

A SCHOLAR, TEACHER, JUDGE, AND JURIST IN A MIXED JURISDICTION: THE CASE OF AHARON BARAK

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INTRODUCTION

Mixed legal systems are defined as systems that derive from more than one legal tradition or family.¹ Can we also define "mixed-legal jurists"? Do scholars, teachers, judges, or jurists in mixed-legal jurisdictions differ from their colleagues in "pure" jurisdictions? Naturally, jurists in a mixed jurisdiction are usually educated in their home country and are therefore trained to work within its hybrid-legal environment. But do they also have a particular awareness of the idea of mixed-legal systems? Do they share a sense of responsibility towards the special character of their mixed jurisdiction? In this piece, I investigate these questions by analyzing the mixed-legal system of Israel

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1. William Tetley, *Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel and Quebec/Canada)*, 78 TUL. L. REV. 175, 182 (2003).

through the eyes of Aharon Barak, a world-renowned Israeli jurist and judge.

Barak, born in 1936, was a prominent law professor and a prolific writer and legal theorist, who became Dean of the Hebrew University Faculty of Law at an early age. He was then appointed Israel's Attorney General and later joined the Israeli Supreme Court, on which he served for nearly thirty years as an Associate Justice and then as the President of the Court.² Even after his retirement from the bench, he has remained an important figure in Israeli academia and public life to this day.³ In this Article, I describe Israel's mixed-legal system by following Barak's long career as a scholar, teacher, judge, and jurist. I show how Barak expressed Israel's unique mixture while simultaneously shaping it. Yet my deeper purpose in this Article is to use Barak's ideas on mixed jurisdictions to demonstrate the Israeli dynamic conception of law, and to explain the Israelis' insistence on the originality and independence of their legal system.

Barak is of interest to comparatists for three reasons. First, as I discuss below, no one has better expressed Israel's legal mixture. In his long and diverse career, Barak personified Israeli legal fusion and was a living example of a "mixed jurist." Second, Barak's important functions as a law professor, dean, Attorney General, judge, and President of the Supreme Court clearly enabled him to deeply affect Israeli mixed law and its legal system. Barak not only represented Israel's legal mix, but forged it according to his own worldview.⁴ Third, Barak is probably the

2. For more biographical information on Barak, see NOMI LEVITSKY, *YOUR HONOR* (2001) (Isr.); ARIEL BENDOR & ZEEV SEGAL, *THE HAT MAKER: DISCUSSIONS WITH JUSTICE AHARON BARAK* (2009) (Isr.).

3. A 2008 survey analyzing the number of references in the media to Israeli jurists has found that Barak was fourth on the list, even though he retired two years prior to the survey. See Amit Ben Arroyo, *Accountability*, *MARKER* (Dec. 30, 2008, 7:11 AM), <http://www.themarker.com/law/1.512404>. Only the acting Attorney General, Minister of Justice, and President of the Supreme Court preceded him. *Id.*

4. For a critical account of Barak's jurisprudence in general, see Richard A. Posner, *Enlightened Despot*, *NEW REPUBLIC* (Apr. 22, 2007), <https://newrepublic.com/article/60919/enlightened-despot> (reviewing AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006)) ("I have my differences with Robert Bork, but when he remarked . . . that Barak 'establishes a world record for judicial hubris,' he came very near the truth What Barak created out of whole cloth was a degree of judicial power undreamed of even by our most aggressive Supreme Court justices. He puts [John] Marshall, who did less with more, in the shade [Nevertheless], Barak himself is by all accounts brilliant, as well as austere and high-minded—Israel's Cato.").

best example of Israel's dynamic-legal character and of the uniquely Israeli type of mixed-legal system; he is the foremost advocate of the idea that Israel is a mixed jurisdiction that borrows from many traditions,⁵ while also insisting on its originality and intellectual independence by refusing to bow before any particular legal tradition.

Barak considered legal fusion to be an important character of Israel's legal culture and a symbol of its independence.⁶ According to him, the Israeli legal system has deep roots in both the Jewish and Western legal traditions, but he also believes that it is a young and vibrant juridical system which is inspired by different legal cultures—Jewish and non-Jewish, ancient and modern, Anglo-American and Romano-Germanic—to form its own hybrid-yet-original system.⁷ The result of this history is a unique mix, which on the one hand reflects and articulates its various legal and cultural sources, yet on the other hand is an innovative creation attentive to Israel's present-day values, needs, and interests. Therefore, according to Barak, Israel's legal system is a unique blend that cannot be accurately attributed to any of the known legal families, not even to “the third legal family” of mixed—common/civil law—jurisdictions.⁸

This Article has three parts: the first describes Israel as a *sui generis* mixed jurisdiction; the second discusses Barak's special awareness of Israel's hybrid-legal system and his views regarding legal borrowing and the need of developing an Israeli autonomous and original law; and the third follows Barak's biography from law school to the bench, describing the ways he expressed Israel's mixture, while at the same time shaping it according to his ideas described earlier in the Article.

5. By legal borrowing I mean the different ways of adopting, emulating, and transplanting legal norms, ideas, and institutions from other jurisdictions.

6. See Aharon Barak, *The Tradition and Culture of the Israeli Legal System*, in EUROPEAN LEGAL TRADITIONS AND ISRAEL: ESSAYS ON LEGAL HISTORY, CIVIL LAW AND CODIFICATION, EUROPEAN LAW, ISRAELI LAW 473, 491–92 (Alfredo Mordechai Rabello ed., 1994) [hereinafter Barak, *Tradition*]; Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 ELEC. J. COMP. L. (Apr. 2002) [hereinafter Barak, *Reflections*], <http://www.ejcl.org/61/art61-1.html> (“[T]hough Israel belongs to the Western legal culture, we do not belong solely to the commonly accepted families of Western legal culture. We have our own style, which is similar to but different from the common law family.”).

7. Barak, *Reflections*, *supra* note 6.

8. *Id.*

I. ISRAEL'S UNIQUE MIXED LEGAL SYSTEM

To better understand Barak's ideas, it is necessary to become acquainted with mixed-legal systems and with Israel as a *sui generis* mixed jurisdiction. There are two ways to look at mixed jurisdictions.⁹ From a wider perspective, mixed-legal systems are systems that derive from more than one legal tradition or family. Since the law is an ever-changing historical phenomenon, many legal systems are hybrids or "somewhat" mixed, because their norms, institutions, procedures, and culture all developed from different traditions and constantly merge and transform.¹⁰ In that sense, many—if not all—legal systems are hybrids, composed of Western common law and civil law, with interspersed local, traditional, or religious laws.¹¹

From a narrower perspective, when talking about a distinct family of mixed-legal systems, comparatists usually refer to jurisdictions in which both the Romano-Germanic tradition of the civil law and the Anglo-American tradition of the common law

9. See generally Vernon Valentine Palmer, *Two Rival Theories of Mixed Legal Systems*, 6.1 ELEC. J. COMP. L. (June 27, 2007), <http://www.ejcl.org/121/art121-16.pdf>.

10. See, e.g., H Patrick Glenn, *Quebec: Mixité and Monism*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 1, 1 (Esin Örüçü et al. eds., 1996) [hereinafter *MIXED AND MIXING*] (citations omitted) ("There is . . . a hidden, temporal dimension in the idea of a mixed legal system. The sources of its law are disparate, and hence mixed, and at the present time statist structures have been unable to complete the task of transfiguring disparate law into systemic, national law. So long as this process is incomplete, the jurisdiction will remain mixed and the mixité will remain evident in ongoing, continuing use of disparate sources."); Esin Örüçü, *Introduction to MIXED LEGAL SYSTEMS AT NEW FRONTIERS* 1, 1 (Esin Örüçü ed., 2010) ("Any attempt to undertake a comprehensive study of 'mixed legal systems' and to analyse what the concept entails and implies in general terms is a perilous and delicate task. The matters are initially complicated by the fact that a great variety of legal systems have developed from mixed sources and all modern systems of any sophistication or complexity are mixed to a certain extent."); Mathilda Twomey, *The Parts that Make a Whole?: The Mixity of the Laws of Seychelles*, in *MIXED LEGAL SYSTEMS, EAST AND WEST* 55, 55 (Vernon Valentine Palmer et al. eds., 2015) [hereinafter *EAST AND WEST*] ("[T]he third legal family includes those systems that experienced double colonization, thereby combining in one jurisdiction both continental (civil law) private law and 'common law' public law with judicial institutions and procedural and evidential law reflecting significant assimilation of Anglo-American mechanisms.").

11. See KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 63–73 (Tony Weir trans., Oxford Univ. Press 1998) (1977) (discussing "stylistic factors which enable us to identify the families of legal systems and to attribute individual systems to them," and writing that "[s]ources of law are a distinguishing feature of Islamic and Hindu law and also help us to divide the Common Law from the Continental legal families").

play an important role. Jurists and observers—both within and outside the mixed system—are conscious of the dual character of the law.¹² This “third legal family,” as Vernon Palmer called it,¹³ includes *inter alia* Quebec, Louisiana, South Africa, Scotland, Israel, the Philippines, Puerto Rico, Cyprus, and Malta.¹⁴ Although Israel’s legal system is a composite of Western law with religious (mainly Jewish, but also Moslem, Christian, and Druze) law and local customs,¹⁵ this Article focuses on the narrow—common law–civil law—definition of “mixed jurisdictions.”

Comparatists have identified three levels of mixture in these mixed jurisdictions.¹⁶ The first is the common law–civil law blend of legal rules and institutions *within* private law.¹⁷ Israel, for example, simultaneously adopted common law institutions such as trust and estoppel, and civil law institutions such as the third-party-beneficiary contract and the centrality of good faith.¹⁸ The

12. See Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 8 (Vernon Valentine Palmer ed., 2d ed. 2012) [hereinafter MIXED JURISDICTIONS WORLDWIDE] (“[Mixed Jurisdiction] systems are built upon dual foundations of common law and civil law materials.”); Tetley, *supra* note 1, at 183–85 (quoting Palmer, *supra*).

13. Vernon Valentine Palmer, *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL LAW JOURNAL [MCGILL L.J.] 321, 342 (2009) (Can.) (“By speaking of a third legal family, I do not wish to imply that there are no other families beyond common law, civil law, and mixed jurisdictions. To the contrary, I believe that only the limits of our present knowledge and our basic Eurocentric lack of curiosity have kept us from discovering many more.”).

14. See Tetley, *supra* note 1, at 183; see also Ivan Sammut, *Interpreting the Law in a Mixed Jurisdiction: The Professor vs. the Judge—Peers or Rivals*, 62 LOY. L. REV. 777 (2016). (discussing the mixed legal system of Malta).

15. See Nir Kedar, “*I’m in the East, but My Law is from the West*”: *The East–West Dilemma in the Israeli Mixed Legal System*, in EAST AND WEST, *supra* note 10, at 141, 141–42 (“The legal tension between East and West is, in fact, rooted in one of the two deepest dilemmas of modern Jewry: the shape of Jewish culture in the modern secularized world The gradual political emancipation during the past 250 years and the ongoing process of secularization forced the Jews—first in Western Europe and later in other parts of the world—to find a way to remain Jewish while abandoning traditional Judaism: both the religious faith and the traditional way of Jewish life.”).

16. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 21 (2003) (“In a mixed jurisdiction, mixedness occurs at (at least) three different levels.”).

17. *Id.* (“First, and taking a long view, it is possible to distinguish between substantive rules of the system and the methodology by which those rules are applied—the institutions, method of reasoning, and overall mentality.”).

18. Tamar Gidron & Stephen Goldstein, *Israel*, in MIXED JURISDICTIONS WORLDWIDE, *supra* note 12, at 577, 582–83 (“[T]he duty to act in good faith was elevated to the rank of an overriding principle in the formation and performance of contracts; contracts in favor of third parties were recognized expressly and

second level of mixture is the division between private law, which is predominately Romano–Germanic in most mixed jurisdictions, and public law, which is primarily Anglo-American in all mixed legal systems.¹⁹ The third level of mixture is a distinction between the substantive private law, which is mainly civilian, and the procedural rules and modes of legal interpretation and reasoning, which are principally influenced by the common law in most mixed systems.²⁰

Israel is an atypical mixed legal system for several reasons.²¹ First, it is the only mixed jurisdiction that is not a former civil law country which was later taken over by England or the United States. Instead, it is a common law jurisdiction that gradually embraced civil law.²² True, since the mid-nineteenth century the

unqualifiedly . . . [However], it is important to note that the principles of trust and estoppel still have applicability in Israeli law.”); Barak, *Tradition*, *supra* note 6, at 475–79.

19. See Efrén Rivera Ramos, *The Impact of Public Anglo-American Institutions and Values on the Substantive Civil Law: Comments on Judge Aharon Barak’s Keynote Address*, 78 TUL. L. REV. 353, 354–58 (2003) (discussing the private–public law separation in the context of Puerto Rico’s mixed legal system); see also Palmer, *supra* note 12, at 9 (“[Another] characteristic [of mixed jurisdictions] is structural. In every case the civil law will be cordoned off within the field of private law, thus creating the distinction between private continental law and public Anglo-American law.”); Reid, *supra* note 16 (“The next level of inquiry concerns the rules themselves, the civil law jewel in the common law setting. Here the broad distinction is between public law and private law. Public law, at least in the sense of constitutional and administrative law, is in all mixed systems derived from the common law tradition. In private law, the ideas of the civil law predominate.”).

20. See Stephen Goldstein, *The Odd Couple: Common Law Procedure and Civilian Substantive Law*, 78 TUL. L. REV. 291, 292 (2003) (“[M]ixed jurisdictions may be seen as a testing ground for comparative law insights that go beyond their particular situation. In this regard, the most striking phenomenon is that, with the exception of Scotland, in all the mixed jurisdictions studied, common law (i.e., Anglo-American) procedure prevails, although the substantive private law in these jurisdictions is primarily civil law.”); Reid, *supra* note 16.

21. Nir Kedar, *Law, Culture and Civil Codification in a Mixed Legal System*, 22 REVUE CANADIENNE DROIT ET SOCIÉTÉ [CAN. J.L. & SOC’Y] 177, 180–83 (2007) (Can.); see Celia Wasserstein Fassberg, *Language and Style in a Mixed System*, 78 TUL. L. REV. 151, 157 (2003) (“Israeli law . . . became a fairly typical example of a mixed system in a nontypical way.”); Barak, *Tradition*, *supra* note 6, at 483–84; Gidron & Goldstein, *supra* note 18, at 577 (“The Israeli legal system is a mixed jurisdiction, but the manner in which the mixed nature of the system came into being is different . . . from the way in which other mixed jurisdictions . . . came into being.”).

22. Vernon Valentine Palmer, *A Descriptive and Comparative Overview, in MIXED JURISDICTIONS WORLDWIDE*, *supra* note 12, at 19, 65 (“This description of the judicial reception of common law cannot be easily applied to Israel because . . . Israel’s evolution is *sui generis*. Israel acquired a mixed legal system by a reverse process of pouring civil law into a common law system, and instead of a *judicial* reception of

law in Ottoman Palestine drew heavily on French law, but during the thirty years of British Mandate over Palestine (1917/8–1948) local law underwent a massive process of Anglicization.²³ As a result, Israel was established in 1948 to a great extent as a common law jurisdiction.²⁴ Only during the 1960s and 1970s Israel became a “real” mixed legal system as its private law and later criminal law moved towards the civilian tradition, following the massive Jewish immigration from Europe and the Moslem world.²⁵

This unusual historical pattern also created an incongruity between Israel’s mostly Anglo-American oriented law and the cultural and intellectual environment within which it operates. While Israeli law remained heavily influenced by the Anglo-Saxon colonial tradition, its political culture (i.e., the Israeli basic attitude towards the state, society, the law, or bureaucracy) is mainly inspired by ideas imported from continental Europe by Jewish immigrants.²⁶

common law, Israel experienced a *legislative* reception of *civil law*.”) (emphasis in original); Fassberg, *supra* note 21, at 155–58 (citations omitted) (“[T]he formation of [Israel’s] mixed system does not fit the pattern of a common law power ‘taking over’ and ‘making over’ a civil law system . . . Civil law was consciously added on to what had already become a predominantly common law system.”); Gidron & Goldstein, *supra* note 18, at 577–78 (“In most mixed jurisdictions civil law has been influenced by the infusion of common law. In Israel, it is primarily the opposite: the civil law tradition was introduced into the Israeli system after the common law had dominated it for decades.”).

23. For a discussion of the Anglicization of Palestinian law during the British Mandate, see Assaf Likhovski, *In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine*, 29 *ISR. L. REV.* 291 (1995).

24. See Barak, *Tradition*, *supra* note 6, at 479; see also Fassberg, *supra* note 21, at 170 (“[Israel’s] system of courts, procedures, and precedent did not spring into existence in 1948 as a new and unburdened system; they were preserved from before. Judges and lawyers were already used to thinking, formulating, and framing in [the English] style. Furthermore, as long as English law was a formal complementary source, English judgments were constantly referred to, and even after 1980, when Israeli law declared complete independence from foreign sources, English and American cases and academic writing constitute the bulk of the comparative material used in the Israeli legal community. This literary and rhetorical tradition could not fail to have an influence.”).

25. See Fassberg, *supra* note 21 (citations omitted) (“The next step in the formation of the Israeli mixed system came quite soon after the state was established, when a decision was made to adopt a series of code-like laws in the area of private law. These laws, passed during the 1960s and 1970s, were, in another curious step, based very largely on the German model. This step created the mixed system Israel now has: public law, dominated largely by common law ideas; a largely common law court system, acting according to fundamentally common law procedures; the doctrine of precedent . . . and a codified approach to private law.”).

26. Kedar, *supra* note 21, at 181–83.

Second, Israel's mixed jurisdiction is unique as there is no single influence upon its laws. Unlike the Dutch major influence on the private law in South Africa or the French prevailing effect on Quebec's private law, Israeli private law is not based on one distinct source.²⁷ Instead, it is an eclectic legal system that borrows from several foreign systems: German, French, and Italian, as well as English and American.²⁸ Of course, as an independent state, Israeli law is not subordinate to foreign law; Israel's legislators and judges use foreign law only as a source of comparison and inspiration.

Third, Israel's legal mix is not the result of a linguistic tension or a *Kulturkampf* between two rival groups in Israeli society—one defending civil law and the other upholding common law—nor is it the result of a disagreement between the large population which held to one legal tradition, and a foreign power or an elite group which attempted to transplant another legal tradition. Instead, the transformation of Israel's legal system into a mixed one was gradual and peaceful.²⁹

27. For a discussion of the Dutch influence on South African law, see C.G. van der Merwe et al., *The Republic of South Africa*, in *MIXED JURISDICTIONS WORLDWIDE*, *supra* note 12, at 95, 95–98. For a discussion of the French influence on Quebec law, see Michael McAuley, *Quebec*, in *MIXED JURISDICTIONS WORLDWIDE*, *supra* note 12, at 354, 354–59.

28. See Fassberg, *supra* note 21, at 158 (“[Israel] is also mixed in the less formal sense that it has individual rules, sets of rules, and institutions that can be identified as coming historically from a large number of different systems: Turkish (and through the Turkish French), English (inherited from the Mandate and imported to fill lacunae), and German and Italian (as inspirational sources of civil law) The linguistic aspect of Israeli law is similarly unique. The formal and historical sources of much of Israeli law . . . were in English, German (possibly Italian), Turkish (and a little French), and the languages used by the religious denominations—Arabic, Hebrew, Aramaic, and even Latin.”).

29. See *id.* at 155–60; Gidron & Goldstein, *supra* note 18, at 579–81 (citations omitted) (“At the beginning of the state, there was some discussion of Israel immediately adopting a code for private law based on a continental model This idea was, however, rejected on the grounds that it would be technically impossible to devise and prepare at one time an entire code of private law. Therefore, it was decided to adopt a code ‘piecemeal,’ by adopting a series of separate statutes on the various subjects of private law that would be covered by a code.”); see also William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 *LA. L. REV.* 677, 732 (2000) (“It would be interesting to study the effect on the law of Israel of the presence in that country of two languages (Hebrew and English)”); Tetley, *supra* note 1, at 216–17 (“[T]he long-term survival of a mixed jurisdiction is greatly facilitated by (and perhaps even contingent upon) the presence of at least two official (or at least widely spoken) languages in that jurisdiction, each mirroring and supporting one of the legal systems there [I]t would seem that Israel, in the space of fifty years, has replaced English (the language of the former colonial authority), Arabic (the language of what was a large proportion of the population),

Israelis live in peace with their eclectic mixed-legal system. They do not prefer one legal tradition over the other. Common law and civil law live in Israel in perfect harmony. Furthermore, most Israelis do not feel particularly attached to a specific Western legal culture, nor do they feel obligated to preserve the common law or civil law traditions. This attitude permits them to pragmatically borrow from different foreign legal sources and use the imported legal norms, institutions, or ideas in a dynamic and nonconformist manner, creating an original Israeli legal *mélange*.³⁰

II. BARAK'S IDEA OF ISRAEL'S MIXED LEGAL SYSTEM

Aharon Barak is a genuine “mixed jurist” who personifies Israel’s mixed-legal system and is very sensitive to its *mixité*.³¹ During the 1990s and the early years of the twenty-first century Barak argued repeatedly that Israel is a mixed-legal system, albeit a unique one; and that it is “a system which is itself a family.”³² Clearly, this view is not merely the conclusion of a sensitive and sophisticated jurist, but also an indication of Barak’s vision of Israeli law and culture. His position is both a normative statement and an analytical description of Israel’s mixed jurisdiction.

Like many other observers, Barak noticed that Israel is a mixed jurisdiction in both the wide and narrow sense. In a wider sense, Israeli law is a mix between modern Western law and

and Yiddish (the language of many of the early Jewish immigrants) with Hebrew . . . Israel, which has the enemy without and within the gates, and which has only fifty years of existence, has used language to strengthen the role of what is now the Jewish majority, creating, in the process, [a] mixed jurisdiction . . .”).

30. See Kedar, *supra* note 21, at 182 (“[I]t is important to bear in mind that although Israel inherited the British Mandatory legal system, most of the country’s Jewish citizens were immigrants who brought with them European concepts of society, state and law, which often differed from Anglo-Saxon political ideas. As a result, a unique type of legal *mélange* formed: an Anglo-Saxon legal system operating within a European originated political culture.”).

31. See Barak, *Tradition*, *supra* note 6, at 483 (citations omitted) (“[T]he Israeli system has been influenced by, but is not a part of, the common law and the Romano-German families . . . [But i]t is not a legal orphan, as it belongs to the group of legal systems influenced partly by the common law family and partly by the Romano-German family . . . legal systems of ‘mixed jurisdiction’ . . . Among these are: Quebec (French and English influence), Scotland (French and English), Louisiana (French and American), South Africa (Romano-Dutch and English), and Sri Lanka (Roman-Dutch and English), as well as Israel.”). Barak expressed these ideas on many different occasions, in and outside Israel, in front of an Israeli audience and in international *fora*.

32. *Id.* at 473, 484.

religious and traditional norms.³³ But as Barak rightly points out, Israel is really a modern Western system with only limited enclaves of religious law that apply (in the field of family law) by virtue of secular legislation of the democratically-elected Israeli Parliament.³⁴ Nevertheless, it is important to dwell on Barak's concluding remarks with regard to the Western character of Israeli law, as they form a modernist manifesto that elucidates his claim that Israel is a dynamic *sui generis* mixed jurisdiction "which is itself a family":

The Israeli legal system would seem to be part of Western legal culture. The state's ideology is governed by laws and the rule of law; the basic approach is secular, liberal and rational; and a secular legislature creates and may change the law on a rational basis. The social system aspires to solve problems by means of law and the courts; law is understood as a concept that ensures social progress and change; and the individual has rights as well as obligations.³⁵

Barak is much more interested—and rightly so—in Israel as a mixed-legal system in the narrower sense, as a system in which both the Anglo-American common law and the Romano-Germanic civil law play a decisive role.³⁶ Of course, he was not the first to classify Israel as a mixed jurisdiction, nor was he the first to claim that it is a mixed system, which is albeit closer to the common law tradition. There is also nothing new in Barak's observation that Israel is a *sui generis* legal system, whose history and some of its features are different than those of other mixed jurisdictions.³⁷ Barak's most important and interesting claim is that the Israeli legal system is "a system which is itself a family"—that it does not really belong to any of the known legal

33. Barak, *Tradition*, *supra* note 6, at 474–75 (citations omitted) ("In practice . . . Jewish law applies in Israel by virtue of secular legislation . . . From the standpoint of the law of the State, the secular legislature is empowered to adopt a given set of religious law norms and to reject others . . . [However,] Israel's way of thinking, her legal institutions and their roots, and her secular ideology are all [also] characteristic of Western legal culture. While Israel is a 'Jewish and democratic State,' its Jewishness does not make it part of the Jewish legal culture, since it is expressed in a secular rather than a religious manner.")

34. *Id.*

35. *Id.*

36. *Id.* at 479–84 ("[T]he Israeli system has been influenced by, but is not part of, the common law and the Romano-German families.")

37. See Fassberg, *supra* note 21 (describing how the "fairly typical" Israeli mixed legal system developed in a "nontypical way").

families.³⁸ Indeed, Israeli law is rooted in the ancient legal traditions of both Jewish and Western law, and it is heavily inspired by different Western legal systems.³⁹ However, according to Barak, the main feature of Israeli legal culture is its originality, its intellectual and formal autonomy, and the continuous endeavor of Israelis to develop their laws independently.⁴⁰

What is the source of Barak's views? Is it an academic observation? Does it derive from his ideas with regard to comparative law or to the classification of legal families and traditions? Does it express his ideas of Israel's culture? The answer is a combination of all three.

First, Barak's views on the nature of Israeli law seemingly stems from a theoretical conception of the taxonomy of legal systems and traditions. Young Barak was suspicious as to the existence of a distinguished legal *family* of mixed-legal systems, maintaining that each "mixed" system has its own distinct pattern and unique characteristics.⁴¹ Later he was willing to accept the idea that mixed-legal systems do have identified common, "family-like," characteristics, and even spoke at the first World Congress of the World Society of Mixed Jurisdictions Jurists (WSMJJ), held at Tulane University in 2002.⁴² Still, he

38. Barak, *Tradition*, *supra* note 6, at 484 ("[T]he Israeli system, while it belongs to Western legal culture in general, does not seem to be part of any of the commonly accepted families in Western legal culture.").

39. See Kedar, *supra* note 15, at 141–43 (describing how Israeli law was influenced by both Jewish and Western European legal systems).

40. See Barak, *Tradition*, *supra* note 6, at 473, 474–75, 491–92 ("At the same time a young state and legal system, and an ancient nation with an overarching national tradition, Israel has been through crises and catastrophes that other countries have not experienced. Now she has reached legal and political independence. All this has left its imprint, for better or worse, and has put Israel on the world's legal map as a unique system-family. This uniqueness entails many difficulties. Israel has not yet developed an operative jurisprudence to serve as the basis for the understanding and operation of the law To copy a foreign operative jurisprudence would not be desirable in view of Israel's political and legal independence The Israeli system must not become enslaved to other legal families, but also should not attempt to reinvent the wheel.").

41. *Id.* at 483–84 ("Legal systems of mixed jurisdiction are a recognized phenomenon, and Israel is not alone in this respect. But it is doubtful whether these mixed systems can be grouped into a single family: the identifying marks of a family do not seem to exist among this assemblage of systems.").

42. See WORLD SOC'Y OF MIXED JURISDICTIONS JURISTS, NEWSLETTER 1 (2003), http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Eason_Weinmann/fwcmj.pdf ("Approximately 150 persons from more than twenty countries gathered for the first World Congress on Mixed Jurisdictions in New Orleans, Louisiana on

called for further research on the “common behavior” of mixed-legal systems,⁴³ and was convinced that Israel in particular has its own distinct peculiarities which imply that it is “a system which is itself a family.”

Second, his observation that Israel is a unique mixed jurisdiction is also a reasonable conclusion of an expert in Israeli law. Barak was well aware of Israel’s different legal history and the other distinct attributes of Israeli law, which, even if not unique in themselves, form a particular system: (1) the cohabitation of normatively superior legislated law with sophisticated judge-made common law; (2) the significance of legal academia and its ongoing dialogue with both the judiciary and the legislature; (3) the importance of custom; (4) the central role of comparative law; (5) the common practice of legal borrowing and the simultaneous insistence on the originality and independence of Israeli law; (6) the oscillation of the legal culture between the abstract and the pragmatic, the form and the substance; (7) the normative duality of civil and religious law; and (8) the unique institution of the High Court of Justice that enables one to plea directly to the Supreme Court if her civil rights are infringed.⁴⁴ Barak concludes that all these attributes create a distinct legal system that does not fully belong to any of the Western legal families.⁴⁵

Third, Barak’s assertion that Israeli law is “a system which is itself a family” is also an expression of his modernist Zionist

November 6–9, 2002. The event was hosted by the Tulane School of Law and the Eason Weinmann Center for Comparative Law . . . Aharon Barak, a world-renowned figure and currently President of the Israel Supreme Court, spoke on the impact of public Anglo-American values and institutions on the private civil law in these jurisdictions.”).

43. Barak, *Reflections*, *supra* note 6 (“Legal systems of mixed jurisdictions are a recognized phenomenon, though not enough research has been done on their common behavior; however, with all their similarities, they cannot be grouped into a single family.”).

44. For an introduction to the powers of the High Court of Justice, see The High Court of Justice, Lexicon of Terms, KNESSET, http://www.knesset.gov.il/lexicon/eng/bagatz_eng.htm (last visited Jan. 11, 2017) (“The Supreme Court [of Israel] may sit as the High Court of Justice [HCJ] . . . The HCJ may issue orders to release persons who have been illegally detained or imprisoned; may issue orders to state authorities, local authorities, their officials and other bodies that fulfill public functions by law, to perform an act or refrain from performing an act, while performing their tasks in accordance with the law, and if they have been elected or appointed contrary to the law - to avoid acting . . . Appeals to the HCJ are made by means of a petition.”).

45. Barak, *Tradition*, *supra* note 6, at 484.

ideology. Barak was driven throughout his professional life by the mission of building an independent, enlightened, and progressive Israeli legal system, which borrows from Western law, but at the same time remains profoundly independent, original, and dynamic in its culture, structure, and ways of reasoning.⁴⁶ This explains Barak's endeavor to enact a constitution and civil code, and his persistent attempts to forge original Israeli law and jurisprudence.⁴⁷

There are two main reasons underlying Israel's fascination with legal originality and independence: a general cause that applies to all mixed-legal systems, and a particular Israeli motivation. First, as Vernon Palmer has rightly pointed out, a "fascinating characteristic of mixed jurisdictions is their capacity to create *sui generis* norms" that are original and independent.⁴⁸ Judges, jurists, and legislators in mixed jurisdictions are well trained in comparative law and are accustomed to the practices of legal borrowing and "the manipulation and mingling of common-law and civil-law elements."⁴⁹ The constant acts of borrowing, *mélange*, and *bricolage* often produce novel and original legal concepts. This is true of Israel as well: the hyper-dynamic and complex reality in Israel has forced Israeli jurists to be both productive and creative, experts in legal borrowing, mixing, and manipulating. The fact that the Israeli "legal founding fathers"

46. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 365 (Sari Bashi trans., 2005) (citations omitted) ("In a minority of cases, the various pieces of information about [a statute's] objective purpose conflict. We begin with a possible conflict between individual objective purpose and general objective purpose, that is to say, presumptions of objective purpose derived from the system's fundamental principles The individual objective purpose will generally, but not always, prevail. An exception would be the case of an individual purpose that clashes with the general purpose of human rights. Because a democracy puts such tremendous emphasis on human rights, an interpreter may decide that the general purpose prevails, particularly if the individual purpose is not explicitly, clearly, and unequivocally stated in the language of the statute. Israeli law has developed this approach, as articulated by then-acting Court President Meir Shamgar: 'A fundamental right cannot be denied or restricted except by an explicit piece of legislation by the primary [non-administrative] legislature.' I established a similar holding: 'A piece of legislation should not be interpreted to authorize the violation of fundamental rights unless the authorization is clear, unequivocal, and explicit.'").

47. For a discussion of the constitution and civil code as symbols of national independence and progressivism, see Kedar, *supra* note 21, at 183–94.

48. Palmer, *supra* note 22, at 71. Of course, all legal systems are original, independent and dynamic to a certain extent, because the law is a dynamic phenomenon that transforms constantly in response to society's varying needs, and to the requirements of the ever changing human mind.

49. *Id.*

were trained in different legal traditions before arriving in Israel further contributed to the formation of Israeli “legal laboratories,” in which a new law was alchemized out of the *mélange* of different foreign and local legal ingredients.⁵⁰

Second, Israeli legal originalism is also a realization (and an expression) of the Zionist ideology. The ideas of independence and originality are embedded in Zionist and later Israeli thought because they were both the Zionist target and the means to achieve that end. First, cultural and political sovereignty was Zionism’s target. As the Jewish national movement, Zionism’s purpose was to enable modern Jews to freely develop their *own*—independent and original—culture (whatever that culture may be).⁵¹ In the words of David Ben-Gurion, Israel’s first Prime Minister: Zionism’s first aim was to enable modern Jews to be “one hundred percent Jewish and one hundred percent free.”⁵² Second, independence and originality were perceived by the Zionists as the necessary conditions for the preservation of Jewish life, because the basic Zionist idea was that Jewish

50. Stephen Goldstein, *Israel: Creating a New Legal System from Different Sources by Jurists from Different Backgrounds*, in MIXED AND MIXING, *supra* note 10, 147, 149–50 (“When the State of Israel was founded in 1948, virtually all the private law was English. It is this private law which, in the last 47 years, has moved from common law to civil law [I]t is natural that in the course of developing its private law, Israel would look to continental as well as to common law sources. Yet, this would not explain the almost complete replacement of common law principles with those of the civil law. The reason for this lies, rather, in the identity of the leading figures in Israeli law during the first generation of its independent development. These ‘fathers’ of the independent Israeli legal system . . . were predominantly Jewish jurists who had been trained in continental Europe [T]hese jurists retained a strong affinity for continental private law. They, and their students, were the primary reason for the movement of Israeli private law from its common law origins to a new civil law basis.”).

51. The Zionist movement constantly refused to define Jewish identity. See Nir Kedar, *Ben-Gurion’s Opposition to a Written Constitution*, 12 J. MOD. JEWISH STUD. 1, 9 (2013) (“Although the main objective of Zionism was the preservation of Judaism . . . at a very early stage the Zionist movement rejected the cultural, ‘spiritual’ debate and primarily declined the formal attempts, including the legal ones, to define Judaism, the Jewish people, or Jewish culture (and subsequently Israeli culture).”); see also Kedar, *supra* note 15, at 147–48 (“[F]rom its inception, Zionism focused all its energies and resources on creating statehood for Jews and building a society on that statehood. All factions of the Zionist movement were united against the calls of what was known as *spiritual Zionism* to base the Zionist revolution on an internal Jewish cultural debate and on the creation of a modern Jewish culture The dominant Zionist position was that the culture of the Jewish state would be Jewish by definition, because most of its citizens would be Jewish and because the national framework would express the culture of the Jewish majority and support it.”) (emphasis in original).

52. DAVID BEN-GURION, 5 IN BATTLE 58 (1957) (Isr.).

culture could prevail over time only if the Jews would be able to freely fashion their lives and culture and legislate their laws by themselves, and for themselves, according to their own values, needs, and interests as a sovereign people.⁵³

It would not be an exaggeration to say that Israelis are obsessed with the originality and independence of their laws. This passion for independent and original law is not apparent at first glance, since the content of Israeli law is not very different than that of other modern countries. The absence of specific Jewish/Israeli characteristics from the content of Israeli law instigated a harsh legal–cultural debate over the demand of some Israelis to “Israelize” or “Judaize” Israeli law, especially by injecting Jewish law into it.⁵⁴ Nonetheless, Israeli law is deeply

53. See SHLOMO AVINERI, *Introduction to THE MAKING OF MODERN ZIONISM: THE INTELLECTUAL ORIGINS OF THE JEWISH STATE* 3, 3 (1981).

54. See ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* 155 (2006) (“[T]he debate between supporters of legal revival and supporters of Anglicization in the Jewish legal community in Palestine was not a clear-cut affair, a battle between nationalists and assimilationists, romantic particularists and hardheaded supporters of Anglicization. The early history of the Zionist movement has usually been told as a story of a conflict between two camps: political Zionists, a group composed mainly of western and central European Jews concerned with the creation of a Jewish political entity in Palestine, and cultural Zionists, mainly eastern European Jews, who advocated the creation of a Hebrew culture based on Jewish traditions.”); Nir Kedar, *Israeli Law as a Lieu de Mémoire (et d’oubli): Remembering and Forgetting Jewish Law in Modern Israel*, in ERINNERN UND VERGESSEN, REMEMBERING AND FORGETTING 196, 202–03 (Oliver Brupbacher et al. eds., 2007) (“The idea of making Jewish law the law of the Zionist community was born in the early twentieth century [A] group of Russian Zionists in Moscow established the ‘Society of Hebrew Law’ [and] believed that the national and cultural renaissance of the Jewish people must be accompanied by a legal resurgence as well, and that the growing Zionist community should use its own rich legal heritage as the basis of its laws rather than derive its inspiration solely from modern Western law—the law of Gentiles.”); see also Assaf Likhovski, *The Invention of ‘Hebrew Law’ in Mandatory Palestine*, 46 AM. J. COMP. L. 339, 339–40 (1998) (citations omitted) (“The movement for [a Hebrew] legal revival, according to [Menachem] Elon’s historical narrative, sought to reconnect the legal system of the future Jewish state in Palestine with the legal culture of the Jewish Exile, moribund since the rise of the Enlightenment in the eighteenth century [However], I . . . argue for another reading of the early . . . history of the movement for the revival of Hebrew law. The ‘revival’ of Hebrew law, like the ‘revival’ of a large part of Hebrew culture was not meant to be a continuation of the Jewish past, but a break with it; not so much the ‘restoration’ of an old tradition, as the invention of a new one. Secular Zionists sought to create a new ‘Hebrew’ person who would be the anti-thesis of the old Exilic Jew. Secular Zionist ideology despised the culture of the Jewish Exile, and wanted to replace this culture with an invented, secular, ‘Hebrew’ culture.”); Amihai Radzyner, *Jewish law’ Between ‘National’ and ‘Religious’: The Dilemma of the Religious–National Movement*, 26 BAR-ILAN L. STUD. 91 (2010) (Isr.); Kedar, *supra* note 15, at 147–48. While most Israelis do not oppose expressing Jewish-Israeli identity in Israel’s laws,

independent and original in many ways. As a matter of principle, Israel never translated or copied the laws of another country *en bloc* (as many other countries such as Turkey, China, and Japan have done),⁵⁵ but always drafted its own original laws according to its needs and social purposes. Of course, Israeli law is heavily influenced by modern European and Anglo-American law,⁵⁶ and

one must admit that it is a futile challenge because no accepted definition of Jewish law or culture exists, and there is no agreement on the proper way to incorporate Jewish law (or even Jewish symbols) into modern Israeli law. *See generally* NIR KEDAR, SHOULD JEWISH IDENTITY BE ANCHORED IN ISRAELI LAW? (2015) (Isr.). As a result, Israel embraced a semi-formal “silencing policy” that was expressed in the legislation of a “constitution without a preamble” (i.e., a series of basic laws instead of one comprehensive formal constitution). *See* Kedar, *supra* note 15, at 148 (“[T]he rejection of Hebrew law was in fact the legal expression of Israel’s silencing policy, endeavoring to suppress harsh cultural and political disputes.”). In this way, Israel avoided enacting legislation that would necessitate a positive clarification of the Israeli-Jewish identity, in addition to facilitating the almost total avoidance by judges and legal scholars of such discussions. *See id.*

55. *See* ZWEIGERT & KÖTZ, *supra* note 11, at 154 (citations omitted) (“China introduced civil codes between 1925 and 1935 which, apart from family and inheritance law, were largely based on German law . . . [and] Japan [had] already adopted most of the [Bürgerliches Gesetzbuch] and the [German] Code of Civil Procedure at the turn of the century . . .”) (emphasis in original); *see also* Shiuyan Han, *A Snapshot of Chinese Contract Law from an Historical and Comparative Perspective*, in TOWARDS A CHINESE CIVIL CODE: COMPARATIVE AND HISTORICAL PERSPECTIVES 235, 236–37 (Lei Chen & C.H. van Rhee eds., 2012) (“[O]n 26 December 1930 . . . the first Civil Code in China [was completed] The Code adopted the structure and concepts of the German Civil Code [and] was also influenced by the Japanese Civil Code, the Swiss Civil Code, the Russian Civil Code and, to a lesser extent, the Civil Code of Thailand.”); Shigenari Kanamori, *German Influences on Japanese Pre-war Constitution and Civil Code*, 7 EUR. J.L. & ECON. 93, 94 (1998), <http://link.springer.com/content/pdf/10.1023%2FA%3A1008688209052.pdf> (“In the enactment of Japan’s civil code . . . the influence of French advisors was stronger than that of the Germans [T]he new civil code, which might be called the mixture of French and German laws, was enacted and enforced during the period from 1896 to 1898 All in all, Japan owes much to Germany for her modernization, especially in the field of the constitution and the civil code.”); Esin Özücü, *The Impact of European Law on the Ottoman Empire and Turkey*, in EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH- AND 20TH- CENTURY AFRICA AND ASIA 39, 39 (W.J. Mommsen & J.A. de Moor eds., 1992) (citations omitted) (“By the fourteenth century the Ottomans were the rulers of the Balkans, and by the middle of the sixteenth century the Empire had expanded in the west as far as Vienna. It had become the largest in the world However, the Ottomans did not colonize the territories they conquered. Unlike the Western European system of law, which was expanded partly by European settlers who carried the law of their homelands with them into their new settlements, Ottoman Islamic law was not transplanted.”); ZWEIGERT & KÖTZ, *supra*, at 178 (“After Kemal Atatürk created the Republic of Turkey in 1922 the Swiss Code . . . was brought into force almost word for word as the new Turkish Civil Code of 1926.”).

56. *See* Goldstein, *supra* note 50, at 149–50.

Israeli jurists and judges master the crafts of legal comparison, borrowing, and mixing. Nevertheless, Israeli law is always drafted in Hebrew by independent Israeli jurists who create their own original laws according to Israel's values, needs, problems, and social aims; they do so both by importing foreign ideas and by crafting original Israeli solutions. The history of the Israeli constitution is a good example of this point.

Israel has a "constitution without a preamble": a series of constitutional "Basic Laws" instead of one comprehensive constitutional document.⁵⁷ This unique and original solution is a characteristic expression of Israeli legal thinking. Israel's founding fathers strongly believed in the values of human rights, the rule of law, and democracy, but were not persuaded that these values would be best protected by a written constitution.⁵⁸ After all, history has proven that most countries have written constitutions with fancy charters of rights and freedoms, but most of them are far from being law-abiding democracies. Therefore, before embarking on the long and complicated legislation process, the Israeli Parliament (called the Knesset) verified whether the enactment of a written constitution would benefit Israeli society, considering the specific social and political conditions in Israel at that time.⁵⁹ As Ben-Gurion put it: It is not enough to claim that Israel needs a written constitution because almost all nations

57. For a discussion of the Israeli constitution and its history, see Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact* 21 CAP. U. L. REV. 1, 2 (1992) (citations omitted) ("A written constitution, in the narrow sense defined as 'rigid' and 'formal,' is not the only form that a constitution might take. There are unwritten constitutions, such as are found in the United Kingdom and the State of Israel, that include the Basic Laws . . . I submit that written constitutions curb the supremacy of the legislature, while under unwritten constitutions the legislature is supreme. Yet, unwritten constitutions might be deemed to be more flexible and to better secure substantive due process and guarantees of civil liberties."); Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactics in Israel*, 70 ALB. L. REV. 409, 410 (2007) ("The constitutional tactic chosen by Israel's founding fathers was the 'decision not to decide,' which fulfilled the goals and needs that impel nations toward formal constitution-making in the first place.").

58. Nathan Yanai, *Politics and Constitution-Making in Israel: Ben-Gurion's Position in the Constitutional Debate Following the Foundation of the State*, in CONSTITUTIONALISM: THE ISRAEL AND AMERICAN EXPERIENCES 101, 101 (Daniel J. Elazar ed., 1990) ("[A]fter issuance of the declaration of Israel's independence, it was possible to proceed with the efforts of state-building without a written constitution. A constitution thus became an option rather than an historical imperative for the foundation of the state, and the subsequent debate on the issue in the first Knesset may be viewed as anti-climactic.").

59. *Id.*

have one, “it should [also] be demonstrated that we need it, and that we need it in the shape called ‘constitution’ and not [in the shape of separate] laws, and that we need it specifically now, in this Parliament session, during these two years.”⁶⁰ The Parliament’s conclusion was negative; the Knesset members feared that under the given circumstances in young Israel the drafting process would ignite a *Kulturkampf* (mainly with regard to the definition of Israel as a “Jewish State”), spur political unrest, and eventually damage Israeli democracy. The Parliament’s original solution was to enact a piecemeal constitution with no preamble. It was an exceptional solution that clearly deviated from the “normal” trajectory of newly established states in the twentieth century, but it avoided an early *Kulturkampf* and perhaps even prevented the eruption of violent clashes between different Israeli factions. Not bothered by a cultural brawl, the Israeli Parliament and Supreme Court gradually crafted a developed—albeit scattered—constitution and a progressive bill of rights.⁶¹

Aharon Barak’s view on Israel as a *sui generis* and original mixed jurisdiction clearly follows that general Zionist path. The next section traces Barak’s long and diverse career—from law student to Chief Justice—demonstrating the influence of the two Western legal traditions on his mind and actions, and showing at the same time his central role in the shape of Israel as a unique mixed jurisdiction with a distinct and independent voice.

III. BARAK AS A REPRESENTATIVE OF ISRAEL’S MIXED LEGAL SYSTEM

Aharon Barak (Brick) was born in Kaunas, Lithuania in 1936. He was the only son of Luba (Leah) Brick, a teacher, and her husband Hircsh (Zvi), a local Zionist political leader and an attorney by training.⁶² Following the Nazi occupation of the city in 1941, the family spent three years in the Kaunas ghetto, and miraculously managed to escape deportation and death.⁶³ At the end of the war, after wandering through Hungary, Austria, and Italy, the family immigrated to Palestine and settled in

60. See David Ben-Gurion, Prime Minister of Isr., Remarks at a Meeting of Mapai Knesset Members 28 (June 14, 1949) (transcript available at the Ben-Gurion Archives in Sde-Boker, Israel).

61. NIR KEDAR, BEN-GURION AND THE CONSTITUTION 222–27 (2015) (Isr.).

62. LEVITSKY, *supra* note 2, at 71–73.

63. *Id.* at 55–69.

Jerusalem (where they changed their name to Barak).⁶⁴ Young Aharon studied law, international relations, and economics at the Hebrew University of Jerusalem, where he also completed his LL.M. and LL.D. degrees.⁶⁵ Between 1966 and 1967 Barak spent a year at Harvard University as a visiting scholar.⁶⁶ In 1968 he was appointed professor at the Hebrew University, and in 1974 was named the Dean of its Law Faculty.⁶⁷ In 1975, at 38 years of age, he was awarded the Israel Prize for legal research,⁶⁸ and became a member of the Israel Academy of Sciences and Humanities.⁶⁹ During that same year, after only one year as dean, Barak was appointed Attorney General of Israel in Yitzhak Rabin's (first) government.⁷⁰ In 1978, after three years as the Attorney General in the governments of Rabin and Menachem Begin, Barak was appointed to Israel's Supreme Court, where he served as an Associate Justice between 1978 and 1995, and as the President of the Court (the Chief Justice) from 1995 to 2006.⁷¹ After his retirement he returned to academia, dividing his time between Israel, Europe, and North America.⁷² In what follows, I inspect more closely Barak's legal career as a "mixed jurist."

A. A "MIXED LEGAL STUDENT"

Barak was educated in the Israeli mixed legal environment, inspired both by the common law tradition and the civil law culture. The acquaintance of young Barak with civil law had

64. LEVITSKY, *supra* note 2, at 92.

65. *Id.* at 98, 101, 106–07.

66. *Id.* at 116–18.

67. *Id.* at 123.

68. See, e.g., *Barak, Aharon*, VERSA: OPINIONS SUP. CT. ISR., <http://versa.cardozo.yu.edu/justices/barak-aharon> (last visited Jan. 11, 2017). The Israel Prize is the highest award bestowed by the State of Israel on individuals with outstanding accomplishments in the fields of arts and sciences. See *Israel Society & Culture: The Israel Prize*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/israelprize.html (last visited Jan. 11, 2017) ("The Israel Prize is the most prestigious award in Israel, given to those who display[] excellence in their field or contributed strongly to Israeli culture The prize is awarded in four fields: humanities, social sciences and Jewish studies; natural and exact sciences; culture, arts, communication and sports; and lifetime achievement and exceptional contribution to the nation.").

69. Prof. Aharon Barak, *Members*, ISR. ACAD. SCI. & HUMAN., <http://www.academy.ac.il/Index2/Entry.aspx?nodeId=809&entryId=18319> (last visited Jan. 11, 2017).

70. LEVITSKY, *supra* note 2, at 130.

71. According to Article 13 of Israeli Court Law, 1984, judges retire at the age of 70.

72. BENDOR & SEGAL, *supra* note 2, at 13.

already started at home. Although not an active lawyer, his father Zvi was a Lithuanian attorney educated in the civil law tradition at the university in Kaunas.⁷³ Later, at the newly-founded faculty of law in Jerusalem, where Barak earned his LL.B., LL.M., and LL.D., he was introduced to a largely Romano-Germanic academic environment. The curriculum of the Jerusalem law faculty was based heavily (though not solely) on the Central-European law school program, especially the Swiss program.⁷⁴ For instance, up until 1970 (Barak started his studies at the Hebrew University in the early 1950s) the main course in private law was “obligations,” as in the European tradition, rather than separate courses in contract law and tort law given in the common law universities.⁷⁵ In fact, Barak would be the first law professor to teach a separate course on tort law.⁷⁶

As a law student, Barak was mainly influenced by Professor Guido Uberto Tedeschi, who immigrated to Palestine from Siena, Italy, in 1938 following the passage of anti-Semitic laws, and became one of the architects of Israeli private law.⁷⁷ Tedeschi was among the “founding *troika*” of the law faculty at the Hebrew University; he was a leading member of the Committee for the Design of Future Legislation appointed by the Ministry of Justice, whose main task was to design and prepare the civil codification in the nascent state; and was even asked to join the Supreme Court in 1953 but preferred to remain at the University.⁷⁸ This distinctly “civil law thinker” had a major impact on the young student Barak, who was his teaching and research assistant for many years, and wrote his doctoral thesis under his instruction.⁷⁹

73. LEVITSKY, *supra* note 2, at 71–72.

74. Pnina Lahav, *American Moment[s]: When, How and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES L. 653, 666 n.44 (2009) (citing Yoram Shachar, *Mishkan Ke-Mishpato*, 19 MECHKEREY MISHPAT 397, 407 (2003) (Isr.)), <http://www7.tau.ac.il/ojs/index.php/til/article/viewFile/724/683> (“Yoram Shachar reports that when the faculty of law at the Hebrew University was established, the small group of founders adopted the Swiss law school curriculum, as presented to them by Nathan Freiberg.”).

75. *Id.* at 673; LEVITSKY, *supra* note 2, at 114.

76. *See* Lahav, *supra* note 74, at 673.

77. For more information about Professor Tedeschi, see Assaf Likhovski, *Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence*, 4 THEORETICAL INQUIRIES L. 621, 654–56 (2003). For more information about the relationship between Tedeschi and Barak, see LEVITSKY, *supra* note 2, at 103–06.

78. LEVITSKY, *supra* note 2, at 104.

79. *Id.* at 104–06.

At the same time, Israel was also profoundly influenced by the common law tradition. The thirty years of British presence in Palestine had a decisive influence on the substance of Israeli law and on the form of its legal system. Since Israel formally kept British-Mandatory law in order to avoid chaos, Israeli law was basically Anglo-Saxon.⁸⁰ Many lawyers, judges, and jurists received their legal education in the Palestine Law Classes (the law school opened by the British authorities in Jerusalem), in England, or elsewhere in the Anglo-Saxon world.⁸¹ Even those who obtained their legal education in continental Europe acquired deep familiarity with the Anglo-Saxon law that was in force in mandatory Palestine. Furthermore, despite the Israeli fight for independence, the Israeli elite had great admiration for the English political and legal mind. For example, Justice Haim Cohn, who studied law in Germany, described the encounter of the Jewish-German jurists with English law: “[It was] some sort of regeneration: the discovery of the splendor and magnificence of English law was for the German jurist a grand and unexpected experience.”⁸² Evidently, English law also had a great impact on the law taught at the Hebrew University Law Faculty.⁸³

80. See discussion, *supra* notes 23–25.

81. Assaf Likhovski, *History of British Legal Education in Mandatory Palestine*, in EXPERIMENTAL LEGAL EDUCATION IN A GLOBALIZED WORLD: THE MIDDLE EAST AND BEYOND 177, 180–82 (Mutaz M. Qafisheh & Stephen A. Rosenbaum eds., 2016) (citations omitted) (“Higher education, including formal legal education, was a rare phenomenon in most British colonies in the first part of the twentieth century [T]he territories controlled by the British Colonial Office . . . had only four universities . . . [and] only the University of Malta had a law school. In Ceylon and Palestine, independent law schools established by the British, Colombo Law College and Jerusalem Law Classes, provided formal legal education However, [colonial] territories . . . permitted lawyers to practice if they were admitted to a bar in the United Kingdom [Thus,] many colonial students studied law in England, took the bar exams, and gained admission to the English Bar [Then, i]n 1920, the Attorney General of Palestine, Norman Bentwich, decided to establish the Law Classes in Jerusalem as a means of providing ‘government officials’ and ‘clerks and interpreters of the courts [with] some knowledge of law,’ and for the training of local lawyers and magistrates.”).

82. Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 ISR. STUD. 159, 185 (1998) (citations omitted) (“In his beautiful obituary for Alfred Witkon, Haim Cohn described how his colleague ‘went to England to acquire English legal education as provisions for the road to Palestine.’ And yet, ‘England was for him not merely a springboard, but some sort of regeneration”).

83. Lahav, *supra* note 74, at 667 (“It should also be emphasized that the model of the Israeli law school bore British influence as well. The British presence in Palestine had a decisive influence on Israeli law. In addition to substantive influence on the legal system, the Palestine law closes offered prospective lawyers the same legal education prevailing in other British colonies.”).

The mixed-legal education visibly left an impression on Barak. First, the inter-war European legal thinking brought to Israel by his law professors heavily influenced him.⁸⁴ Nathan Feinberg, the first dean of the law faculty in Jerusalem, and the main designer of the faculty's curriculum, was a friend of Hans Kelsen and an admirer of his positivist analytical legal thinking.⁸⁵ As a result, the methodic analytical conception of the law prevailed in the studying program.⁸⁶ From Tedeschi, Barak inherited not only the love for private law, but also the careful and analytical approach to law.⁸⁷ Like his European born professors, Barak also envisions private law as a cathedral: a magnificent edifice of legal norms carefully and methodically built.⁸⁸ Indeed, Barak is conceived by many Israelis as "the great Rabbi of Israeli law," meticulously dissecting the law like a rabbi scrutinizing the Talmud in a *Yeshiva* (a Talmudic college).⁸⁹

On the other hand, Barak was heavily influenced by the Anglo-Saxon legal mind both as a student in Israel and in his year as a visiting scholar at Harvard.⁹⁰ There, he was exposed to

84. LEVITSKY, *supra* note 2, at 104.

85. Hans Kelsen (1881–1973) was an Austrian jurist and philosopher. He was the main drafter of the Austrian constitution in 1919, and he served as a judge on the Austrian Constitutional Court. Later he became a law professor at the University of Cologne. Following the rise of the Nazi party, he had to leave Germany because of his Jewish ancestry, eventually arriving in the United States where he became a professor at the University of California at Berkeley. His most famous book *The Pure Theory of Law*, originally printed in 1934, proffers an analytical theory of positive law, and is considered to be one of the most influential treatises in twentieth-century legal philosophy. See generally RUDOLF ALADÁR MÉTALL, HANS KELSEN: LEBEN UND WERK (1969).

86. See Lahav, *supra* note 74, at 666 (citations omitted) ("The [Israeli legal] curriculum . . . had to resolve a problem not present in the American context: the lack of college education among the majority of the student population. The European curriculum provided an answer to this dilemma. It was based on a linear pedagogic conception, where students first received general knowledge through introductory courses, and only later were exposed to the 'bread and butter' subject matters.").

87. LEVITSKY, *supra* note 2, at 104.

88. See Aharon Barak, *Towards Codification of the Civil Law*, 1 TEL-AVIV U. STUD. L. 9, 13–28 (1975) (detailing various conclusions and principles to be drawn from the existence of a civil code in Israel).

89. For a comparison of Barak's legal thinking to that of a Rabbi, see LEVITSKY, *supra* note 2, at 31.

90. Lahav, *supra* note 74, at 657 (citations omitted) ("In the academic year 1966/1967, two Israeli law professors from the Hebrew University, Aharon Barak and Itzhak Zamir, spent a year as visiting scholars at Harvard At Harvard Law school, the two friends took, among other courses, the groundbreaking course on legal process, and another course on American legal education. Both courses were

the twentieth-century American sophisticated progressive jurisprudence.⁹¹ The purposive school of the “Legal Process” developed by Henry Hart and Albert Sacks especially inspired him.⁹² There, he added to his legal analytical skills the idea of the law as a purposive social instrument, a conception of the law that is wider and richer than the BGB-style law envisioned in inter- and post-war Europe.⁹³ Years later Barak would admit: “I accept [Hart and Sacks’] essential and fundamental approach to the legal process in general and to interpretation in particular, and I recognize the deep influence of their position on the crystallization of my position.”⁹⁴ It is important to bear in mind that Barak did not replace his European civil law like legal conception with a new common law oriented one; instead, he added an additional layer of legal thinking to his existing legal mind, creating a new legal synthesis.

B. A “MIXED PROFESSOR OF PRIVATE LAW”

Barak was appointed Professor at the Hebrew University Faculty of Law in 1968 and Dean in 1974.⁹⁵ His professorship expressed the dual influence on his thought, as well as his idea of Israel as an independent and unique legal system. Barak arrived at Hebrew University following a year at Harvard Law School, from which he brought many “American” ideas that he strove to implement in Jerusalem to reform the faculty’s curriculum and teaching methods.⁹⁶ At that time, Israeli legal academia underwent massive reforms, not all of which were initiated or led by Barak.⁹⁷ Still, he was a central figure in what is considered to

etched in their minds.”).

91. See Lahav, *supra* note 74, at 657.

92. *Id.* (“The legal process course, taught by Henry M. Hart, Jr. and Albert M. Sacks, introduced [Barak and Zamir] to another way of thinking about the law, a way that deeply influenced their future scholarship.”). See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

93. The BGB (which stands for Bürgerliches Gesetzbuch) is the German civil code, which, after twenty years of research and formulation, came into effect on January 1, 1900. R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW* 156–57 (D.E.L. Johnston trans., 1992).

94. AHARON BARAK, *THE GENERAL THEORY OF INTERPRETATION* 402 (1992) (Isr.).

95. LEVITSKY, *supra* note 2, at 116, 123.

96. See *id.* at 116–20; see also Lahav, *supra* note 74, at 657–58 (“On their return to Jerusalem, [Barak and Zamir] initiated reforms in legal education in keeping with the American model which they had witnessed at Harvard.”).

97. Lahav, *supra* note 74, at 673 (describing how Barak’s student and future colleague, David Kretzmer, borrowed some innovative legal teaching methods from Joshua Weisman, who had been “looking for ways to enliven the class and encourage

be the first phase of the “Americanization” of Israeli legal academia.

First, Barak promoted a curricular reform: a change from the mandatory menu of courses built around the Swiss model (that Israel implemented at that time) to a more flexible curriculum closer to the American model, which offers more elective courses in different forms.⁹⁸ Barak himself taught for the first time a course in tort law that replaced the old European-originated course in obligations.⁹⁹ Second, Barak was a driving force for reform in the teaching mode: it was a movement towards live class discussions, and away from the frontal lectures in which students are more passive.¹⁰⁰ In Barak’s case, the change in the teaching methods reflected a deeper transformation of his legal thinking—the embracement of purposive legal thinking *à la* Legal Process School.¹⁰¹ As a young professor, Barak asked his students to elaborate in class both on the social purposes of the legal norms they were discussing and on the reasoning of the assigned cases.¹⁰² Third, Barak introduced to the Israeli academia the American idea of student-run law reviews.¹⁰³ During his year at Harvard, he studied the protocol and bylaws of the *Harvard Law Review* and, upon returning to Israel, he suggested that the Hebrew University should adopt them. His

the students to think analytically,” and who actually “came by himself to the problem method as a preferred method of teaching”).

98. LEVITSKY, *supra* note 2, at 121.

99. Lahav, *supra* note 74, at 673 (“In the fall of 1967, for the first time Barak taught a course in tort law (until then the subject was part of a course known as obligations, where contracts and torts were taught back-to-back, as is the custom in continental Europe).”).

100. *Id.* at 671–73 (citations omitted) (“[A further] innovation . . . was the introduction of more lively teaching methods. Throughout the 1950s and 1960s, the conventional method of teaching . . . was frontal lecturing, also known as lectures ‘*ex cathedra*.’ The professor would come to class, generally sit down and dictate a lecture, which the students would copy diligently into their notebooks. Only rarely were students invited to question the knowledge thus transmitted. If someone did dare interrupt the lecture by posing a question, the answer was usually short and authoritative. There were no office hours, and professors had minimal interaction with students Barak himself was a gifted teacher, and his experience at Harvard propelled him towards a different mode of instruction. On his return, he conducted classes where questions were asked and dialogues with students were welcome and encouraged.”).

101. *See* BARAK, *supra* note 94.

102. *See* Lahav, *supra* note 74, at 673 (citations omitted) (“Barak was warm and gentle, and his demeanor always reflected love of knowledge and immense curiosity. Questions were probed in the true spirit of deepening understanding.”); LEVITSKY, *supra* note 2, at 114–15, 121.

103. *See* Lahav, *supra* note 74, at 662–65; LEVITSKY, *supra* note 2, at 122–23.

suggestion was accepted, and the first Israeli student-run law review (*Mishpatim*) was established in 1968.¹⁰⁴

At the same time, Barak was a leading force in the “Europeanization” of Israeli private law, supporting the adoption of European (continental) legal ideas. Barak was also an enthusiastic proponent of the “the new civil legislation” that took place between 1962 and 1981.¹⁰⁵ This massive wave of legislation, which was deeply influenced by German and other civilian laws, encompassed more than twenty code-like laws in all areas of private law and was perceived as the first stage of civil codification that would be followed by a second and final stage—the consolidation of the diverse laws into a single, methodical, comprehensive code. As an expert in private law, Barak participated in the drafting committees of two of the bills: the Agency Bill and the Bailees Bill, influencing both the content and the form of these new civil law like bills.¹⁰⁶ Significantly, he repeatedly claimed in his classes and academic publications that this piecemeal legislation already forms a “de-facto codification” united by the same legal spirit and organizing ideas.¹⁰⁷ The next phase of the codification process, maintained Professor Barak,

104. Lahav, *supra* note 74, at 662–63 (“In 1968, the Faculty of Law at the Hebrew University decided to establish a new law review that would be run by students. They called it *Mishpatim* . . . [I]n form *Mishpatim* did resemble the *Harvard Law Review*. In an interview, Barak remembered visiting the editorial board of the *Harvard Law Review* at Gannett House, studying their modus operandi, and consulting their bylaws. On his return to Israel, he proposed adopting the same model. The idea of a student-run law review was not easily swallowed by the faculty . . . [H]owever, Barak applied his formidable persuasive skills and the law review was launched. The best students were chosen for the editorial board, and they were placed in charge of reviewing manuscripts and making decisions on publication. To alleviate the anxiety of the faculty, Barak volunteered to serve as *Mishpatim*’s first faculty advisor.”).

105. Interview with Aharon Barak, Professor of Law, IDC Herzelia, in Herzelia, Isr. (Aug. 3, 2015) (on file with author).

106. *Id.*

107. See, e.g., Aharon Barak, *The Independence of the New Civil Codification: Risks and Possibilities*, 7 MISHPATIM 15 (1976) [hereinafter Barak, *Independence*] (Isr.); Barak, *supra* note 88, 10–12 (“The new statutes enacted by the Knesset in the civil law areas differ from other legislation in Israel in that they bear the characteristics of a code. Each separately in its area, and all together, constitute a code . . . I believe there can be no doubt that the new civil legislation objectively fulfills the characteristics of a code.”). Barak still adhered to this idea twenty years later. See Aharon Barak, *Interpretation of the Civil Statute Book (The Code) ‘Israel Version,’* in ESSAYS IN MEMORY OF PROFESSOR GUIDO TEDESCHI: A COLLECTION OF ESSAYS ON JURISPRUDENCE AND CIVIL LAW 115, 160–61 (Itzhak Englard et al. eds., 1995) [hereinafter Barak, *Interpretation*] (Isr.).

would mainly be a technical process of compilation.¹⁰⁸

Already at that early stage in his career it was evident that Barak was not interested in promoting European law or inculcating American legal culture in Israel. Instead, his motivation was to carve an original and independent Israeli legal system that would borrow from different sources, but would pave its own independent Israeli way.¹⁰⁹ Barak and his colleagues did not copy foreign ideas or institutions as such, but reformulated them and prudently wove them into the Israeli legal fabric. They combined American and European educational ideas with original Israeli ones to create an Israeli original academic blend,¹¹⁰ and in the same manner they crafted a mixed system of private legislation that was inspired by European and North American law, but was in fact an original Israeli product.¹¹¹ His ardent support of civil codification was not an attempt to import Romano-Germanic law to Israel, but an expression of his belief that a civil code is an important symbol of independence and modernity that every new state should embrace.¹¹² Similarly, in leading the aforementioned profound curricular reform, Professor Barak was not expressing a penchant for American legal culture, but rather a motivation to bolster a progressive Israeli legal academia.¹¹³

108. See Barak, *Independence*, *supra* note 107, at 33. For a brief history of Israeli civil legislation and the civil code, see Kedar, *supra* note 21, at 193–94.

109. BARAK, *supra* note 94, at 135–36.

110. Lahav, *supra* note 74, at 658 (“[Upon Barak’s return from Harvard, s]eeds of American influence were planted on Israel’s legal soil . . . [Nevertheless,] American legal education was [not] transplanted wholesale into Israeli law. A great deal about Israeli legal education is authentic and specific to Israel, and surely English and continental European influence have been particularly strong.”).

111. See Kedar, *supra* note 21, at 187–94 (“[B]etween 1962 and 1981 more than twenty code-like laws were enacted . . . in all areas of private law (excluding family law). The ‘new civil legislation,’ as Israeli jurists termed it, gradually replaced most of the civil statutes, that had been introduced by the Ottoman and Mandatory regimes The supporters of the ‘new legislation,’ led by Uri Yadin and Aharon Barak . . . emphasized that [it] favoured the autonomy of Israeli law not only by obviating the reference to English law or to legislation originating in Ottoman law, but also by assisting in the development of Israel’s own law and jurisprudence that were compatible with the reality in the country and did not force Israelis to live according to a law that originated in a foreign environment for foreign purposes.”).

112. *Id.* at 187–94 (“[Israel’s] civil code is not only the product of determined ‘civilian-oriented’ jurists, but is mainly the result of a widely accepted continental culture that depicts the civil code as an important national symbol of modernization and independence.”).

113. Lahav, *supra* note 74, at 672–74 (“No one will deny that the American teaching method had significant influence on Israel. Still, not everything that looks similar, or even identical, was actually imported Something that looks like a

C. A “MIXED ATTORNEY GENERAL”

Barak served as dean for only one year, after which he was appointed Attorney General of Israel.¹¹⁴ His turbulent period in that office was marked by two revolutions: an Anglo-Saxon-like revolution in public law, heavily influenced by North American constitutional thinking, and a European-like revolution in private law. Both revolutions ripened while he was a Supreme Court Justice, but as Barak himself argued, he felt that his service as Attorney General was more important than his time on the bench, as the Attorney General stands at the helm of the Israeli legal system.¹¹⁵

The first revolution led by the former professor was constitutional. Barak did not attempt to draft an Israeli charter of rights and freedoms, nor was he trying to consolidate the different Basic Laws into one comprehensive constitution. But he did strengthen the role of the Attorney General as the guardian of the rule of law: he stressed the supremacy of the law, especially that of penal law, and emphasized the importance of equality under the law.¹¹⁶ Barak was not afraid to indict corrupt high-ranking politicians, nor was he afraid to indict the Prime Minister’s wife (Leah Rabin) for illegally holding a bank account in the U.S. (an act that led to Rabin’s resignation and early elections).¹¹⁷ He was the first Attorney General in Israeli history to participate in all government meetings and was frequently consulted by the Premier.¹¹⁸ Barak even accompanied Prime Minister Begin to Camp David to participate in the peace talks with Egypt, and was among the drafters of the famous peace agreements between the two countries.¹¹⁹

In addition, Barak simultaneously promoted a European-like “codification revolution.” Upon taking office as Attorney General, he ordered the Ministry of Justice’s Legislation Department (which is subordinate to the Attorney General in Israel) to

transplant may, in fact, be homegrown. At Tel Aviv, the younger faculty was also eager to introduce new teaching techniques The spirit of reform was in the air, and itself became the subject of scholarship.”)

114. LEVITSKY, *supra* note 2, at 128.

115. DINA ZILBER, *IN THE NAME OF THE LAW* 161 (2012) (Isr.).

116. LEVITSKY, *supra* note 2, at 139–53; ZILBER, *supra* note 115, at 159–80.

117. YECHIEL GUTMAN, *THE ATTORNEY GENERAL VERSUS THE GOVERNMENT* 277–342 (1981) (Isr.); ZILBER, *supra* note 115, at 159–80.

118. LEVITSKY, *supra* note 2, at 200.

119. *Id.* at 202–15.

initiate the “second phase of codification,” which required consolidation of the different civil laws enacted during the 1960s and 1970s into one comprehensive and coherent civil code, with a general introductory part in the Continental-European style.¹²⁰

For Barak these were not European or American revolutions, but Israeli ones; a major step in the continuing effort to establish an Israeli progressive and independent legal system. He continued to lead these movements while he was sitting on the Supreme Court.

D. A “MIXED SUPREME COURT JUSTICE AND CHIEF JUSTICE”

Barak served only three years as Attorney General (the second shortest term in Israeli history).¹²¹ In 1978 he was appointed to the Israeli Supreme Court.¹²² Soon he stood out as a brilliant and brave judge with a solid juridical worldview and a clear agenda. A former law professor who continued to publish extensively, Barak used both the academic and judicial stages to further promote the two revolutions he endorsed: the Anglo-American-like constitutional revolution and the Romano-Germanic-inspired codification revolution.

Although he was an acting judge, Barak continued to lead the Civil Codification Drafting Committee and influenced the form and substance of the future code.¹²³ He chaired the committee until 2004, when it submitted the draft code to the Ministry of Justice’s Legislation Department.¹²⁴ Since his retirement from the bench, Barak has remained an enthusiastic supporter of the Israeli civil code. Even at the age of eighty, Barak closely inspects the prolonged debates around the bill in the Knesset, trying to persuade the unconvinced young Israeli jurists and legislators that civil codification is a project of national importance.¹²⁵

The North American-like constitutional revolution in Israel is also very much identified with Justice Barak. In fact, he was

120. For a more complete history of the Israeli Civil Code, see THE CIVIL CODE—KHOK DINEY MAMONOT (2004) (Isr.); Barak, *Interpretation*, *supra* note 107.

121. ZILBER, *supra* note 115, at 159–80.

122. LEVITSKY, *supra* note 2, at 205.

123. See *Preface to the Civil Code Bill*, 525 ISR. OFFICIAL GAZETTE 700, 701 (2011) (Isr.), <http://www.knesset.gov.il/Laws/Data/BillGovernment/595/595.pdf>.

124. See *id.*

125. Though it is not documented, I heard Barak in several open lectures urge Israeli law students, lawyers, and law professors to stir up the codification process.

the one who coined the term “constitutional revolution.”¹²⁶ As a judge, Barak further developed his activist interpretation of the rule of law, turning the Supreme Court into the leading institution in the “legalification” and “constitutionalization” of Israeli society.¹²⁷ When the Knesset had legislated two Basic Laws that dealt with human rights, Barak declared—first in his academic writings and then in a famous court decision—that Israel underwent a “constitutional revolution” in the sense that the Israeli Basic Laws now formed a comprehensive constitution, granting the courts the power of judicial review over acts of the Israeli Parliament.¹²⁸ This reform imitated the course of U.S. constitutional history, and was heavily inspired by the spirit of the then-new Canadian Charter of Rights and Freedoms and the accompanying jurisprudence of the Canadian Supreme Court, as well as by the new constitutional reasoning of higher courts in the common law world from the U.S. to India.¹²⁹

Barak’s judicial policy is an example of Israel’s mixed-legal culture—a hybrid legal system that combines legal norms and institutions from both Western legal families, and whose private law is very much influenced by the civil law tradition, while its public and procedural laws are shaped mainly according to the

126. See Aharon Barak, *The Constitutional Revolution: Protected Basic Rights*, 1 MISHPAT UMIMSHAL 9 (1992) (Isr.) (containing Barak’s first usage of the term “constitutional revolution”). He began to use it in English shortly thereafter. See Aharon Barak, *Constitutional Revolution: Israel’s Basic Laws*, 4 CONST. F. 83, 83 (1993) (Isr.).

127. GIDEON SAPIR, CONSTITUTIONAL REVOLUTION IN ISRAEL: PAST, PRESENT AND FUTURE 86–115 (2010) (Isr.).

128. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill., 49(4) PD 221 (1995) (Isr.). For an English summary, see United Mizrahi Bank v. Migdal Cooperative Village, *Translated Opinions*, VERSA: OPINIONS SUP. CT. ISR., <http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village> (last visited Jan. 11, 2017) (“The three cases [consolidated into *United Mizrahi Bank*] represented the first instances in which Israeli courts annulled a law passed by the Knesset on the grounds of unconstitutionality due to a violation of fundamental rights established in a Basic Law The primary approach of the Court is set out in the opinion of President Barak. According to [him], the Knesset’s authority to frame a constitution derives from the doctrine of constituent authority. The Knesset derives its constituent authority from the First Knesset by means of constitutional continuity. This view of the Knesset’s constituent authority best reflects the national consciousness and legislative history of the State of Israel. The Knesset, therefore, acts in two capacities. It enacts laws as a regular legislature, and it adopts Basic Laws in its capacity as constituent assembly. Basic Laws so enacted enjoy supra-legislative, constitutional status.”).

129. For a critical account of this process, see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2d ed. 2007).

common law model. But it must be noted that Barak's policy as Attorney General and as a judge truly expressed his belief that Israel is a unique mixed-legal system—an original and independent jurisdiction that does not feel obliged to follow any specific legal tradition, but crafts its own original legal path. Thus, his insistence on the rule of law and constitutionalism not only followed similar developments in the English speaking world (and in fact, in the industrialized world in general), but mainly represented his belief that democracy and the rule of law are essential elements in the Zionist revolution and the building of an enlightened civil society in Israel. Similarly, his “codification revolution” not only mirrored similar European processes of codification and re-codification, but expressed his conception of the civil code as a symbol of independence and modernity.

Barak truly endeavored to develop an Israeli independent and original law that would be compatible with Israel's reality, releasing the Israelis from the requirement to live under a law that was created in a foreign jurisdiction and for foreign purposes. Indeed, his order as Attorney General to begin the second phase of civil codification was part of a larger project initiated by him to obviate the reference to English law and to obsolete legislation originating in Ottoman law.¹³⁰

CONCLUSION

In a 1990 article, Justice Barak declared:

From the establishment of the State until the present day, two quiet “revolutions” have occurred in Israeli law—the *first* in the area of public law, and the *second* in the area of a private law. In public law we have witnessed the incorporation of a functional constitution In private law we have witnessed the coalescing of a civil codification.¹³¹

It would be hard to find a more lucid expression of Israel's dynamic mixed-legal system, influenced by both the common law and civil law traditions. Of course, this is not a naïve description of Israel's legal history made by an experienced law professor, but really a normative claim made by a senior Justice of the Supreme Court, who is a former acclaimed Attorney General and a world-

130. Aharon Barak, *The Foundations of Law Act and the Heritage of Israel*, 13 JEWISH L.Y.B. 265, 280–83 (1987).

131. Aharon Barak, *The Codification of Civil Law and the Law of Torts*, 24 ISR. L.R. 628, 628 (1990).

renowned jurist. Equally important, it is a statement made by the person who actually carried out—and in fact led—these two very significant revolutions that transformed Israel as a mixed jurisdiction.

Returning to the questions posed in the introduction of this Article, we can certainly say that Barak was a conscious “mixed jurist,” particularly aware of the idea of mixed-legal systems and of the hybrid character of Israeli law. Barak truly celebrates Israel’s *mixité*, depicting it as a sign of a vital and progressive jurisdiction—an original and independent legal system with a strong sense of sovereignty and authenticity. Unlike many legal thinkers, Chief Justice and former Attorney General Barak had the opportunity to realize his ideas. In leading the revolutions of constitutionalization and civil codification, as in his other accomplishments, Barak maneuvered among different legal traditions in order to foster Israel as a dynamic mixed-legal system, which is open to the different legal cultures of the world yet insists on its intellectual, legal, and political originality and independence.