

# The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience

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## I. INTRODUCTION

“Remedies for Breach of an Obligation”—this is the title of the section on remedies in the Israeli Draft Civil Code.<sup>1</sup> Its objective is to create a unified and comprehensive statutory scheme for awarding remedies in all branches of private law (civil and commercial).

This development is no doubt of significant interest to the Israeli lawyer. However, for a number of reasons, acquaintance with this law reform should be of value to legal comparatists in many other jurisdictions. First, from a comparative perspective the present state of the law of remedies in Israel, as well as the forthcoming reform of this area, represent a fascinating example of the complex way in which both the Common Law and the Civil Law traditions have shaped in the past—and continue to shape today—the development of private law in ‘mixed jurisdictions’ such as Israel. In this respect, an acquaintance with the special characteristics of the Israeli law of remedies—and with the

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1. A Hebrew version of the official draft civil code (from 20/6/06) is accessible at [www.justice.gov.il/MOJHeb/TazkireiHok](http://www.justice.gov.il/MOJHeb/TazkireiHok).

current attempts to codify and harmonize it—may be illuminating to the legal comparatist, in mixed and ‘non-mixed’ jurisdictions alike.

Second, we believe that the specific reform of the law of remedies in Israel may inspire lawmakers, judges and legal scholars in other legal systems. To the best of our knowledge, it represents the most ambitious legislative attempt to codify and harmonize the remedial rules of civil law. In so doing, the Israeli law reform, so we shall argue, illustrates the manner in which original legislative efforts may serve to simplify the law and free it from the burden of formal distinctions and divisions that undermine our ability to understand the law and operate it in a straightforward manner that will guarantee the realization of its basic values and objectives.

This Article opens, in Part II, with a brief introduction to the idea of a “law of remedies” as an autonomous field of legal knowledge. Parts III and IV present a comparative overview of the state of the “law of remedies” in the Common Law on the one hand and within the Civil Law tradition on the other hand. The remainder of the Article consists of an examination of Israeli law. Part V examines the present situation in Israel, the structure and characteristics of Israeli private law in general, and of the law of civil remedies in particular. Then, in Part VI we introduce the reader to the details of the Israeli law reform and present our final conclusions.

## II. THE LAW OF REMEDIES—INTRODUCTORY REMARKS

Legal remedies are means of protecting legal entitlements. A remedy is the practical and tangible aspect of the legal right, which gives it meaning and power.<sup>2</sup> A legal right that is not protected and enforced by the legal system is therefore not a right at all, but only a chimera, a claim or an interest that has no legal status.<sup>3</sup> In short: where there is a right, there is a remedy, and only where a remedy is provided—a legal right exists.<sup>4</sup>

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2. In the words of one of the first leaders in the field of remedies: “Civil actions are not brought to vindicate nice theories as to negligence or nuisance or consideration. They are brought because a person who has been injured, or is afraid he may be, wishes to prevent the injury or be redressed for it.” Charles A. Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 377 (1955).

3. For example, it is difficult to speak of contractual rights and duties in a legal system that does not provide sanctions or remedies for the breach of such rights and duties.

4. As the famous Latin maxim commands: “*Ubi ius ibi remedium; Ubi remedium ibi ius.*” See also the famous dicta of Chief Justice Holt in *Ashby v. White*, (1703) 2 Ld. Raym. 938, 953: “[I]f the plaintiff has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it.” See also Blackstone’s assertion that

However uncontroversial the last paragraph may seem to the modern lawyer, the very concept of a ‘remedy’ as well as the idea of a ‘law of remedies’ are still vague and unstable. This holds true not only with regard to legal systems pertaining to the civil law tradition, where the legal concept of remedies as distinct from rights is generally unfamiliar,<sup>5</sup> but surprisingly enough in the common law as well. Here, notwithstanding the long entrenched usage of the term “remedy” in everyday legal discourse and the large body of modern literature dealing with remedies and their role within private, as well as public law,<sup>6</sup> no consensus has yet been attained as to the exact meaning and scope of these very basic concepts. With one recent notable exception,<sup>7</sup> no major work has been dedicated to exploring the boundaries of what is frequently referred to as “the law of remedies” and no comprehensive attempt made to build a long-lasting common terminology and taxonomy for this unsettled field of legal knowledge.<sup>8</sup>

Various authors have defined remedies in different ways, some of which are so wide as to include every court order, and every relief given to an aggrieved party by the legal system. In this Article we do not intend to examine and debate the possible meanings of the term

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“[i]t is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (Oxford, 1768, rep. London, 1966), and 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 (Andrew Burrows & Edwin Peel eds., 2003).

5. See *infra* Part IV.

6. For an extensive list of sources, see *infra* note 21.

7. Rafal Zakrzewsky, Remedies Reclassified (2005).

8. As Zakrzewsky put it in the introduction to his pioneering work: “It is not surprising then that books are written and courses taught under the title of ‘Remedies’. What is surprising is that the foundations, ambit, and structure of the law of remedies have so far eluded close scrutiny.” *Id.* at 1. Other experts in the field have expressed similar views. See, e.g., Stephen M. Waddams, *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. . . . [N]o authority has tried to define or delimit ‘remedies’”; and compare more recently Yves-Marie Laithier, *The French Law of Remedies for Breach of Contract*, in COMPARATIVE REMEDIES FOR BREACH OF CONTRACT 103, 106 (2005): “Admittedly, the often-used notion of *remedy* is seldom rigorously analyzed by common lawyers.” (citing ENGLISH PRIVATE LAW § 18.01 (Peter Birks ed., 2000)).

“remedy”.<sup>9</sup> For the purposes of this Article it will suffice to propose a much narrower, and in our view more practical definition.<sup>10</sup>

According to this definition a “remedy” is an entitlement arising out of the breach of an obligation (or duty) and taking the form of a burden imposed on the person responsible for that breach. This definition preserves the core idea that a remedy, at least within the confines of private law, is something that is intended to redress a wrong, *i.e.*, a violation of a legal right.<sup>11</sup>

The proposed definition of a remedy brings to light what we believe are the four basic characteristics of every civil remedy:

- (a) A remedy is an entitlement, *i.e.*, a legal right.
- (b) A remedial entitlement is created following the violation (including the anticipated violation) of a pre-existing right. It is therefore a secondary right.<sup>12</sup>
- (c) From the standpoint of the person entitled to the remedy (the aggrieved party), a remedy involves a practical benefit or advantage, awarded him for the sake of alleviating the grievance.
- (d) A remedy involves the imposition of a burden or disadvantage on the person legally responsible for the violation of the aggrieved party’s right.

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9. For a detailed discussion of the various meanings given the term “remedy” in the legal literature and case law, see ZAKRZEWSKY, *supra* note 7, at 9-22. See also his discussion of the definitions offered or assumed by authors of central works in the field. *Id.* at 24, 29, 31-34, 38.

10. In support of a narrow, and thus more meaningful definition of the term “remedy”, see, e.g. Waddams, *supra* note 8, at 113.

11. For a similar conception of a “remedy”, see, e.g., DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES—CASES & MATERIALS 1 (3d ed. 2002): “A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged.” Compare also Doug Rendleman, *Remedies—the Law School Course*, Remedies First Discussion Forum, 39 BRANDEIS L.J. 535, 535 (2000): “A Remedy is what a court, after finding a substantive violation, will do—simultaneously—for the victim *through* the wrongdoer.”

12. John Austin was probably the first to establish the distinction between primary and secondary rights, to which he attached vital importance. He said:

Rights and duties are of two classes: 1st. Those which exist *in* and *per se*. which are, as it were, the ends for which law exists. 2ndly, Those which imply the existence of other rights and duties, and which are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose. . . . Those which I call primary do not arise from injuries or from violations of other rights and duties. Those which I call secondary or sanctioning . . . arise from violations of other rights and duties.

JOHN AUSTIN, *Lecture 45*, in LECTURES ON JURISPRUDENCE (Campbell & Murray eds., London 5th ed. 1885), *cited in* REMEDIES, COMMENTARY AND MATERIALS 1-2 (Tilbury, Noone & Kercher eds., North Ryde 2d ed. 1993).

As we shall later see, this narrow concept of the term “remedy” was clearly adopted by the drafters of the new Israeli Civil Code, and should serve as the starting point for any discussion of the law reform which is the focus of this Article.

In order to understand this law reform and to appreciate the extent to which it is innovative, an overview of the traditional approaches of the common law and the civil law systems is in order, before describing the Israeli experience. In looking briefly into the experience of these two major legal families, we wish to review their different attitudes towards the concept of a “law of remedies”, in order to better understand the Israeli position.

### III. THE LAW OF REMEDIES—A COMMON LAW PERSPECTIVE

As noted above, in Anglo-American legal systems the concept of a legal remedy and the distinction between wrongs and remedies are deeply rooted in legal thought and legal discourse. Indeed, from its very early development English Common Law has been characterized by a functional approach, in which remedies played a much more central role than abstract rights and duties.<sup>13</sup>

Common law jurists would commonly define a “civil wrong” as the breach or violation of a legal duty owed by one private person to another, be what may the origin of that duty (a contract, the common law of torts, fiduciary relations, statutory duty, or even family and property law).<sup>14</sup>

Accordingly, one of the most common meanings of the term “civil remedy” (and the one adopted for this Article),<sup>15</sup> is a legal response to the commission of such a civil wrong. Thus, the law of remedies consists of the rules and principles relevant to determining the concrete remedy or combination of remedies suitable as a response for each category of civil wrongs.

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13. This was due, in large part, to the technical and formalistic procedural system known as the “writs system”, that governed English civil procedure for about 700 years and until the nineteenth century. For a summary of the development of the writs system, see JOHN H. BAKER, *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., René David, *A Law of Remedies and a Law of Rights*, in *ENGLISH LAW AND FRENCH LAW* ch. 1, at 1-15 (1980).

14. See, for example, the legal definition of the term according to WEBSTER’S *ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* (1996): “[A]n invasion of another’s right, to his damage.” Compare the definition of the *OXFORD DICTIONARY OF LAW*: “Any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for their infringement.”

15. See *supra* text accompanying note 11.

For many centuries there has been no serious attempt in Anglo-American case law and legal literature to organize the massive body of rules governing the award of remedies in civil disputes. Remedial rules developed over the centuries within the narrow confines of the numerous forms of actions, a reality that presented an obstacle to the development of a systematic theory of civil liability in general, and of civil remedies in particular.

A major step towards generalization of remedial principles took place during the eighteenth and nineteenth centuries. Following the industrial revolution, with the rise of modern liberal thought, and significant procedural simplifications to the litigation system, Anglo-American scholars and judges started to put in efforts in order to turn the law from a thicket of precedents seemingly unrelated to each other, into a scientific field of knowledge. During this ‘Age of Principle’ lasting roughly till the end of the nineteenth century, the common civil law was gradually ‘squeezed’ into a limited number of stable legal categories. These general categories—mainly Contracts, Torts, Property, Family law and the law of Succession—still form the core of Anglo-American private law as we know it.<sup>16</sup>

However, even during this formative period, which was characterized by a much more systematic approach to problems of civil liability, the general rules and principles governing the award of remedies for civil wrongs continued to develop in isolation from each other. This development took place mainly within the most clearly ‘remedy oriented’ fields of contract and tort law, which despite their common legal history were kept strictly apart from one another throughout the nineteenth and much of the twentieth centuries.<sup>17</sup> 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

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16. For an instructive survey of the history of classification in Roman, Civil and Common law along these basic lines, see Roscoe Pound, *Classification of Law*, 5 AM. L. SCH. REV. 269 (1922-1926) (lecture delivered on December 28, 1923).

17. See, for example, Professor Atiyah’s description of this dichotomy:

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 voluntarily 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.

Patrick S. Atiyah, *Contract, Promises and the Law of Obligations*, in *ESSAYS ON CONTRACT* 10, 10 (Oxford 1986).

official merger of equity and common law—with no serious attempts to compare them to similar ‘legal’ remedies or to integrate them into a larger body of legal rules governing the award of remedies for civil wrongs.<sup>18</sup>

This pattern of isolation in analysis of remedial problems became so entrenched in the minds of judges and lawyers that it remained prevalent throughout the twentieth century, notwithstanding significant changes of attitude that took place in Anglo-American legal literature and academia. This change of attitude was most evident in the United States. There, following the publication of two pioneering works on remedies in 1954 and 1955,<sup>19</sup> in which remedial analysis was first presented as deserving integrated and thorough academic treatment, courses on “remedies” gradually started to form part of the curricula and became popular in most law schools across the country.<sup>20</sup> This development, in turn, increased the interest of lawyers and academics in the combined analysis of remedies, resulting in an impressive wave of ground-breaking scholarly work during the early seventies, and then again during the late eighties and early nineties, not only in the United States but in other English speaking countries as well.<sup>21</sup>

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18. This generalization was particularly true for Australia, in which the final merger of law and equity was belated and was completed as late as 1972. For the effects of this historical fact on the development of the law of remedies in Australia, see Gary Davis & Michael Tilbury, *The Law of Remedies in the Second Half of the Twentieth Century: An Australian Perspective*, 41 SAN DIEGO L. REV. 1711, 1718-22 (2004). However, the grasp of the historical division between law and equity was felt during the last century all over the common law world, including the United States. In 1962 an American scholar described the situation in these words: “The merger of law and equity, though no recent innovation, is far from a completed process. Old habits of mind do not fade away; the bench and bar continue to think and talk in terms suitable only to a largely nonexistent dual system of courts.” In light of this observation that author decided to not discuss the recent developments concerning remedies in the conventional dichotomic way but rather “to examine here those aspects of the remedial process that seem to cut across all fields of law, leaving for discussion in the appropriate place those remedial problems unique to a particular area of substantive law.” Charles E. Ares, *Remedies*, 1962 ANN. SURV. AM. L. 673, 673 (1962).

19. See, correspondingly, JOHN E. CRIBBET, *CASES AND MATERIALS ON JUDICIAL REMEDIES* (1954); CHARLES A. WRIGHT, *CASES ON REMEDIES* (1955). See also Wright’s influential article, *supra* note 2, in which he urged the reader to regard “[d]amages, equity, restitution and the other incidental judicial devices . . . as part of an integrated law of remedies, rather than as separate areas of the law.” *Id.* at 391-92.

20. In 1993 this development was described by America’s number one expert on remedies, in these words: “[T]he unified treatment of all remedies has become generally accepted, and the field has now generated a major body of literature. . . .” DAN B. DOBBS, *LAW OF REMEDIES, DAMAGES-EQUITY-RESTITUTION 2* (2d ed. 1993).

21. The main works during the seventies were: in England, FREDERICK H. LAWSON, *REMEDIES OF ENGLISH LAW* (1972), followed by the 1980 second edition; in the U.S. the main treatise was and still is DAN B. DOBBS, *A HANDBOOK ON THE LAW OF REMEDIES* (1973), followed by the immense three-volume 1993 edition cited *supra* note 20; and in Scotland, DAVID M.

This intellectual movement was accompanied by a parallel increase of interest, especially throughout the seventies and eighties, in the interrelations between the three main branches of the law of obligations (contract, tort, restitution) and their remedial regimes specifically. This body of literature highlighted, in different contexts and from different perspectives, the various similarities—and the questionable distinctions—between principles of remedies in contract law, tort law and the law of restitution.<sup>22</sup>

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WALKER, *THE LAW OF CIVIL REMEDIES IN SCOTLAND* (1974). More recent important works include: DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES—CASES & MATERIALS* (1985), followed by second and third editions (1994 and 2002); in England, ANDREW S. BURROWS, *REMEDIES FOR TORTS AND BREACH OF CONTRACT* (1987), followed by a second and a third edition (1994, 2004); DONALD HARRIS, *REMEDIES IN CONTRACT AND TORT* (1988), followed by a second edition, 2002 (with David Campbell & Roger Halson); in Australia, MICHAEL J. TILBURY, *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, for example, the list of American textbooks listed in DOBBS, *supra* note 20, at 2 n.6. In Canada, see BERRYMAN, BLACK, CASSELS, PRATT, ROACH & WADDAMS, *REMEDIES: CASES & MATERIALS* (5th ed. 2006) (1st ed. 1988); in Australia, see BRUCE KERCHER, MICHAEL NOONE & MICHAEL J. TILBURY, *REMEDIES, COMMENTARY AND MATERIALS* (2d 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. For one of the first articles on the subject of public remedies, see Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); today, see, e.g. CLIVE LEWIS, *JUDICIAL REMEDIES IN PUBLIC LAW* (3d ed. 2004); DAVID I. LEVINE, *REMEDIES—PUBLIC AND PRIVATE* (4th ed. 2006).

22. For a representative bibliography, see G.H.L. Fridman, *The Interaction of Tort and Contract*, 93 L.Q.R. 422 (1977); Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 237 (1977) (“[M]arking that boundary line [between contract and tort] has been acknowledged by some of our ablest scholars to be among the most perplexing challenges in the law.”); Barry J. Reiter, *Contracts, Torts, Relations and Reliance*, in *STUDIES IN CONTRACT LAW* 235 (Barry J. Reiter & John Swan eds., 1980); Jonathan M. Albano, *Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions*, 22 BOSTON COLLEGE L. REV. 545 (1981); Andrew S. Burrows, *Contract, Tort and Restitution—A Satisfactory Division or Not?*, 99 L.Q.R. 217 (1983); William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEG. STUD. 241 (1983); Richard E. Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163 (1983); Jon Holyoak, *Tort and Contract After Junior Books*, 99 L.Q.R. 591 (1983); Werner Lorenz, *Some Thoughts about Contract and Tort*, in *ESSAYS IN MEMORY OF PROFESSOR F.H. LAWSON* 86 (1986); Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentations*, 15 HOFSTRA L. REV. 443, 445 (1987) (“Contract and tort have never been two entirely distinct forms of liability, though we tend to view them as though they were.”); Robin Cooke, *Tort and Contract*, in *ESSAYS ON CONTRACT* 222 (Paul D. Finn ed., 1987); Keith M. Mason, *Contract and Tort: Looking Across the Boundary from the Side of Contract*, 61 THE AUSTRALIAN L.J. 228 (1987); Steve Hedley, *Contract, Tort and Restitution; or, On Cutting the Legal System Down to Size*, 8 LEG. STUD. 137 (1988); Jane Swanton, *The Convergence of Tort and Contract*, 12 SYDNEY L. REV. 40, 74 (1989) (“There is an increasing awareness among lawyers and law-makers of the artificiality of drawing a rigid distinction between tort and contract.”); Joost Blom, *Remedies in Tort and Contract: Where Is the Difference?*, in *REMEDIES, ISSUES AND PERSPECTIVES* ch. 16, at 395 (Jeffrey Berryman ed., 1991); Thomas C. Galligan,



This large and versatile body of literature, consisting of treatises, “Cases & Materials” textbooks and scholarly articles, seems to have turned the Anglo-American legal literature dealing with private law remedies into a well recognized—though not as well organized—branch of legal knowledge.<sup>23</sup>

Nevertheless, as stated above, in most common law jurisdictions the broad recognition of the substantial affinity of the principles governing remedies for civil wrongs has not yet gained much influence on the practice of the courts, who still deal with remedial issues separately, as before.<sup>24</sup> This in turn may have dissuaded some important writers in the field, most of whom address practitioners and law students, from adopting a pure ‘remedy oriented’ analysis, inducing them to discuss remedial problems, or at least to present them to the reader, using the traditional headings of tort, contract, restitution, property or ‘equitable remedies’ rather than under one unifying model, applicable to all kinds of civil wrongs.<sup>25</sup> It is not surprising therefore that attempts to construct a general and harmonious model of remedies applicable to any civil context have generally been only partial and few.<sup>26</sup> Furthermore, although the body of literature dealing with remedies has expanded over

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*Contortions along the Boundary between Contracts and Torts*, 69 TUL. L. REV. 457 (1994); M.M. Loubser, *Concurrence of Contract and Tort*, in LAW IN MOTION 327 (1st World Law Conference, 1996); Israel Gilead, *Non-Consensual Liability of a Contractual Party: Contract, Negligence, Both or In-Between?*, 3 THEORETICAL INQ. L. 511 (2002). 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 (Peter Jeffrey Birks ed., Oxford 1996); REMEDIES: ISSUES AND PERSPECTIVES (Jeffrey Berryman ed., Ontario 1991). For earlier illuminating discussions, see, e.g., Peter W. Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOKLYN L. REV. 196 (1948); W.D.C. Poulton, *Tort or Contract?*, 82 L.Q.R. 346 (1966).

23. 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., Peter Birks, *Rights, Wrongs and Remedies*, 20 OXFORD J. LEG. STUD. 1 (2000) (arguing that remedial rights should be assimilated into the law governing substantive rights). A remarkable attempt to answer the challenge and organize this body of knowledge was recently undertaken by Rafal Zakrzewsky in his book, *supra* note 7.

24. See, for example, BURROWS, *supra* note 21, at 8, who retained in his work the traditional division between contract and tort *inter alia* because: “The judges continue to think and talk in terms of distinct actions for torts and breach of contract.”

25. For this common method of analysis, see, for example, the works of BURROWS, *supra* note 21; HARRIS, *supra* note 21; BENJAMIN ANDOH & STEPHEN MARSH, CIVIL REMEDIES (1997); DOUG RENDLEMAN, CASES AND MATERIALS ON REMEDIES (6th ed. 1999). To some extent, this holds true to the most comprehensive work on remedies to date written by DOBBS, *supra* note 20.

26. Rare attempts in this direction are to be found in the following textbooks: LAYCOCK, *supra* note 21 (classification by type of remedy); TILBURY, *supra* note 21 (devoting the first of two volumes to general principles, with no express reference to the tort/contract division); see also Lawson’s seminal work, *supra* note 21.

time, most discussions of civil remedies still appear within traditional textbooks on torts and contracts, most of which dedicate one general heading—not always comprehensive—exclusively to the discussion of “remedies”.

To conclude, the treatment of remedies in Anglo-American law today is characterized by a wide gap between theory and practice: on the theoretical level most contemporary experts dealing with remedies seem to agree that there *should be*—and to a considerable extent there already *is*—a unified ‘law of remedies’, that is, a common set of principles and considerations controlling the legal response to civil wrongs. On the practical level, however, traditional distinctions and entrenched legal categories of substantive law (torts, contracts, property etc.) and of jurisdiction (law vs. equity) continue to dominate legal discourse and legal thought of most judges and lawyers, thus operating in the opposite direction. In spite of significant progress made during the second half of the last century, Professor Wright’s assertion that “the most important thing to say [about the law of remedies] is that there is no law of remedies”<sup>27</sup> seems to hold true even today.<sup>28</sup>

Notwithstanding, from time to time one may discern judicial recognition of the need to question the justification for traditional distinctions between remedial principles operating within the various branches of civil law.<sup>29</sup> We believe this trend is desirable, as it enables judges and lawyers to identify similarities (and differences) between

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27. Wright, *supra* note 2, at 376. Cf. also the assertion made a few years later by Ares, *supra* note 18, at 673, that although a unified approach to remedial issues is desirable, “The difficulty with this approach, of course, is that there is no such thing as the “law of remedies.” The law on this subject is to be found in bits and pieces strewn throughout the cases and treatises.”

28. 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:

[T]here 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, *supra* note 21, at 1722.

29. In Canada, see, for example, *Brown v. Waterloo Regional Board of Commissioners of Police*, (1981) 136 D.L.R. (3d) 49, 65 (Ont. H.C.) (per Linden, J.): “In recent years, the principles of damages in tort and contract are becoming more consistent. That is good and should be encouraged.” Similar attitudes have been expressed in the famous Canadian case of *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, and in the English House of Lords in *Attorney General v. Blake*, [2001] 1 A.C. 268 [H.L.].

remedial problems arising in various branches of law.<sup>30</sup> Such awareness facilitates understanding of the law, and enables the design of more simple and coherent rules. This in turn would contribute to the realization of the basic values of fairness, certainty and efficiency which civil justice is supposed to promote.

#### IV. THE LAW OF REMEDIES—A CIVIL LAW PERSPECTIVE

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 tradition—are far from being entrenched in legal thought. This is most evidently reflected in the lack of any accepted parallel to the legal terms “remedy” and “law of remedies”. Thus, when a leading French scholar was 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: “[T]he French reporter is confronted with a terminological difficulty which, as always, reflects a more fundamental problem: what is a remedy?”<sup>31</sup>

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30. Professor Treitel addressed the adverse effect of ignoring such similarities as early as 1967 when, discussing the area of remedies for breach of contract, he noted: “[D]iscussions of this problem [remedies for breach of contract] are often widely scattered in the books, with the result that very different solutions are proposed for problems which appear to be basically similar.” Gunter H. Treitel, *Some Problems of Breach of Contract* 30 MODERN L. REV. 139, 139 (1967). Treitel’s seminal work on comparative remedies for breach of contract may be seen as an important attempt to alleviate this difficulty. See GUNTER H. TREITEL, REMEDIES FOR BREACH OF CONTRACT—A COMPARATIVE ACCOUNT (1988). Professor Waddams expressed a similar view:

An examination of remedial questions that cut across different areas of substantive law is not only desirable, but even urgent. . . . Failure to make such an examination is likely to produce the awkward effect of the name of the cause of action, where the plaintiff has a choice, determining the result. . . . It cannot be satisfactory for remedial rules to differ when the substance of the plaintiff’s complaint is the same.

Waddams, *supra* note 8, at 118.

31. Denis Tallon, *Remedies (French Report)*, in CONTRACT LAW TODAY—ANGLO FRENCH COMPARISONS 263 (Donald Harris & Denis Tallon eds., 1989). André Tunc, the renowned French legal comparatist, has also pointed out the difficulty of finding an appropriate French parallel for the English term “remedy” and suggested to adopt the French word “remède” (literally, medicine) to fill this gap in French jurisprudence. See CODE DE COMMERCE UNIFORME DES ÉTATS-UNIS preface, at 17 (Mme. C. Lambrechts ed., 1971), cited in Tallon, *supra*. Similar problems arise with regard to German law. See, for example, the answer offered by “*Transblog*”, a Weblog on German-English legal translation, to a question on how to translate the term “remedy” into German: “Possible translations, depending on the context, are *Klagebegehren*, *Gerichtliche Abhilfe*, *Rechtsschutz*, or *Entschädigung*. *Rechtsbehelf* sounds wrong, at least in most examples. Romain also gives *Rechtsverwirklichung* and *Heilmittel*. Concrete examples are really needed to discuss this.” One commentator on the Blog added: “For remedies, one could also say *Rechtsfolgen* (*aus Vertragsverletzungen*) or *rechtliche Mittel*”; while another offered the term

In a sense, this short and straightforward question serves as the best illustration of the civil law's traditional approach to the subject matter of our discussion. According to that approach there is simply no such thing as the 'law of remedies'. Indeed, the lack of parallel terminology in this case is not a mere coincidence: it reflects a fundamental variance of methodology between the Common Law and Civil Law traditions with regard to the structure and inner classification of private law.

As we have seen, in the Common Law a remedy would be commonly defined as the legal system's response to the commission of a civil wrong.<sup>32</sup> Obvious as this description may seem to an Anglo-American lawyer, it will most probably sound unfamiliar to a continental lawyer not acquainted with the Anglo-American legal tradition. In the civil law tradition, the treatment of what a common lawyer would call civil remedies would be found—in both the Romanist and Germanic civil legal systems—under the Law of Obligations. The law of obligations is considered a central part of private law in any civil law tradition.<sup>33</sup> It encompasses three major categories: contractual obligations; quasi-contractual obligations (restitution of unjust enrichment) and extra-contractual or delictual obligations (*i.e.*, obligations flowing from the violation of extra-contractual duties).

However, rather than treating the remedies for breach of an obligation together in an integrated way—as one might have expected from a legal tradition that regards the various types of obligation as different forms of a basically similar phenomenon—civilian jurisprudence has not developed any general theory of remedies for the violation of civil obligations. In a typical civilian legal textbook on the law of obligations (*schuldrecht* or *obligationenrecht* in German; *droit des obligations* in French, *derecho de obligaciones* in Spanish) one would not find an integrated discussion of all remedial issues under one section, but rather would have to look for the relevant material in various sections or subsections. Indeed, since the very distinction between a right and a remedy is not found readymade in civilian thought, 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

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*Rechtsanspruch*. The text is accessible at [www.margaret-marks.com/Transblawg/archives/000334.html](http://www.margaret-marks.com/Transblawg/archives/000334.html).

32. See *supra* text accompanying notes 14-15.

33. For an instructive overview of the development of the modern law of obligations in continental law from its Roman origins, see THOMAS G. WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 282-322 (1999) (ch. 12, *Law of Obligations*).

substantive law.<sup>34</sup> 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.<sup>35</sup>

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 the whole field of obligations, and thus discuss both contractual liability and tort liability, as well as remedial problems arising in both fields.<sup>36</sup>

Second, and more importantly, considerable similarities exist between remedial principles governing the reaction to both contractual and extra-contractual wrongs. Indeed, whereas in common law systems the very existence of such similarity as well as its extent are still debatable and in need of critical exposition, in most civil law systems it reflects the official position of the civil codes, and is widely recognized as an indisputable fact by both the courts and the legal academia.

A short summary of the way in which the most important civil codifications regulate remedial questions may be helpful in establishing our claim that despite the absence of any general theory of remedies,

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34. See, for example, FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, *DROIT CIVIL—LES OBLIGATIONS* (5ème ed. 1993), who deal with the duty to make reparation in case of breach under the heading of “La responsabilité contractuelle”, which also includes a discussion of both the elements of contractual responsibility and limitations on it. *Id.* at 404-94. The authors’ discussion of tort liability (*responsabilité civile*, *id.* at 495-666) represents the same mixture of substantive law and remedial law. From a comparative perspective it is interesting to note that this kind of mixture is also characteristic of the way in which the tort of negligence is discussed in Anglo-American legal literature. This is due to the peculiar structure of that common law tort, of which damage to the plaintiff is a constitutive element.

35. 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 Denis Tallon, *L’inexécution du contrat: Pour une autre présentation*, 1994 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 223 (1994).

36. This last format is very popular in France, where most discussions of remedies are found in books on civil law (*droit civil*) in the volumes dealing with obligations (*les obligations*). See, e.g., TERRÉ, SIMLER & LEQUETTE, *supra* note 34; JEAN CARBONNIER, *DROIT CIVIL, TOME 4, LES OBLIGATIONS* (13e ed. 1988). Discussion of damages would frequently appear also in books dealing exclusively with either tort liability (*responsabilité civile délictuelle*, or just *responsabilité civile*) or contractual liability (*responsabilité civile contractuelle*). See, e.g., PHILIPPE LE TOURNEAU & HENRI MAZEAUD, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE* (1978); Jacques Ghestin, *LES OBLIGATIONS—LES EFFETS DU CONTRAT* (1992); GENEVIÈVE VINEY, *INTRODUCTION A LA RESPONSABILITÉ: ÉVOLUTION GÉNÉRALE, RESPONSABILITÉ CIVILE ET RESPONSABILITÉ PÉNALE, RESPONSABILITÉ CONTRACTUELLE ET RESPONSABILITÉ DÉLICTEUELLE* (1995). This holds true for Germany as well. For popular textbooks on obligations, see, e.g., DIETER MEDICUS, *SCHULDRECHT: EIN STUDIENBUCH* (Aufl. 12, 2000); KARL LARENZ, *LEHRBUCH DES SCHULDRECHTS* (Aufl. 13, 1986). For a Spanish textbook, see, e.g., MANUEL ALBALADEJO, *DERECHO CIVIL—DERECHO DE OBLIGACIONES* (8a ed. 1989).

civil law has usually attained a significant degree of uniformity in the treatment of remedies.

Turning first to the two most influential codifications, namely the Code Napoleon (1804), and the German B.G.B. (1900), neither includes any general concept parallel to the common law concepts of “breach”, “wrong” and “remedy”.<sup>37</sup> As previously mentioned, these notions are foreign to civilian legal thought, and thus do not fulfill any function in the organization or classification of these two renowned codes.

In the *Code Civil* the whole law of obligations is to be found under the heading of the third book on “The Different Modes of Acquiring Property”, which combines discussion of the law of succession with the treatment of the law of obligations. Most remedial provisions regarding breach of contract are scattered over the various sections, and even chapters, of Title III (dealing with contractual and other consensual obligations).<sup>38</sup> Responsibility for extra-contractual wrongs is dealt with separately under Title IV (dealing with non-consensual obligations) with no attempt to bring any of the remedial provisions governing contractual and extra-contractual wrongs together or to otherwise unify them (*e.g.*, by way of cross-reference).

Nevertheless, in France partial unification of the law of remedies was attained when the *jurisprudence* (*i.e.*, French case law) made clear that the rules governing compensation for breach of contract (articles 1146-1156 *C.C.*) will apply by analogy to the quantification of compensatory damages for unlawful acts leading to extra-contractual responsibility (*i.e.*, torts), the conditions of which—but not the principles for their quantification—are addressed in articles 1382-1396 *C.C.* Thus, a significant degree of harmonization was produced as regards monetary compensation for civil wrongs.<sup>39</sup>

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37. The B.G.B.’s approach to the treatment of remedies has been significantly modified by the recent 2002 law reform of the law of obligation. See discussion *infra* text accompanying notes 64-69.

38. In the words of a leading French scholar: “The exposition [of contract remedies] contained in the Civil Code (which is not noted for the rigour of its structure) is itself disconcerting.” Tallon, *supra* note 31, at 264. For useful presentations of the French scheme of remedies for breach of contract, see, *e.g.*, P.D.V. MARSH, *COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE, GERMANY* 319-36 (1994) (ch. 21, *Remedies and Excuses for Non-performance*); Tallon, *supra* note 31, at 264-78.

39. Tallon, *supra* note 31, at 273, explains that “[t]he result is a considerable harmonization of the effects of delictual and contractual liability” and that the same principles apply to all kinds of damages (physical, pecuniary and non-pecuniary). The same point was made years ago by André Tunc, *The Twentieth Century Development and Function of the Law of Tort in France*, 14 *INT’L & COMP. L.Q.* 1089, 1090 (1965): “To a great extent, the rules governing liability for torts and contractual liability are the same.”

A considerable degree of harmonization was attained, almost a century later, by the 1889 Spanish Civil Code. Although greatly influenced by the style of the *Code Civil*, this code reflects a much more systematic approach to the law of obligations, to which a wholly separate (fourth) book is dedicated. Similar to the *Code Civil*, the Spanish code does not recognize the concept of “remedy” or even the notion of “non-performance” of obligations. However, in striking contrast to its predecessor, the *Código Civil* has in fact unified the law of remedies under a separate Title dealing with “The Nature and Effect of Obligations”. This Title includes nineteen articles, most of which are clearly remedial in nature,<sup>40</sup> forming a unified scheme of remedial rules (mainly concerning enforced performance and monetary compensation) applicable throughout the whole law of obligations.

Germany’s B.G.B. manifested an even more unified and analytical approach to the treatment of remedies. Here, in Book II of the code (dealing with the “law of obligations”) the first section addresses the “Content of Obligations”. Under Title I of this section, under the heading of “Obligation to Perform”, is to be found the major part of the law of remedies. Prior to the recent German law reform of the law of obligations, to be discussed later,<sup>41</sup> this Title included fifty two detailed articles dealing with the appropriate way to fulfill obligations, as well as with some basic principles of liability and remedies.

Article 241 (“duty deriving from obligation”) provides the basic principle that entitles the creditor to demand performance from the debtor.<sup>42</sup> Apparently, this provision only declares a primary duty of performance. However, it clearly inspires the basic remedial scheme laid out in articles 249 to 253. These provisions announce the principle of compensation and clarify that compensation is to be effected *in kind*, and may be transformed into monetary compensation only under certain conditions.<sup>43</sup> Although this arrangement clearly assumes the prior violation of a civil right, it does not mention such a violation as a precondition of the duty to compensate, thus ostensibly treating this duty as a primary duty rather than a remedial one. However, a clear connection between violation and remedy was established by article 284.

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40. The remedial rules are stated in articles 1096, 1098-1111 of Title II (§§ 1094-1112).

41. See *infra* text accompanying notes 64-69.

42. Article 242 supplements article 241 by the principle of good faith, stating that the debtor is bound to effect performance in good faith and according to common usage.

43. These conditions are, *inter alia*: (1) Bodily injury or injury to property; (2) Expiry of a reasonable period notice to the debtor; (3) Physical restitution is impossible or entails disproportionate expenditure.

Prior to the 2002 law reform this was the first article in the German code to mention—although in a somewhat incidental way—the concept of *default* or *non-performance* of an obligation.<sup>44</sup> However, the clearest remedial formulation was no doubt found in article 286, which established the general duty of a debtor to compensate the creditor “for any damage arising from his default”,<sup>45</sup> whatever may be the origin of the violated obligation. Articles 287 to 292 further elaborated on matters concerning quantification, mainly the right to interest on money debts and damages awards. However, further provisions relating to compensation for extra-contractual wrongs are dealt with separately,<sup>46</sup> as is the contractual remedy of rescission (and restitution following it).<sup>47</sup>

Hence, in the 1900 version of the B.G.B. we already find an obvious attempt, if only partial and somewhat covert, to create a unified set of general principles governing the award of remedies for breach of civil obligations. Further steps toward unification were taken in the 2002 German law reform of the law of obligations, to be discussed later.

The 1912 Swiss Federal Code of Obligations probably represents the first conscious attempt to bring together and harmonize the law of remedies.<sup>48</sup> The first part of the code (“General Provisions”) opens, in Title I (“Origin of Obligations”) with a systematic treatment of the three main branches of the law of obligations (*i.e.*, contracts, torts and unjust enrichment). Then, under Title II (“Effect of Obligations”), right after the first Chapter (“Performance of Obligations”)—in which no reference is made to default by the debtor—appears a distinct Chapter under the heading “The Effect of Non-Performance” (*Des effets de l’inexécution des obligations*). This chapter dedicated thirteen articles (97 to 109) exclusively to the consequences of failing to perform an obligation. Article 97 announces the general duty of reparation for any harm of which the defaulting party is guilty.<sup>49</sup> Article 98 deals with the right to reparation in relation to obligations to do or not to do (“*obligation de*

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44. Compare, today, to article 280, discussed *infra* note 66 and accompanying text.

45. As translated by Forrester, Goren & Ilgen: THE GERMAN CIVIL CODE (1975).

46. See section III, tit. 25, esp. §§ 823, 826, 839, 842, 845, 847, 849.

47. Those are thoroughly treated under section II (Contractual Obligations) §§ 346-361.

48. In fact, the first Swiss codification was the 1881 Swiss Code of Obligations, which preceded the Swiss Civil Code of 1912, as well as the revised Code of Obligation of that same year. The Swiss code of obligations was adopted, indeed almost copied, by Turkey in 1922, and had significant influence on the Italian Civil Code of 1942. For a useful discussion of the development of Swiss private law, see Thomas H. Reynolds, *Civil Law III: Civil Law Codification in the German-Speaking States of Northern and Central Europe*, L.L.M.C. SOURCEBOOK, [www.llmc.com/civil\\_law\\_3.htm](http://www.llmc.com/civil_law_3.htm).

49. Compare §§ 285-286 B.G.B.; § 1382 C.C.



*faire e de ne pas faire*”) the breach of which entitles the creditor to perform the obligation at the debtor’s expense or to demand restitution—in money or in kind—for the damage caused by such breach (but not to specific performance). Article 99 makes clear that unless otherwise indicated, the rules governing liability for torts (*i.e.*, mainly articles 41 to 49) would apply, *mutatis mutandis*, to contractual wrongs. The remaining provisions further elaborate on general issues such as waiver of liability, damages for belated performance, and interest. Finally, it is worth noting that the chapter also incorporates (in articles 107 to 109) discussion of the conditions under which the creditor is entitled to rescind a contract, as well as the relationship between this remedy and the right to claim performance or damages.

The move towards harmonization of remedial rules was followed to some extent by the New Italian Civil Code of 1942.<sup>50</sup> This modern and most influential civil-commercial codification<sup>51</sup> contains, under the first Title of the Book on Obligations (Obligations in General), a separate chapter (Chapter III) exclusively dedicated to the non-performance of obligations (*inadempimento delle obbligazioni*).<sup>52</sup> The chapter deals mainly with the general duty of reparation of unlawfully caused harm and the rules governing its scope and quantification. Harmonization of damages rules is also guaranteed by an explicit reference from the part dealing with tort liability to specific principles of damage assessment included in the chapter under discussion.<sup>53</sup> However, unlike the Swiss Code, the chapter does not mention the contractual remedy of rescission which is discussed separately under the next Title, dealing with general principles of contractual obligations.<sup>54</sup>

Manifest attempts to unify large parts of the law of remedies were seen towards the end of the twentieth century in the modern codifications of the Netherlands (1992) and of Quebec (1994).<sup>55</sup> However, as we shall

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50. Italy’s first Civil Code was promulgated in 1865. In 1942 it was replaced and united with the commercial code of 1888. For a succinct survey of the development of Italian law in the 19th century, the background for its codification in 1865 and then again in 1942, see Thomas H. Reynolds & David A. Combe, *Civil Law II: Spain, Italy and Portugal (Introduction & Overview)*, L.L.M.C. SOURCEBOOK, § 14, [www.llmc.com/civil\\_law\\_2.htm](http://www.llmc.com/civil_law_2.htm).

51. The Italian Civil Code has had enormous impact on various civil law systems in Latin America, as well as on the new codification in the Netherlands. See Reynolds & Combe, *supra* note 50.

52. §§ 1218-1229.

53. The reference is made by article 2056 to articles 1223, 1226, and 1227.

54. Tit. II, ch. 8 (*Della Risoluzione del Contratto*), §§ 1447-1462.

55. The Dutch codification replaced the 1938 civil code that was based on the French *Code Civil*. For a short survey on the background and characteristics of the Dutch codification, see Arthur S. Hartkamp, *Judicial Discretion under the New Civil Code of the Netherlands* (Rome

see, these two codes apply a substantially different methodology for dealing with remedies.

The Dutch codification deals with remedial issues in Book Six of the civil code (titled “The General Part of the Law of Obligations”) under two main headings: section 9 on “The Consequences Non-Performance” (articles 74 to 94) and section 10 on “Legal Obligations to Make Reparation of Damage” (articles 95 to 110).<sup>56</sup> The first of these two sections defines the scope of civil liability for failing to perform an obligation and the preconditions for such liability, and discusses other issues such as penalty clauses and election between remedies; while the second presents an elaborate scheme for defining and assessing compensable damage. However, these two chapters do not exhaust the treatment of remedies: relevant material is to be found in several other segments of the code. For example, section 7 regulates the “Right to Suspend Performance”;<sup>57</sup> section 12 defines the scope of the right to “set off” obligations;<sup>58</sup> several remedial articles relating to tort liability are treated separately in section 1 of Title 3 of the same Book;<sup>59</sup> and so is the case with the right to rescind a contract, which is dealt with under section 5 (“Bilateral Contracts”) of Title 5 (“Contracts in General”).<sup>60</sup> All in all therefore, although very organized and highly sophisticated, the treatment of remedies in the Dutch code does not reflect, in our view, a fully integrated remedial scheme.

The most vigorous legislative attempt to create such a unified and comprehensive system is reflected in the 1994 Civil Code of Quebec. Here, in Book 5 (“Obligations”), under Title 1 (“Obligations in General”), we find Chapter 6 (“Performance of Obligations”) section 2 of which deals with the “Implementation of the Right to Enforce Performance”).<sup>61</sup> Article 1590 opens the section by defining the duty to

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2002), w3.uniroma1.it/idc/centro/publications/04hartkamp.pdf. The 1994 codification in Quebec replaced the original civil code promulgated in 1866. Official information on the history of codification in Quebec is accessible at [www.justice.gc.ca/en/ps/inter/his\\_que\\_law/index.html](http://www.justice.gc.ca/en/ps/inter/his_que_law/index.html); see also *Civil Code*, CANADIAN ENCYCLOPEDIA, [www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001638](http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001638).

56. The translation of the headings appearing in the text is based on Hanappel, Mackaay, Wrendorf & Thomas, *The Civil Code of the Netherlands Antilles and Aruba* (2002).

57. §§ 52-57.

58. §§ 127-141.

59. See *id.* esp. §§ 162-163, 166, 168. Furthermore, and somewhat surprisingly, a few important principles regarding the right to enforce performance of obligations are dealt with separately under Title 11 (“Rights of Action”) of Book Three of the code (“Patrimonial Law in General”). See esp. §§ 296, 299-300, 302, 304, 305a-305b.

60. See esp. §§ 265-279.

61. In French: “De la mise en œuvre du Droit à L’exécution de L’obligation”.

perform, and laying out in a most explicit way the remedial avenues available to the aggrieved creditor whenever the debtor fails to perform. Those avenues include, in addition to the residual right to claim monetary compensation (*exécution par équivalent*) for partial or complete non-performance, the right to:

- 1) force specific performance of the obligation;
- 2) obtain, in the case of a contractual obligation, the resolution or rescission of the contract or the reduction of his own correlative obligation;
- 3) take any other measure provided by law to enforce his right to the performance of the obligation.

And so, in the very opening of the section, we receive at once a concise, simple and apparently comprehensive plan of the remedies available to the aggrieved creditor under the private law of Quebec. This plan is coherently followed throughout the remainder of the section: subsection 2 addresses shortly (articles 1591-1593) the self-help remedies of suspension (of creditor's obligations) and detention (of debtor's assets). Subsection 3 (articles 1594-1600) deals with the conditions under which the debtor is to be brought "Under Default" ("*en demeure*"), a concept which in civilian systems is considered a precondition for the imposition of any legal sanction on the debtor. Subsection 4 (articles 1601-1603) discusses shortly the first avenue mentioned in article 1590, namely, the creditor's right to enforce performance of positive and negative non-performed obligations either by an injunction or by judicial authorization to carry out the obligation himself or to remove the undesirable effects of its breach. Subsection 5 (articles 1604-1606) provides, also very concisely, the conditions under which the creditor is entitled to terminate the contract. Finally, subsection 6 (articles 1607-1625) presents a relatively elaborate set of rules governing the award of "Performance by Equivalence", *i.e.*, substitutionary relief in the form of compensatory damages (liquidated as well as non-liquidated).<sup>62</sup> One of those provisions, however, is not concerned with compensatory damages, but rather with punitive damages, which are available only when provided by statute, and only to the extent needed for the sake of deterring future wrongdoing.<sup>63</sup>

The last piece of legislation to be briefly discussed is the relatively recent German law reform effected by the "Law for the Modernization of

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62. To this elaborate scheme one may add articles 1457, 1458, which announce, respectively, the duty to make reparation of damages caused as a result of a negligent conduct (tort) or a violation of a contractual duty (breach of contract).

63. See art. 1621.

the Law of Obligations”.<sup>64</sup> This statute came into force in January 1, 2002, and among other important innovations in other areas (mainly consumer protection law) it has had a major impact on the structure of the German law of obligations in general, and the law of remedies in particular.

A detailed discussion of this reform is outside the scope of this article.<sup>65</sup> It will suffice to mention two of its most obvious structural innovations, both included in the revised Title on “Obligation to Perform”: First, the explicit adoption of a general concept of “breach of duty” (*Pflicht-verletzung*) as a precondition to civil liability for breach of any kind of obligation (substituting the traditional German distinction between various forms of non-performance, as well the entrenched insistence on “Fault” as precondition of any liability);<sup>66</sup> Second, the construction of a simple scheme of remedies, consisting of three basic remedies: Specific performance,<sup>67</sup> compensatory damages<sup>68</sup> and termination (in case of contractual obligations).<sup>69</sup>

A final remark must go to the late twentieth century efforts of leading European and non-European scholars to unify the principles governing contract law and tort law, as witnessed in the 1994 and 2004 Unidroit Principles for International Commercial Contracts (PICC),<sup>70</sup> the

64. Gesetz zur Modernisierung des Schuldrechts of 26 November 2001, BGBl I, 3138 ff.

65. For a succinct presentation of the main innovations and the background for this law reform, see Reinhard Zimmerman, Remedies for Non-Performance: The Revised German Law of Obligations Viewed Against the Background of the Principles of European Contract Law, 6 EDINBURGH L. REV. 271 (2002), published also in REINHARD ZIMMERMAN, THE NEW GERMAN LAW OF OBLIGATIONS—HISTORICAL AND COMPARATIVE PERSPECTIVES 39-78 (2005). For another useful summary, see Hans Schulte-Nölke, The New German Law of Obligations: An Introduction, [www.iuscomp.org/gla/literature/schulte-noelke.htm](http://www.iuscomp.org/gla/literature/schulte-noelke.htm).

66. The new concept is introduced in article 280(1): “If the obligor fails to comply with a duty arising under the obligation, the obligee may claim compensation for the loss resulting from this breach. This does not apply if the obligor is not liable for the failure.”

67. This concept is not literally referred to in the code. However it clearly follows from article 241 which defines the creditor’s right to demand performance. For a discussion of the new provision relating to the right to specific performance and its limits, see Zimmerman, *supra* note 65, at 280-86.

68. The new scheme of principles relating to damages is to be found mainly under articles 280-285 and 287-288 of the revised code. For a discussion of these provisions, see Zimmerman, *supra* note 65, at 286-97.

69. The remedy of termination is still regulated separately, however, in its original location, namely Title 5 of Section 3 (formerly Section 2) on “Contractual Obligations”. For a discussion of the relevant provisions of the revised code, see Zimmerman, *supra* note 65, at 301-08.

70. The UNIDROIT principles are accessible at: [www.unidroit.org/english/principles/contracts/main.htm](http://www.unidroit.org/english/principles/contracts/main.htm). For commentary, see, e.g., MICHAEL J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2005).

1995, 1999 and 2003 Principles of European Contract Law (PECL)<sup>71</sup> and the 2005 Principles of European Tort Law.<sup>72</sup> Although these documents focus exclusively on either the contractual or the delictual sphere, they present a very systematic approach to the treatment of remedies for breach of contract and the commission of torts. In this respect they may be helpful in any future attempt to harmonize and integrate the European law of civil remedies in a useful and coherent way.

What, if any, is the conclusion to be drawn from our brief survey of the civilian approach to remedies? Leaving a detailed discussion for another occasion, it will suffice here to express our view that the treatment of remedial issues in most civil law systems is characterized by an apparent tension. The source of that tension lies in the apparent contradiction between the lack of any explicit recognition or awareness of the existence of an integrated “law of remedies” on the one hand, and a constant move towards gradual harmonization and simplification of that same body of law on the other hand. The general approach of the civil tradition to the idea of an integrated law of remedies is therefore complex and multifaceted. At minimum, one should concede that civil law has never been truly hostile to such an idea, and that compared to the common law it has been much more receptive to it, at least in practice, if not so much in theory.

## V. THE LAW OF REMEDIES IN ISRAEL—AN OVERVIEW

Israel is a comparatively young legal system. As a mixed jurisdiction its development since its establishment in 1948 has been characterized by influences of both Common Law and Civil Law traditions.<sup>73</sup> This dual influence is most clearly evident within private law, and within the law of remedies.<sup>74</sup>

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71. The European principles are accessible at [frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/pecl\\_full\\_text.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm). See also PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000-2003).

72. The Principles are accessible at [www.egtl.org](http://www.egtl.org). For the official commentary, see PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY (2005).

73. And to some extent by Jewish law as well. Jewish law plays a central role within Israeli Family law and the law of Succession. However, in other areas, and especially within the law of obligations, its influence has been much more subtle. For discussions of the Israeli system as a mixed jurisdiction, see, e.g., Gad Tedeschi & Yaacov S. Zemach, *Codification and Case Law in Israel*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS 273 (Joseph Dainow ed., 1974); Gabriela Shalev & Shael Herman, *A Source Study of Israel's Contract Codification*, 35 LA. L. REV. (SPECIAL ISSUE) 1091 (1975).

74. As regards public law, this dual influence is less clear. For example, Israeli constitutional and administrative law has evolved almost completely as case law and was heavily influenced by English, American and more recently Canadian law. In its earlier stages, this was

The influence of the civilian tradition on Israeli law is evident throughout vast areas of our civil law. Indeed, wide areas such as property law, the law of restitution, the law of succession and most of the law of contracts are all governed today by original statutory arrangements.<sup>75</sup> These statutes were enacted by the Israeli legislator over a period of more than twenty years, with the express intention to integrate them in due course into a single civil code.<sup>76</sup> From a substantive perspective these arrangements do not always reflect continental solutions (as much as they do not always conform to Anglo-American ones). However, in terms of style, structure and scope they most clearly follow the traditional patterns of systematic European codification, rather than the typical piecemeal and peripheral character of private law reform in most common law systems.

This generalization is particularly true with respect to the two main statutes that govern the rights of contracting parties, namely the General Contracts Statute of 1973,<sup>77</sup> and the Contract Remedies Statute of 1970 (usually referred to as the “Remedies Statute”). The impact of the civilian tradition on these two pieces of legislation is obvious, in terms of both style and substance.<sup>78</sup>

As an historical fact, both the Remedies Statute on which we shall focus and the General Statute, were intended to free Israeli law from its prior subordination to the intricacies of the common law heritage. That target was achieved by substituting a systematic set of statutory rules for the older law of contracts that was hitherto based on common law principles applied and developed by the judiciary.<sup>79</sup>

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true with Israeli criminal law as well. However, a few decades ago this influence seems to have waned. Continental influence (mainly of German law) seems to play now a much more important role, and has had direct impact on legislative reform in this field.

75. Tort law, on the other hand, is governed to date by common law principles. *See infra* text following note 90.

76. *See, e.g.*, Aharon Barak, *The Codification of Civil Law*, 3 *IYUNEI MISHPAT* 5 (1973) (in Hebrew); Uri Yadin, *The Succession Law as Part of the Israeli Civil Law Legislation*, 3 *IYUNEI MISHPAT* 26 (1973) (in Hebrew); Aharon Barak, *The Independence of the New Civil Codification: Risks and Opportunities*, 7 *MISHPATIM* 15 (1976) (in Hebrew); Uri Yadin, *Towards the Codification of the Civil Law in Israel*, 6 *IYUNEI MISHPAT* 506 (1979) (in Hebrew); Aharon Barak, *The Codification of Civil Law and the Law of Torts*, 24 *ISR. L. REV.* 628 (1990).

77. For a thorough examination of the scope of this statute, see Gabriela Shalev, *General Comments on Contracts (General Part) Law, 1973*, 9 *ISR. L. REV.* 274 (1974).

78. For a discussion of the continental influences, see, e.g., Shalev & Herman, *supra* note 73, esp. at 1097-1101.

79. This process has been described as early as 1975 as revolutionary, in the sense that “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.” Gabriela Shalev, *From Common Law to Independence: Supreme Court Decisions on Contract Law in 1975*, 2 *TEL AVIV*

As far as technique and style are concerned, the Remedies Statute clearly reflects continental influence. It represents an obvious attempt to achieve clarity and coherence and to provide a simple and systematic mechanism through which any contractual dispute over remedies may be resolved. The Statute is comparatively short 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”.<sup>80</sup> Article 2 is the most important provision of the statute. It reads as follows: “Upon breach, the aggrieved party is entitled to demand enforcement of the contract, or to terminate it, and he is further entitled to damages in lieu of any of the said remedies, or in addition to them, all subject to the provisions of this statute.” Thus, this preliminary provision presents the main remedies available to the aggrieved party, clarifies the interrelations between those remedies, and sets the basic structure of the Israeli law of remedies for breach of contract.<sup>81</sup>

The second chapter of the Remedies Statute elaborates on each of the three remedies mentioned in article 2. Section 1 (articles 3 to 5) recognizes the aggrieved party’s right to enforce performance of the contract, and defines the possible limits to this right. Section 2 (articles 6 to 9) sets the rules governing the remedy of termination, including the right of both parties to restitution whenever termination takes place. Section 3 (articles 10 to 16) announces the aggrieved party’s right to compensatory damages, including liquidated damages, the amount of which may be reduced by the court if greatly disproportionate to the damage reasonably foreseeable as a result of the breach at the time of formation. Finally, in the third chapter (“Miscellaneous”) several important issues are discussed, such as rules on anticipatory breach,<sup>82</sup> frustration of the contract, and the self-help remedies of detention and set-off (articles 17 to 20). The last five articles (21 to 25) are of secondary importance and deal mainly with matters of jurisdiction and procedure.

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UNIV. STUD. IN LAW 33 (1976); see also Daniel Friedmann, *The Independent Development of Israeli Law*, 10 ISR. L. REV. 515 (1975).

80. The latter is defined as an injunction ordering the defendant to either take a certain action (including the payment of a sum of money due and the removal of the byproducts of breach) or to refrain from acting in violation of a contractual duty.

81. In this respect, it resembles article 1590 of the Quebec Civil Code of 1994, discussed *supra* text following note 61.

82. For a discussion of this concept, see Gabriela Shalev, *Remedies on Anticipatory Breach*, 8 ISR. L. REV. 8 (1973).

From a substantive point of view, however, the Remedies Statute reflects a rather mixed approach. Indeed, this is not surprising given that it was strongly inspired by the 1964 Hague Convention on the International Sale of Goods,<sup>83</sup> which itself represents a compromise between common law and civil law principles. As such, the provisions of the Remedies Statute reflect a true mixture of civil and common law approaches to remedies for violation of contractual rights. For example, a civil law approach was clearly adopted with respect to the remedy of specific performance, which was defined as a primary remedy. On the other hand, the basic provisions governing the award of compensatory damages and the remedy of rescission strongly resemble traditional common law solutions.<sup>84</sup>

In retrospect, one may confidently say that the Remedies Statute has been very successful and fulfilled its purposes. Since its enactment 37 years ago, this statute has been the basis for awarding remedies in almost every contractual dispute, commercial and non-commercial alike.<sup>85</sup> As will be demonstrated shortly, the structure and style of this original statute serve today as the basis for the Remedies Chapter of the forthcoming Israeli Civil Code.

Two final observations regarding the influence of the Civil Law tradition are in order before turning to the examination of the common law's influence on the Israeli law of remedies. In two important respects our private law diverges significantly from Anglo-American common law. First, Israeli law does not make any allowance for the Anglo-American dichotomy between law and equity. This dichotomy had played a certain role in the past, so long as English law served as a formal source of Israeli law. However, its influence gradually waned along with the introduction of new legislation which, as mentioned above, replaced English law with original and independent legal frameworks.<sup>86</sup> Hence, the distinction between law and equity, which in

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83. 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](http://www.unidroit.org/english/conventions/c-ulis.htm). A revised version was later adopted in 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](http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf).

84. For English law's influence on the Remedies Statutes, see, e.g., Shalev & Herman, *supra* note 73, at 1101-03. For a detailed overview of the provisions of the Remedies Statute, see Gabriela Shalev, *Introduction to the Law of Contract*, in INTERNATIONAL ENCYCLOPEDIA OF LAW—ISRAEL 100-123 (1995).

85. The Remedies Statute is applied regularly in labor disputes, and in cases involving consumer and standard contracts.

86. Most of the new statutes expressly disallow any further reference to English law for the sake of adjudicating issues falling under their scope. Final abolition of English law as a



common law systems has greatly impeded the integration of legal and equitable remedies,<sup>87</sup> has had no parallel impact on the development of the law of remedies in Israel.

Second, in Israeli law the Civil Law principle of good faith (*bona fide*) has played a paramount role in the development of private law. Explicitly stated in articles 12 and 39 of the 1973 General Contracts Statute, which impose a wide duty of good faith and fair dealing in both contractual and pre-contractual relations,<sup>88</sup> this principle is frequently described as a “royal principle” of unlimited scope, applicable to any civil context, including procedural law and even public law.<sup>89</sup> The impact of the principle of good faith is most clearly witnessed in the field of contract law. It is relied upon by lawyers in almost every contractual dispute, and is very frequently referred to in judicial decisions. Among other important influences, the principle has played a vital role in the interpretation of the Remedies Statute during the years. On one important occasion the good faith principle was relied upon by the Supreme Court for the purpose of introducing into contract law the defense of “contributory negligence”, previously implemented only within the ambit of tort law.<sup>90</sup>

In light of all that has been said, Civil law’s influence on the Israeli law of contract remedies is undisputable. Hence, at this stage one might be tempted to speculate that the Israeli law of remedies would probably develop along the lines of the civilian tradition. However, unfortunately, this is far from being the case. We believe that this is largely the result of the influence of the common law tradition on Israeli jurisprudence in general, and on Israeli tort law in particular.

As for the latter, unlike the areas of contracts and restitution, the whole area of tort law is governed to date by the Torts Act, a detailed statute enacted by the British Mandate prior to the establishment of the state of Israel. According to article 1 of the Act, which is still in force today, the provisions of the Act are to be interpreted according to English

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binding source of law took place in 1980, with the enactment of the “Statute on the Foundations of Law”, article 2 of which declared final liberation from the historic grip of English law.

87. See *supra* text accompanying note 18.

88. For a discussion of those important provisions, see, e.g., Gabriela Shalev, *The Pre-Contractual Process Under Israeli Law*, in ISRAELI REPORTS TO THE 13TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 15 (1990); Gabriela Shalev, *Precontractual Liability in Israel*, in PRECONTRACTUAL LIABILITY (Ewoud D. Hondius ed., 1990); Gabriela Shalev, *Contract Law*, in INTRODUCTION TO THE LAW OF ISRAEL 111, 115-19 (1995); Gabriela Shalev, *Contract Law*, in THE LAW OF ISRAEL: GENERAL SURVEYS 212-22 (Itzhak Zamir & Sylviane Colombo eds., 1995).

89. See, e.g., Gabriela Shalev, *Good Faith in Public Law*, 18 ISR. L. REV. 127 (1983).

90. See *Eximin S.A. Belgian Corp. v. Textile & Footwear Ital Style Ferarry Inc.*, 47 P.D. 64, 80-83 (1993).

Common Law principles. And so, unlike other areas where the influence of English law has gradually disappeared, tort law has kept the peculiar characteristics of the English Common Law, although in the form of a static statutory scheme.

Although the act does contain a separate chapter on “Remedies for Wrongs”, it is deficient, especially regarding damages, which are regulated by a single provision. Furthermore, in important respects 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 prompted the judiciary to ignore the relevant provisions, adopting instead a more traditional common law approach.<sup>91</sup>

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

For many years this situation has impeded comparative analysis, in both the case law and the legal literature, of the remedial rules of tort law on the one hand, and contract law on the other. As a result, no attention was given to substantive similarities between the remedies in both fields, and the principles governing them. In fact, until very recently, with the rise of scholarly interest in the proposal to unify the law of remedies, there has been almost no academic discussion of the interrelations between tort and contract law, neither in general nor in the context of their respective remedial regimes.

Another factor that in our view has also contributed to the isolated development of the law of remedies in Israel is the strong influence of the Common Law tradition on Israeli jurisprudence, case law and literature. Israeli statutory law defines precedent as a formal source of law. The judge is regarded as a senior partner in the creation of law, and case law plays an important role in every legal field. In addition, due to cultural, linguistic and a variety of other historical and sociological factors, Israeli academia and judiciary are much more heavily influenced by Anglo-

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91. For example, the remedy of injunction, according to the language of article 74, should be granted as of right unless a number of accumulating 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 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.

American legal systems than by the Civil Law tradition. This influence is clearly demonstrated in the content and structure of the curricula in the nine law schools that operate in the country. For example, the very notion of a general “Law of Obligations”, so fundamental to any civilian lawyer, is still unfamiliar to most Israeli lawyers and academics. Tort and contract are taught and treated as wholly separate subjects, usually with little emphasis on the strong affinity between them on the remedial level. Furthermore, in sharp contrast to the situation in the United States and in other Common Law jurisdictions, the subject of remedies has not in the past been considered as deserving careful study and research, and has not been taught to law students as a separate legal subject.

Given the fundamental differences between the statutory schemes which still govern contract law and tort law in our country, 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 reform Israeli law, and to unify the whole law of civil remedies. In the following Part we outline the basic features of this proposal.

#### VI. LAW REFORM: REMEDIES IN THE NEW ISRAELI CIVIL CODE

In Israeli terms, the proposal to formally unite the statutory basis of the law of civil remedies is a groundbreaking development. First, it carries some significant modifications to the substantive norms governing the award of remedies in civil and commercial disputes. Second, and most importantly in the context of this article, 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 proposal creates a “law of remedies”, a distinct legal field previously not recognized in Israeli jurisprudence. If the reform is adopted by the legislator, a dramatic change will take place in the formal structure of the whole law of obligations: Tort law, Contract law, the law of Restitution and any other formal source of civil obligations, will no longer be divided into substantial and remedial law, primary and secondary rights. Their remedial regimes will be ‘cut off’, and united with the remedial regimes that operate within the other branches of the law of obligations.

What might be the purpose of such a far reaching transformation of the structure of the law? The proposal itself does not provide a detailed answer to this question. All that is said in the commentary to the Draft Civil Code is this:

The uniqueness of this chapter lies in its application to the fields of both tort law and contract law. This reflects the view that from the moment a remedial right for a violation of an obligation arises, the legal source upon which that right is founded should have only a limited impact.<sup>92</sup>

In a series of articles (in Hebrew) the authors of this article have addressed this important question.<sup>93</sup> In a nutshell, our answer is that the object of the proposal is to give official recognition to the idea, long acknowledged by many, that the remedial principles controlling the award of remedies for civil wrongs, including torts and violations of contractual obligations, carry substantial similarities in terms of both the type of remedy available to the aggrieved party and the legal rules governing their application.<sup>94</sup> The proposal assumes that remedial rules of law should be based not on the formal origin of the wrong committed (tort, contract, property, etc.) but rather on the substantial characteristics of the injury to the plaintiff and of the specific remedy requested by him.

In the remainder of this we shall take a glance at the structure of the remedies chapter, in an attempt to demonstrate the method applied in the draft in order to achieve this goal.

The remedies chapter in the Draft Civil Code contains 54 articles and is divided into seven sections. Similar to other chapters of the draft—and to the Remedies Statute discussed earlier, which in many respects serves as the basis for the draft—the remedies chapter opens with a general section including a few definitions and a number of general principles. Among the terms introduced are the notions of “Enforcement” and “Fundamental Breach” as well as the key concept of “Breach” (which is defined outside the chapter, in the opening articles of the draft code). All of these definitions are based on the ones provided today in the Remedies Statute, but in the draft they have been redefined so as to allow their applicability outside the contractual sphere. Thus, for example, instead of the current definition of “Breach” in the Remedies Statute (“an act or omission contrary to the *contract*”) a wider definition

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92. DRAFT CIVIL CODE vol. II (Commentary for the Public) 201 (2004).

93. See Yehuda Adar, Why Unify Contract and Tort Remedies?—A Reply to Professor Dagan, 36 *MISHPATIM* (HEBREW UNIV. L. REV.) 357 (2006); Yehuda Adar, Of the Honey and the Sting: Reflections on Remedies and the Draft Civil Code, 5 *MISHPAT VE'ASAKIM* (IDC L. REV.) 347 (2006); Gabriela Shalev & Yehuda Adar, 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).

94. For the wide recognition of this phenomenon in Anglo-American legal literature, see sources cited *supra* note 22.

is offered in the draft, according to which a breach is “an act or omission contrary to an *obligation*.”<sup>95</sup>

The draft then moves on to define “Obligation”. This basic term is defined, albeit in a somewhat partial and indirect manner, within article 445, which provides: “Within this chapter, a duty to refrain from committing a wrong shall be treated as an obligation.” Apart from the fact that it introduces into the Israeli legal jargon a concept hitherto rarely used outside the realm of contractual obligations, this definition is innovative in the sense that it deviates from the ordinary meaning of the term “Obligation” as understood and employed in civil law systems. In the civil law tradition an “obligation” is commonly defined as a legal tie between two *definite* persons (a creditor and a debtor) entailing a duty of one of them towards the other, to act or to refrain from acting in a certain manner.<sup>96</sup> In contrast, the Israeli definition afforded in article 4 of the draft, endorses a much wider concept. Under the draft, the term “Obligation” seems to encompass any legal duty correlative to a legal right, *i.e.*, not only duties correlative to rights *in personam* (such as contractual duties or duties of compensation under tort law) but also duties that are correlative to rights *in rem* (such as the typical rights protected by tort law and property law).<sup>97</sup> The purpose is to enable a clear and explicit analogy between torts, breach of contract, and any other possible type of violation of civil rights. Under the new definition any infringement of a legal right is considered a breach of an obligation (or a civil wrong) and as such gives rise to the general remedial rights provided for by the remedies chapter.

In addition to definitions, two main substantive principles are set out in the first section. First, similar to article 2 of the Remedies Statute, the draft announces the right of a person suffering a breach to enjoy the remedies afforded by the statute. Second, it addresses the issue of

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95. Draft Civil Code art. 4.

96. *See, e.g.*, JEAN CARBONNIER, DROIT CIVIL 17 (19ème ed. 1995). For an official definition, see, e.g., La. Civ. Code art. 1756 (1984), available at [www.legis.state.la.us/lss/lss.asp?doc=108990](http://www.legis.state.la.us/lss/lss.asp?doc=108990): “An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something.”

97. It seems that this concept is not dissimilar to the German concept of *pflichtverletzung*, introduced by the new law reform of the law of obligations (*see supra* text following note 65). In this context it is illuminating to mention that some systems have completely eliminated the distinction between contractual and tort liability. The CZECH REPUBLIC CIVIL CODE of 1964 expressly rejects that traditional distinction, at least as far as money damages are concerned. Section 420(1) of the Code provides: “Everyone shall be liable for damage caused by violating a legal duty”, thus fixing a general principle of compensation for wrongful acts (accessible at <http://mujweb.cz/www/vaske/obcan1.htm>).

accumulation of remedies, providing a guideline according to which “[t]he aggrieved party is entitled, up to the realization of his complete right, to choose his remedy or to accumulate remedies, as long as they do not contradict each other.”

The remedies draft then proceeds to consider the main remedies available to the aggrieved party. Following the structure of the Remedies Statute, it deals first with the remedy of Enforcement. Article 448, adopting the approach of the Remedies Statute and applying it across all civil law, makes clear that a party suffering a breach of obligation (*i.e.*, a civil wrong) is entitled to enforce the obligation as against the wrongdoer, subject to four exceptions. The exceptions deny the remedy whenever enforced performance of the obligation is impossible; when it would oblige the wrongdoer to provide a personal service (or to accept such service); when it would impose an unreasonable burden of supervision on the court; or if enforcement would be otherwise unjust considering the circumstances of the case.

The section includes a number of other provisions dealing with the enforcement of money debts, with modified enforcement (*cy-prés*) and with other issues concerning the judicial administration of the remedy.

Section 3 deals with the contractual remedy of termination, and basically adopts the same remedial scheme provided by the Remedies Statute.

Section 4 deals with the remedy of compensatory damages. The first subsection defines the general right to compensation for damage caused by a breach, and also defines the purpose of the award of damages, which is “[to] put the aggrieved party, as much as possible, in the same situation he would have been in had the breach not occurred.”

This important provision clarifies, in a straightforward manner, that the aim of damages in contract, torts and in fact in any other civil context should be the same. However, in what seems a striking contrast to this view, the next two sections retain the present distinction between the remoteness tests in contract (foreseeability) and tort (directness and naturalness).<sup>98</sup> The second subsection announces a few more general principles of general application such as contributory negligence and mitigation, and also introduces the possibility of awarding punitive damages for a malicious breach of obligation.

A major contribution of the draft was made in the remaining subsections of the damages section. Each of these subsections deals

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98. This is somewhat odd, in light of the fact that Israeli case law has usually ignored the directness test and adopted in most tort cases a test of foreseeability. See discussion *supra* note 91.

separately, but quite thoroughly, with the different kinds of injury a breach of obligation might cause: Corporeal damage, physical damage to property, and pure non-pecuniary loss. Each of them includes a brief presentation of the main compensable “heads of damage” and then goes on to discuss special issues concerning the assessment of the different types of injury. A separate subsection authorizes the court to order temporary assessment of damages instead of a lump sum, and outlines a few guidelines. The last subsection deals with the possibility of awarding compensation independent of the proof of loss, either under objective standards of market value (in case of termination) or according to a liquidated damages provision.

The next two sections (5 and 6) deal, respectively, with restitution following termination, and with the doctrine of anticipatory breach, which is formulated broadly, so as to apply not only to a threatened breach of contract, but also to a threatened tort.

The chapter concludes in subsection 7, which enlists three special remedies previously not widely recognized as general civil remedies. Two of these remedies are only applicable to contractual disputes, namely the remedy of suspension of performance (recognized in cases of fundamental breach) and the remedy of reduction of price. The third is a new remedy, called “deterrent injunction”. This remedy, largely based on the French doctrine of *astreintes*, is basically a private fine imposed on a defendant for disobeying an injunction. Similar to other remedial doctrines adopted by the draft, such as punitive damages, contributory negligence and anticipatory breach, this new remedial measure will also be available outside its traditional “homeland” (in this case contract law).

To conclude, the chapter’s internal structure and classification, as well as its substantive innovations, all reflect the attempt to bring unity, coherence and simplicity to the law of remedies. This effort is driven by the belief that a modern law of remedies should not base itself on the classification of the primary right violated, but rather on the specific purposes and problems which arise when such a right has been violated. As mixed jurisdiction jurists, we believe not only that such an approach should be welcomed by the Israeli legislator, but that it may inspire other legal systems that strive towards a more rational, comprehensible and efficient scheme of civil remedies. Acquaintance with the Israeli experience in this area should be valuable for any jurist interested in the study, development and reform of the law of remedies.