

TOWARDS A NEW  
EUROPEAN IUS COMMUNE

*edited by*

A. GAMBARO - A.M. RABELLO



# TOWARDS A NEW EUROPEAN IUS COMMUNE

*Essays on European, Italian and Israeli Law,  
in occasion of  
50 years of the E.U. and of the State of Israel*

*edited by*

A. GAMBARO – A.M. RABELLO



The Harry and Michael Sacher Institute for Legislative  
Research and Comparative Law  
The Hebrew University of Jerusalem  
1999-5759

## TABLE OF CONTENTS

A.G.- A.M.R., <i>Introduction: Towards a new European "Ius Commune"</i>	I
 <b>History of Law</b>	
Paolo Grossi, <i>Historical Models and Present Plans in the formation of a future European Law</i>	1
Francesco Lucrezi, <i>Haruspicy in the Constantinian Legislation</i>	9
Antonio Padoa Schioppa, <i>A common Law of Europe: Reflections on the Decline and Rebirth of a Model</i>	21
Alfredo Mordechai Rabello, <i>The Attitude of Rome towards Conversions to Judaism</i>	37
Rodolfo Sacco, <i>Nature du Droit Privé</i>	69
Shmuel Shilo, <i>Jewish Law in the Israeli Legal System</i>	81
 <b>Property</b>	
Antonio Gambaro, <i>Toward a Codification of the European Law of Property</i>	89
Joshua Weisman, <i>Limited Ownership</i>	99
 <b>Contract, Consumer Law, and Banking Law</b>	
Guido Alpa & Rossella Delfino, <i>Towards a new European Common Law of Contracts</i>	105
Ricardo Ben Oliel, <i>Banking Liability in Providing a Safety-Box Service</i>	119
Helen Bonk, <i>The contract Law of Russia</i>	127

Sylviane Colombo, <i>Money laundering in Israel: a new Path</i>	141
Ugo Mattei, <i>The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments</i>	149
Salvatore Mazzamuto, <i>Unfair Contract Terms in Italian Law</i>	169
Cosimo Marco Mazzoni, <i>Gift ethics and Organ donation</i>	181
Uriel Procaccia, <i>Rules of market: A perennial dilemma in Corporate Governance</i>	187
Mario Serio, <i>Unfair Contract Terms in English Law</i>	199
Gabriela Shalev, <i>Constitutionalization of Contract Law</i>	205
<b>Torts and Environment Law</b>	
Lydia Belotsky, <i>State Responsibility and Liability for Damage to the Environment</i>	237
Andrea Bianchi, <i>Harmonizing Liability Rules for Environmental Damage in Europe: Achievements and Prospects</i>	261
Israel Gilead, <i>Cause-in-Fact in Israeli Tort Law</i>	279
Pier G. Monateri, <i>Economic Losses: A Swamp Between Tort and a Newer Property</i>	291
Barbara Pozzo, <i>Challenges to the Tort System in the Environmental Field: The European Perspective</i>	299
Giovanna Visintini, <i>Comparative Remarks on the Importance of the Law in Action, with special regard to Tort Law</i>	313
<b>Procedure</b>	
Federico Carpi, <i>The Efficacy Of Foreign Judgements and Orders</i>	325

Stephen Goldstein, *The Structure of the Israel Supreme Court: Problems and Prospects* 333

Pablo Lerner, *Imprisonment of Debtors in Israeli Law* 349

### **Constitutional Law**

A.M.R. *Introductory Note* 373

Asher Felix Landau, *The Constitutional Status of Basic Laws* 375

Aharon Barak, *Judgment: United Mizrahi Bank Ltd., Et Al. V. Migdal Village, Et Al* 381

Ruth Gavison, *A Constitutional Revolution?* 517

\* \* \*

Antonio Baldassarre, *Judicial Discretion and Constitutional Adjudication* 527

Mario Comba, *Constitutional Rights and Judicial Review in Federal States* 541

Emanuele Ottolenghi, *Stability, Immobility, Ineffectiveness: Assessing the Impact of Direct Election of the Prime Minister* 553

Alexander Somek, *Conflicting Conceptions of Higher Law – Austria and the European Trend in Judicial Review of Legislation* 571

### **Administrative Law and Telecommunications**

Roberto Caranta, *From Faulty To Illegality: Shifting Patterns In Governmental Liability* 621

Debora Housen Curiel, *Developments in European Community Telecommunications Law: The Storm before the Calm* 637

## **European and International Law. Private International Law**

Talia Einhorn, <i>The EC-Israel Association Agreement: Comparative Aspects of Liberalizing International Trade</i>	649
Celia Wasserstein Fassberg, <i>Recent Developments in Israeli Choice of Law in Matrimonial Property or What Exactly is a Ius Commune</i>	675
Iris Rabinovich Brun, <i>The Trust and Private International Law: an Israeli perspective</i>	685
Sara Modena Terracini, <i>The 1995 Euro-Mediterranean Association Agreement between Israel and the EU</i>	699
Author Index	705

## INTRODUCTION: TOWARDS A NEW "IUS COMMUNE"

We are pleased to present the studies prepared and discussed during the first Italian-Israeli Meetings on Law Studies. The first encounter took place in Israel with meetings at the Hebrew University in Jerusalem, at the University of Haifa and at the College of Management at Rishon Lezion; the second encounter was in Milan, at the department of Law of the local University.

The two meetings were organized by the Sacher Institute for Comparative Law of the Hebrew University in Jerusalem and the Italian Association of Comparative Law. The studies presented in this book were prepared as part of a process of interaction among jurists from two different countries.

Italy is usually considered a Civil Law country, which is true in a general sense, but this characterization has become less and less significant. Israel has a mixed system, but this too has never really been significant. It is unsatisfactory to define each of these systems by ascribing it to the Common Law or Civil Law tradition.

The discussion of a series of topics treated by both Italian and Israeli jurists was, first of all, an opportunity to meet and become better acquainted.

Bilateral meetings among jurists from different countries is an academic tradition which not only represents an opportunity to meet old and new friends, but also, on an intellectual level, it is an occasion for understanding differences between ourselves and others and for experiencing the insight that understanding others helps us understand ourselves. In the case of Italian and Israeli legal traditions, which on the face of it, are very different, it became evident during the discussions that the two are really very similar.

The Italian-Israeli Meeting was more than a conventional bilateral academic conference. Juridically, the past fifteen years of the XXth century have been dynamic. Legal structures that seem to be consolidated by age-old traditions have undergone significant changes. For the Italian juridical experience, these changes have a clear origin; they are a result of the growing Europeanization of the internal laws of EC countries. For



Israeli law, the reasons for the change are economic and cultural rather than institutional. It is clear that the need for globalization on the one hand, and the strong connection with Western culture, on the other have contributed to the accelerated evolution of the rather recent Israeli juridical tradition.

These changes however, do not uproot a legal tradition; they simply remind us that history is a story of movements and changes. That is why the first part of every meeting was dedicated to the history of Law, which not only represents a search for one's roots but also demonstrates a passion for history. This also explains why these meetings included studies on Roman Law along with Jewish Law as well as European Common Law. It was noted that the evolution of present law has been marked by more evident change in the sector of private Commercial Law because of the push for globalization and the integration of markets. It is not surprising therefore, that the major part of our meetings were dedicated to Consumer Law and Banking Law.

For different reasons however, Constitutional Law is another sector of the contemporary legal experience which has been subject to tensions and profound changes both in Israel and in Italy. This of course has not affected the political-constitutional foundation of parliamentary democracy or of the social state, which seems to be firmly consolidated by now, but rather to the way in which legal principles have been transferred to the field of public action. Historians tell us that the XIth century was the Legal Century in which the Western legal tradition began, because the need for legality was so great. The second half of the XXth century will also be remembered as a period with a strong need for legality, as a reaction to the barbarism of the first half. The problem of defining criteria of legality in the context of political action conducted by freely elected members of parliament and government, is not simple. The members of the Italian and Israeli Legal Meeting had the opportunity to listen to two Supreme Court Judges speak on this problem: Justice Aharon Barak from the Israeli Supreme Court and Professor Antonio Baldassarre, formerly president of the Italian Constitutional Court. Their intellectual contribution was of great value from every point of view.

Apart from the area of law in strong tension for growth, the Italian-Israeli Meeting explored a series of topics: from the Law of Torts and Environmental Law to Civil Procedure, Administrative Law,



Telecommunications and of course, European and International Law. Not that news in these areas are scarce, but the underlying theme was the European dimension. Italian Law is characterized today by the fact that it is a national law within a European Law which is not only a product of European legislation but is also the responsibility of the European jurist. It has already been observed how the process of harmonizing European Law assumes the intellectual supremacy of a core common to the various national laws.

The discussion was then oriented towards the cultural tradition in which Israeli legal doctrine is developing. Finally, the common language that allowed the Israeli and Italian jurists to communicate so intensely and profitably was found in the great models that have formed the European legal tradition in the last two centuries: the French model, the German model and the Common Law model.

What will be the new "Ius Commune" that will allow European jurists to communicate among themselves with the same facility as their ancestors? We do not know. It has become more of a risk to make a legal forecast than to make one for the weather. It is however certain that it will come from a plurality of cultural models to which both Italy and Israel feel linked.

Finally, we would like to thank the Italian *Centro Nazionale di Ricerche* (C.N.R.) for its contribution to our Colloquium and for the publication of this book.

A. G. – A. M. R.