. Reforming civil law in Israel, mainly contract law, had long been understood to be vital. Until then, the legal doctrine in these areas had been a problematical combination of Ottoman legislation and common law doctrines incorporated during the British mandate in Palestine.[15] The need for reform, then, was not a controversial issue. But when the new Israeli contract laws were enacted, they were not only perceived as leading to the long awaited reform of contract law but also as establishing a method of codification in Israeli law. Aharon Barak, one of Israel's most prominent legal scholars and currently the Chief Justice, defined the new contract laws as part of the "new Israeli code."[16] Drafting the civil code all at once was difficult for pragmatic reasons and, therefore, it was enacted chapter by chapter. But this gradual method was not thought to reflect any change in the aspiration to move from a common law tradition to a codificatory tradition. Barak's argument supporting the codificatory nature of the new contract laws relied on the text of these laws, many of which bore the traits of codificatory texts—systematic organization, generality, and so forth. He was not inclined to discuss the external conditions for codification, in the sense explained before. Had these conditions been analyzed at the time, it could have been argued that, on the face of it, the prospects of codification were better in Israel than in England or in the United States, because common law tradition had prevailed in Israel for a shorter period. But the discussion of the background conditions should not be limited to the existence of obvious "rejection" factors. Rather, it should extend to include the existence of positive factors

---

LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 373 (1983); A.E. Anton, *Obstacles to Codification*, (1982) JURID. REV. 15.

15. *See* D. Friedman, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 ISR. L. REV. 192 (1975); D. Friedman, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324 (1975).

16. A. Barak, *Towards Codification of the Civil Law*, 1 TEL AVIV U. STUD. L. 9 (1975).

that can contribute to the absorption of the codificatory method into the legal culture. These factors will be the subject of a separate discussion below.[17]

V. ISRAELI CODIFICATION IN PRACTICE

Before delving into the specific characteristics of the Israeli legal culture which reflect a variety of influences, it may be interesting to look at the "products" of the new Israeli contract laws: the judicial precedents which interpreted this new legislation, and the academic articles published thereafter. The relevant question is how they were influenced by the so-called new codification.

Reading the relevant legal texts leads me to the conclusion that the new contract laws, despite their code-like style, achieved codificatory aspirations only to a limited extent. First, the courts did not relate to the new contract law as a closed system to be interpreted only according to the law's inner rationale. Rather, in contrast with the codificatory tradition, where the force of precedents is limited and decisions have to follow the rationale of the text, the courts followed judicial precedents. Moreover, when the courts rely (as they do quite heavily) on a comparative method, they are more open to the influence of legal systems in English-speaking countries, mainly due to the absence of language barriers. The result is that they are influenced mainly by sources different from those that inspired the drafting of the statutory text to be interpreted. In academic circles, the new legislation is not a substantial starting point for the discussion of legal questions. Usually, academic legal discussions seek normatively desired solutions, each scholar according to his or her worldview—be it utilitarianism, communitarian, etc. Existing legislation is usually viewed as a normative constraint that needs to be addressed, but its interpretation is inspired by views outside it. To some extent, the general mode of drafting the contract laws, described as a codificatory style, facilitates interpretation according to external views. It should also be noted that the "scientific" spirit of codification does not represent views prevalent in legal scholarship.

I would like to illustrate my general description of the mode of operation of the new contract laws with a few examples:

---

17. It may be mentioned, that Daniel Friedman, who argued for the interpretation of the new contract law in light of the precedents and experience accumulated before their enactment pointed out that they did not have an "ideology," in the sense that modern continental codification has had. *See* D. Friedman, *On the Interpretation of Modern Israeli Legislation*, 5 TEL-AVIV U. L. REV. 463, 467 (1977) (Hebrew). As noted, the circumstances of Israeli legal culture will be discussed below.

1. *Offer and acceptance*—The new contract legislation has adopted the long-established terminology of "offer" and "acceptance" to conceptualize contract making.[18] Since this is not an innovation the courts felt free to resort to common law precedents in this matter. Thus, the classic English precedent of *Carlill v. Carbolic Smoke Ball*[19] is still the leading precedent in this matter in contract courses. In practice, the recurring problem is that the concepts of offer and acceptance do not reflect the reality of contract negotiations. This is not a difficulty specific to the Israeli legal system, but the hope that codification would lead to a new law, simpler to use, was not fulfilled. As a result, courts still deal with this matter mainly through the application of precedents.[20]

2. *Defective Consent*—The new contract legislation defines situations in which defective consent creates grounds for a right to rescind the contract (such as mistake and duress).[21] These situations, however, are described in very general terms and, in practice, are interpreted by leaning heavily on the Anglo-American experience—as in such doctrines like economic duress[22] or mistake of law.[23] Discussions are outer directed and not necessarily looking inward to the codificatory text.

3. *Contract Interpretation*—The Israeli Supreme Court has often discussed the theory of contract interpretation. Justice Aharon Barak, in particular, has devoted a great deal of attention to the theory of legal interpretation.[24] The Court's discussion, however, has been highly theoretical, leaning toward Barak's idea of "purposive interpretation," and has hardly been inspired by interpretation clauses in the new contract legislation.[25]

4. *Contract Remedies*—According to the new contract legislation, enforcement and not damages is the prime remedy in contract law. In comparison to the traditional common law approach, this entails a significant change.[26] But many other issues about remedies, like reliance damages in the breach of an inefficient

18. *See* Contracts Law § 1 (General Part).
19. (1893) 1 Q.B. 950.
20. Leading cases in this matter are Rabinai v. Man Shaked, 44(2) 281; Botkovsky v. Gat, 44(1) 57.
21. Contract Law (General Part) §§ 14, 15, 17, 18.
22. Rahamim v. Expomedia Ltd., 43(4) P.D. 95.
23. Aroesti v. Kashi, 48(2) P.D. 513.
24. *See* A. BARAK, INTERPRETATION IN LAW (3 Volumes, to be completed to a series of 5).
25. The most significant precedent in this context is *State of Israel v. Apropim Ltd.*, 49(2) P.D. 265.
26. *Compare* A. Schwartz, *The Case for Specific Performance*, 89 YALE. L.J. 271 (1979).

contract,[27] or the use of the doctrine of cy-pres,[28] have not been clearly decided by the new laws and, in these matters, common law tradition still plays a significant role (at least, in the comparative work performed by the courts).

5. *Restitution and Unjust Enrichment*—The Israeli Supreme Court (following the writings of Daniel Friedman, a leading scholar in the field) decided that the law of unjust enrichment should be recognised as a source for additional remedies even when a contract governs the relationship between the two parties. Thus, it allowed the aggrieved party to sue the nonperforming party for the profits accrued through a breach (denying the concept of the "efficient breach").[29] Formally, this development does not necessarily contradict the codificatory ideology, since the Unjust Enrichment Law (1979) was legislated as part of the codification project. This legislation, however, relies strongly on English sources (unlike the continental legislation that inspired most of Israel's contract law). As a result, the remedial scheme in Israeli contract legislation is highly influenced by English and American law.

Shifting the analysis from specific examples to a general consideration of the legal precedents, the results of an empirical study are worth noting. According to this study, which canvassed forty percent of the published decisions of the Israeli Supreme Court, continental sources are hardly cited. In fact, the study pointed to a consistent decline in the number of continental sources quoted. Continental quotations are no longer central to contract cases, where the legal norm was formally inspired by continental sources.[30]

VI. THE EMERGENCE OF THE GOOD FAITH PRINCIPLE

As noted, "common knowledge" holds that the new contract legislation shifted the orientation of Israeli contract law from the English tradition of common law to the continental codificatory approach. The basis for this prevalent belief appears to be the incorporation of the good faith principle into the new contract laws.[31] This general principle, which was not known to common law tradition (outside specific doctrines like fraud and misrepresentation) plays a

27. Zukim Hotel Ltd. v. Netanyah Municipality, 46(4) P.D. 45.
28. Eshed v. Luber, 33(1) P.D. 13; Friends of Jerusalem Hotel v. Teik, 40(3) P.D. 169.
29. Adres Ltd. v. Harlo and Jones, 42(1) 221.
30. Y. Shachar et al., *Citation Practices of the Supreme Court, Quantitative Analyses*, 27 MISHPATIM 119, 153-57 (1996) (in Hebrew).
31. *See* Contract Law (General Part) §§ 12, 39.

most significant role in German contract law.[32] Since the enactment of the new contract laws in Israel, the courts have tended to make very broad use of this principle, which is indeed central to understanding current Israeli contract law and Israeli law in general.[33] Although I do not dispute these facts, they do not necessarily contradict the argument about the limited changes brought about by the new contract laws themselves. The good faith principle has indeed transformed Israeli contract law, but this does not substantiate an argument about the transformation of Israeli contract law by codification. On the contrary, the broad acceptance of the good faith principle made the so-called codified statutory scheme less important. The courts, when deciding contract cases by recourse to good faith, tend not to pay attention to the specific rules of contract legislation. It is now less important to decide whether a contract has been formed, because a way can be found to impose precontractual liability through reliance on the tool of good faith. In other words, an internal tension prevails between the wish to codify and the acceptance of a broad good faith principle. It may be added that the good faith principle is presently accepted in some part of the Anglo-American legal world as well. In the United States, it was first introduced by the semi-codification of the U.C.C.,[34] and later on was also accepted by the *Restatement*.[35] In England, it is still a matter of debate.[36] Still, there is no doubt that good faith is not necessarily a by-product of continental-style codification. It should be stressed that the good faith principle was also accepted in Israeli law as a governing principle even outside those branches of law that were actually codified. This may be part of the courts' growing tendency to apply broad and "flexible" principles, such as negligence (in tort law) and reasonableness (in administrative law). In this regard, therefore, the expansion of the good faith

32. *See* B.G.B. § 242.

33. *See* Public Transportation Services Beer Sheba v. State Labour Court, 35(1) P.D. 828; Zonenshtein v. Gabaso Bros., 42(2) 278; Beit Yulas v. Raviv, 43(1) P.D. 442; Klemer v. Guy, 50(1) 185.

34. U.C.C. art. 2-103.

35. RESTATEMENT (SECOND) OF CONTRACTS § 205; *see also* A. Farnsworth, *Good Faith in Contract Performance*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW (J. Beatson & D. Friedman ed., 1995).

36. *See* J.W. Carter & M.P. Furmston, *Good Faith and Fairness in the Negotiation of Contracts*, 8 J.C.L. 1, 93 (1994); S.M. Waddams, *Good Faith, Unconscionability and Reasonable Expectations*, 9 J.C.L. 55; J.F. O'CONNOR, GOOD FAITH IN ENGLISH LAW 17-49 (1990). It may be added that the codificatory proposal of the Law Commission lacked an express good faith provision, but this principle was mentioned in explanatory notes which accompanied the text. *See* S.M. Waddams, *Codification, Law Reform and Judicial Development*, 9 J.C.L. 192, 194-95 (1995); R. Sutton, *Commentary on `Codification, Law Reform and Judicial Development*, 9 J.C.L. 200 (1995).

principle in Israeli contract law must be understood in a broader context.

VII. LESSONS FOR FUTURE CODIFICATIONS

My main conclusions center on the limits of legal reform. Legislating a comprehensive, new legal scheme is not enough to bring about a substantial change in the law. The underlying legal culture is no less important in this matter, and constrains the scope of reform. In the Israeli context, the new contract legislation brought about important changes but did not function as a traditional codification. The reforms that were legislated were interpreted and applied according to the former precedents and other legal sources, including scholarly publications. This does not mean that the new legislation was superfluous or redundant. It enabled Israeli contract law to make "a fresh start," without being saddled with outdated doctrines, and it created an organised and relatively systematic doctrinal scheme. It also served as the formal normative basis for introducing the good faith principle to Israeli contract law. However, it can still be argued that the new contract laws do not form a "code" in the broad sense of the term. They constitute a code only in the formal sense, as they contribute to the organization and clarity of contract doctrine. Israel lacked the cultural background needed for the acceptance of a code in the classic continental sense. The result was that the new contract laws were not interpreted according to a codificatory "rationale," and were actually absorbed into the body of existing law.

It may be useful to note the main cultural reasons for this outcome stemming from Israeli culture in general as well as Israeli legal culture in particular:

1. *The status of precedent in the legal system*: To begin with, codificatory aspirations were foreign to Israeli law due to the status of judicial precedents. True, Israeli law does not have a long history of common law tradition. Nevertheless, it was very much influenced by this tradition, and retained a strong English orientation. The thirty years of British Mandate in Palestine, "anglicized" the legal system, leaving only light traces of the long Ottoman history of the country.[37] In addition, precedent was indeed given formal binding power by Israeli legislation.[38] It may be added that granting normative power to

37. *See* Friedman, *supra* note 15.
38. Basic Law: Judicature § 20.

judicial precedents also conforms with the tradition of Jewish religious law[39] (which ascribes high value to precedents).[40]

2. *The role of the courts*: The central role of codification in continental Europe was established against the background of an understanding that the courts should have a relatively modest role in the development of legal doctrine. Thus, continental courts traditionally gave short decisions, which were mainly aimed at deciding controversies between litigants.[41] This description does not fully reflect the present role of European courts in the development of law, but gradual changes in the traditional perception came about only after a considerable period during which the courts were considered insignificant factors in the development of law (and were only perceived as decision makers). By that time, European codification had already established its central role. In contrast, the new contract legislation in Israel was enacted parallel to a significant rise in the importance of the Supreme Court as a leading institution in the development of law.[42] The inevitable result was that the new contract legislation did not enjoy a formative period in which it could establish itself as a major transformative force in the legal system.

3. *Cultural background and external influences*: Another explanation for the limited effect of the reform introduced by the new contract legislation may be the significant cultural influence of the Anglo-American world on Israel and, over the last few years, particularly American culture's influence on Israel's legal and general culture. Furthermore, codifications initiated at the end of the twentieth century do not seem to have the prospect of developing as insulated rational schemes, without the background of the Enlightenment and the belief in reason that classic continental codification benefited from.

---

39. *See* A. KIRSHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW 115-37 (1991); M. ELON, JEWISH LAW 797-804 (3d. ed. 1988) (Hebrew). Jewish law had undergone some "codifications," in the sense that its doctrines were consolidated in organised forms (like the Mishneh Torah and the Shulchan Aruch). But these so-called codifications did not profess to introduce reform, merely to rewrite doctrines in an organised and accessible forms. For the distinction between "ancient" codifications, aimed at organizing traditional law, and "modern" codifications, aimed at reforms, see G.L. Haskins, *Codification of the Law in Colonial Massachusetts: A Study in Comparative Law*, 30 IND. L.J. 1, 2-3 (1954).

40. It should be stressed that Israeli law is not ruled by religious doctrine, and is a modern secular legal system (except in the field of family law). Nevertheless, legal thinking in Israel is influenced, at least to a certain extent by the institutional concepts of traditional religious law, as one of the sources of Israeli culture.

41. *See* J.L. Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43 (1976).

42. *See* M. Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 TEL AVIV U.L. REV. 503 (Hebrew).

4. *The legal academia*: Every legal reform needs theoretical and ideological backing, especially if it goes counter to tradition. In Israel, this support should have been given by legal academics but it was not actually forthcoming. Most Israeli legal scholars, with the exception of Aharon Barak, were not too interested in the ideological aspects of the codification, in contrast to their professional interest in the doctrinal changes it has introduced. One reason might be that the vast majority of legal scholars in Israel trained in English and American universities, or else in Israel itself.[43]

5. *Partial codification and mixed legal cultures*: Codification has flourished in legal systems when applied to several branches of law rather than only to some areas. For many years, however, codification was limited in Israel to civil law. Hence, judges and academics were not used to thinking in a "codificatory mode," and lived in a schizophrenic state of mind, which prevented them from deserting their former legal culture.

What are the prospects for future codifications? Legal reforms through new legislation can always be useful. However, the transformation of the legal culture cannot be attained merely by adopting the characteristics of another system, when the background factors for a fundamental change are missing.

43. N. Cohen & D. Friedman, *Selecting Minds in Multicultural, Besieged, Isolated Society*, 41 AM. J. COMP. L. 449 (1993).