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RENUNCIATION OF RIGHT AND REMISSION OF DEBT IN COMPARATIVE AND ISRAELI LAW*

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I. RENUNCIATION AND REMISSION IN COMPARATIVE LAW

A. INTRODUCTION

Renunciation and remission are not comprehensively treated in recent Israeli legislation. And although the legislature has referred to these terms in the course of its legislation, they are nowhere defined.

The first reference to these terms, chronologically speaking, is in section 1 (c) of the Gift Law, 1968: "A gift may consist of the donor's renunciation of a right against the donee or in the donor's remission of an obligation of the donee towards him."¹

The chapter treating "Several Debtors and Creditors," the

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This article is dedicated to the memory of Professor Guido Tedeschi and concerns one of the areas of law to which Professor Tedeschi contributed at various times. But is there any field of Israeli civil law that Professor Tedeschi did not consider with the analytic clarity and the systematic approach that characterized his work?

The history of Israel's private law is inextricably bound to the guiding work of Professor Tedeschi. His research and activity in drafting laws and preparing comprehensive commentaries paved the way for the new Israeli legislation. We who were privileged to study under him owe our teacher a great debt.

I also wish to thank Dr. Hanina Ben-Menahem, Mr. Pablo Lerner, Dr. Renee Sanilevic and Mr. Ram Shamgar for their assistance in seeking the comparative sources.

1. Gift Law, § 1 (c), 22 L.S.I. 113 (Isr.).

Contracts (General Part) Law,² provides an enlightening reference to the terms under discussion. Section 55 (c) states: "If the creditor discharges one of the debtors of the whole or part of the obligation - by way of waiver, remission, compromise or otherwise - the other is discharged to the same extent, unless a different intention appears from the discharge."³ Thus we have before us a list of terms (renunciation, waiver, remission, compromise, discharge) that often appear in modern codes as factors that terminate a debt by means other than performance.

How shall we define the terms renunciation and remission? Are we obliged to make recourse to English law? I have already taken the opportunity to express my opposition to that method of construction.⁴ In interpreting new code laws, the commentator must interpret the law "from within the law itself." He must define terms both according to their meanings in a specific law and in other Israeli laws. According to the late Professor Zeltner, the reference in section 55(c) of the Contracts Law is not relevant for the purpose of general construction, as that section "refers to waiver and renunciation in but a specific context, that is, in the context of joint debtors."⁵ In his opinion, this context, therefore, affects only the special rule of the effect of discharge on one of the debtors. This objection would appear to be extremely formal. In a law that sets brevity as a goal, as does [Israeli] law, even a brief reference may serve to elucidate the legislative intent. This is particularly so when we may draw a general principle by induction from the specific rule, as in the case before us, from which we may learn by what means a creditor may release a debtor from his obligation.

Today, after the enactment of the Foundations of Law Act, 1980,⁶ recourse to English law for the purpose of construing the terms renunciation and remission is particularly problematic. Rather, we should adopt an approach that would explain jurisprudential terms in light of the general systems of Israeli law,

2. Contracts (General Part) Law, § 55 (c), 27 L.S.I. 117, at 125 (1973) (Isr.).

3. *Id.*

4. Alfredo Mordechai Rabello, *The Gift Law, 5728-1968*, in COMMENTARY OF LAWS RELATING TO CONTRACTS 66 (Guido Tedeschi ed., in Hebrew, Jerusalem, 1979).

5. Estate of Finklestein v. Finklestein 22 (i) P.D. 618 (1968) (Isr.).

6. Foundations Law Act, 34 L.S.I. 181 (1980) (Isr.). We refer especially to the section repealing recourse to English law as the basis of Article 46 of the Palestine Order-in-Council.

while showing a willingness to learn from other legal systems. After all, Israeli law was not created *ex nihilo*, but came into existence only after foreign systems were already in force (e.g., Ottoman and English law) and after civil code systems were extant in the West.

Therefore, in order to examine the terms under discussion, we shall follow a comparative approach.⁷ In so doing, we shall also look to Jewish law. We will focus on the question of whether we are concerned with 1) a unilateral or bilateral act and 2) upon the issue of what approach would be most suitable for future legislation. We shall conduct our study in the light of the historical development of Israeli law by examining the Mejele, Jewish law, English law, as well as other legal systems.

B. MEJELLE

We find mention of remission of debts in Article 847 of the Mejele, in the chapter treating gifts:

If a person to whom money is due makes a gift of such money to the person from whom the money is due, or releases the debtor from payment thereof, such gift or release is valid, and the debt is forthwith extinguished, provided that the debtor does not decline to agree thereto.⁸

We are here concerned with an act of unilateral waiver that is realized by the will of the beneficiary alone, with the possibility provided for the debtor to oppose the waiver. Absent such opposition, the debt is discharged.

In Book II, concerning "Settlement and Release," the

7. See Zeev Zeltner, *Thoughts on the Draft Bill of the Contracts (General Part) Law 5730- 1970*, 3 *IYUNEI MISHPAT* 121, at 132 (1973). It is well-known that Professor Zeltner was one of the leading proponents of this method, at least insofar as German law is concerned. But this approach is not foreign, within certain limits, also to: Aharon Barak, *The Independence of the New Civil Codification: Risks and Prospects* 7 *MISHPATIM* 15, at 24 (1976); Uri Yadin, *Again on the Interpretation of Knesset Laws*, 26 *HAPRAKLIT* 358, at 364 (1970); Daniel Friedmann, *On the Interpretation of Modern Israeli Legislation*, 5 *IYUNEI MISHPAT* 463 *et seq.* (1977).

8. All sections brought here are as translated in C.A. HOOPER, *THE CIVIL LAW OF PALESTINE AND TRANS-JORDAN*, Vol. I (Jerusalem, 1933), Vol. II (Jerusalem, 1936).

Mejelle makes specific reference to renunciation and remission. Article 1562 is of particular interest:

If any person releases any other person from any obligation, such obligation ceases to exist and he can no longer make any claim in connection therewith [see Article 51].⁹

On its face, the unilateral nature is clearly emphasized. The debtor's consent is not required, though he may refuse to accept the release.¹⁰ If the debtor has already expressed his acceptance of the remission, he may not later change his mind. However, the opinion has been expressed that remission in Hanafic Islamic law resembles a bilateral act.¹¹

We have not found in Israeli literature or case law any widespread consideration of the questions under study. When the questions have been considered, it has often been after both recent Israeli legislation and the Gift Law¹² came into effect.

With new Israeli law in effect for some years now, comparisons with Ottoman law are rare, especially as the Mejelle has ceased to be binding law in Israel.¹³

9. *Id.* 2 Article 1562.

10. This was the view of Prof. Tedeschi, as well, who writes, *inter alia*: "Other than the Mejelle, there is no law, either in practice or proposed, that grants force to remission as a unilateral act". Guido Tedeschi, *Repeal of Mejelle - Background and Timing*, 2 *IYUNEI MISHPAT* 458, at 459 (1972). See also Guido Tedeschi, *About the Gift Law* 11 *MISHPATIM* 639, at 642 (1969).

11. CHAFIK CHEHATA, *THEORIE GENERAL DE L'OBLIGATION EN DROIT MUSULMAN HANEFITE* 93 *et seq.* (Paris, 1969). This is the opinion of Chehata: "L'acceptation du debiteur n'est point exigee. Il semble cependant qu'elle est toujours presumee. . . La remise est si bien consideree comme une convention qu'elle est assimilee a un contrat translatif de propriete.. La remise peut revetir la forme d'une transaction d'une dette, elle, n'est jamais possible que si elle est consentie au debiteur. Elle s'analyse alors en effet, en remise de dette." (I wish to express my thanks to Dr. Yaacov Meron for referring me to Chehata's book). If this is indeed the case, then in Islamic law, as well, we find the same procedure found in many other legal systems, emphasizing the consensual nature of remission.

12. Gift Law, § 1 (c), 22 L.S.I. 113 (Isr.).

13. GUIDO TEDESCHI, *REPEAL OF THE MEJELLE LAW, 5744-1984*. See also *id.*, *The Centenary of the Mejelle*, 25 *HAPRAKLIT* 59 (1969); *Id.*, *Repeal of Mejelle*, *supra* note 10; *id.*, *Le Centenaire de la Mejelle*, *REV. INT. DE DROIT COMPARE*, 125 (1969).

C. JEWISH LAW

The accepted rule in Jewish law is that remission does not require a formal act of transfer (*kinyan*) but can be effected orally.¹⁴ Nevertheless, in many places it was customary to perform a formal act or even to draft a bill of remission, though this served for evidentiary purposes and was not conclusive. However, if a formal act or document was made, this could serve to preclude a later claim of insincerity by the remitter. Rabbinic authorities differ as to whether remission by document was the same as oral remission, and some ruled that written remission required the performance of a formal transfer, since drawing up a document of remission and leaving that document in the possession of the creditor would appear contradictory.¹⁵

From the writings of Maimonides, it seems possible to infer that he held that remission constituted a transfer of the debt to the debtor, as he states: "He who remits a debtor a deposit, which he holds, to another. . ." ¹⁶ The accepted view however, is that remission is a waiver of the debt, not merely a transfer, and that "remission is nothing more than the discharge of the servitude."¹⁷ In the Law of Acquisition and Gift 3:2, Maimonides himself writes: 'If he remits a debt that he holds against him or gives him the deposit that was deposited with him.'¹⁸ In other words, the accepted view considers remission a unilateral act by the grantor. The sources do not directly consider whether the debtor may reject the remission. In regard to gifts, the assumption is that the donee may decline the gift upon receiving notice of it. The donee's explicit consent is not required, and he is presumed to consent unless he explicitly expresses opposition. In regard to remission, it may be said that the question depends on the above two approaches as they relate to the nature of remission.

Rabbi Herzog writes:

14. *Maimonides* 5:11 (Mishneh Torah), Law of Sales, Acquisition and Gift, 3:2.

15. SHULKHAN ARUKH, HOSHEN MISHPAT, ch. 241, § 2; 2 IZHAK HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 230 (3d ed., London, 1967).

16. *Maimonides* 5:6 (Mishneh Torah), Law of Sales.

17. Rashba 40:262.

18. *Maimonides* 3:2 (Mishneh Torah), Acquisition and Gift.

Mehilah is not of the nature of transfer (*haknaah*), but of mere withdrawal. That is, the creditor does not in any sense transfer his right to the debtor, which would, of course, automatically extinguish the claim, but he withdraws his right or revokes his lien from the debtor and his estate. This deeper understanding of *mehilah* is not without practical legal effects. Suppose *A* told *B* that he waived the debt due to him from the latter, and *B* declined at the moment to avail himself of the waiver. If *mehilah* is viewed as a kind of transfer, it has failed to take effect since *B* declined; if as mere withdrawal, it has taken effect.¹⁹

Given the prevailing view that remission is a discharge of the creditor's servitude and a unilateral act, it is reasonable to assume that the debtor's knowledge of the remission is unnecessary. However, we find in the Arukh HaShulkhan:

There are those who are satisfied with remission that is not in the presence of the borrower, if it is a remission, and I am of the opinion that it is remission. . . but this is when the borrower is informed of the remission and he intends to acquire his money. But if he has not yet been informed, the lender may retract, as every acquisition does not apply to remission and that when the lender's servitude is lifted, it remains in the hands of the borrower. In any case, as long as the borrower is not informed, the servitude is not lifted.²⁰

The approach of the author of Arukh HaShulkhan is in line with the view that remission is a form of transfer of the debt to the debtor, as he himself states. But it would seem that his attempt to apply the requirement of knowledge of the remission even to the other approach is not successful, and Rabbi Herzog questioned this in his book.²¹ Indeed, the author of Mahaneh Ephraim wrote: "It would appear that when he remits the debt to the debtor, his servitude is discharged from the moment he states his remission, even if the borrower does not consent"²²

19. HERZOG, *supra* note 15, at 229.

20. ARUKH HASHULKHAN, HILKHOT MATANA, ch. 241, § 4.

21. HERZOG, *supra* note 15, at 232.

22. MAHANEH EPHRAIM, HILKHOT ZEKHIA MEHEPKER, ch. 11.

As stated, remission is performed orally, but it can be inferred from the remitter conduct. The classic example is that of a widow who does not demand the price of her marriage contract (*ketubah*) for a period of twenty-five years after her husband's death and who is, therefore, presumed to have waived her rights under the contract. The *responsa* literature considers this question at length, but for our purpose, the conclusion that remission can be inferred from conduct suffices.

D. ENGLISH LAW

1. *Waiver*

The term waiver has various meanings in English law. Lord Wright, commenting on the vagueness of the term, stated:

The word "waiver" is a vague term used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of election as where a party decides between two mutually exclusive rights. Thus, in the old phrase, he claims in *assumpsit* and waives the tort. It is also used where a party expressly or impliedly gives up a right to enforce a condition or a right to rescind a contract, or prevents performance, or announces that he will refuse performance or loses an equitable right by laches.²³

The most common use of the term in contract law is in describing a situation wherein one party to a contract relinquishes his right to performance of a certain stipulation by not insisting upon his right to its perfect performance, be it before or after breach of that stipulation:

In the law of contract, however, it is most commonly used to describe the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term is waived.²⁴

23. *Smyth (Ross T) & Co. Ltd. v. Bailey, Son & Co.* 3 All E.R. 60, 70 (1940) (Eng.).

24. See 9 HALSBURY, HALSBURY'S LAWS OF ENGLAND ¶ 571 (4th ed. 1974).

The term waiver appears in various contexts, of which three are germane to our study:²⁵

a. In the sense of rescission, waiver may mean absolute abrogation of the contract,²⁶ in which case consideration is required for realization.²⁷

b. In the sense of variation, waiver is taken to mean a change in a contractual obligation that is accompanied by consideration and is therefore valid.²⁸ The term also appears in the context of variation: despite being supported by consideration, the waiver is for some reason lacking contractual force. This is so, for example, in regard to the rule that a written contract can be orally rescinded but can be changed only in writing. In other words, an oral variation of an existing contract is not valid. However, if what is done constitutes a waiver or abstention from requiring perfect performance of the written contract, then parole evidence of the waiver may be admitted. The distinction between variation and waiver is ambiguous, but the accepted opinion is that where a change in the contractual obligations and relations is such that it changes the structure of the contract, then it is not a waiver, but a variation.²⁹

In *Hickman v. Haynes*³⁰ the case revolved around a contract for the sale of iron, which was to be delivered in the month of June. The date of delivery was later changed at the buyer's oral request. Despite the extension, the buyer did not fulfil his obligations, refusing to accept delivery. The seller brought an action for breach of the original contract. The Court, in accepting the seller's claim, ruled:

There was no fresh agreement . . . which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by

25. See GUENTER HEINZ TREITEL, *THE LAW OF CONTRACT* 83 (6th ed. 1983).

26. *Price v. Dyes*, 17 Ves 356, 364 (1810) (Eng.): "The waiver spoken of in the case is an entire abandonment and dissolution of the contract."

27. *Atlantic Shipping and Trading Co. Ltd. v. Louis Dreyfus & Co.* 2 A.C. 250, 262 (1922) (Eng.): "To say that a claim is to be waived is incorrect if a right has accrued. It must be released or discharged by deed or upon consideration."

28. *Brikom Investments Ltd. v. Carr*, Q.B. 467, 488, 491 (1979) (Eng.).

29. 9 HALSBURY, *supra* note 24, ¶ 572.

30. *Hickman v. Hayes*, L.R. 100 C.P. 598 (1875) (Eng.).

the plaintiff in June.³¹

c. In the sense of forbearance, where the change in the original contract is not binding due to a failure of consideration, or in the absence of a substantive condition for the creation of an obligation (e.g., a written document) there still may be legal effect due to the fact of waiver, as in the following circumstances:³²

A. The party that asks forbearance is unable to refuse the change. For example, if the seller makes late delivery at the buyer's request, the buyer cannot refuse to accept delivery on the grounds that the performance is at a date later than that stipulated in the contract.

B. In the event that the altered condition was performed and fulfilled, neither party may demand damages on the grounds of deviation from the original contract.

C. The party that waives a right is obligated by his waiver if he led the other party to believe that late performance would be accepted. However, at any time before that date, reasonable notice maybe served and performance demanded on the original date.³³

2. *Means for Effecting Waiver*

A waiver may be expressed or implied from [sic] conduct, but in either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance of the concession.³⁴

31. *Id.* at 604.

32. TREITEL, *supra* note 25.

33. Charles Rickards Ltd. v. Oppenheim 1 K.B. 616 (1950) (Eng.).

34. 9 HALSBURY, *supra* note 24, ¶ 574.

It follows that if a condition for realizing the waiver is that the party for whose benefit the waiver was made actually acted in reliance upon it, then the waiver cannot be viewed as a unilateral act but as a bilateral, legal transaction.

An exception to this is the case where the condition waived is to the benefit of the party who makes the waiver. In such circumstances, he may waive his rights without giving notice to the other party.³⁵

3. Release

Release is an act by which a party renounces his right against the other party to a contract:

A release is an act of one of the parties to a contract discharging a right of action against the other which arises out of the contract.³⁶

The release may be made under seal, in which case no consideration is needed,³⁷ or it may be made orally with consideration. An oral release without consideration is nothing but an expression of intent not to enforce a right, and has no binding legal force. There are three exceptions to this rule, by which release without consideration nevertheless is binding:

1. When the plaintiff is estopped by conduct.
2. When a debtor is appointed executor for his creditors, it is equivalent to release.
3. When a holder of a bill of exchange or promissory note renounces his right by transfer of the instrument to the other party with intent to release him from his obligation.

The rules for contractual obligation apply, as well, to the means for effecting release. Therefore, it would appear that re-

35. 1 JOSEPH CHITTY, CHITTY ON CONTRACTS, GENERAL PRINCIPLES 825 (25th ed. London, 1983).

36. 9 HALSBURY, *supra* note 24, ¶ 594.

37. Preston v. Christmas 22 Wils 86 (1759) (Eng.).

lease is a bilateral, legal transaction. That English law requires consideration for effecting release (subject to the above exceptions) supports the conclusion that it is a bilateral act in English law.³⁸

E. FRENCH LAW

The subject of renunciation and remission is treated in the *Code civil*.³⁹ Renunciation of a real right can be effected unilaterally (i.e., upon abandonment property becomes *res nullius*).⁴⁰ However, regarding the renunciation of a debt (*remise de dette*), the French code explicitly requires that there be *decharge conventionnelle*.⁴¹ The obligatory right can be discharged only by the agreement of the creditor and the debtor. If the debtor does not accept the creditor's renunciation, it is without effect and the creditor may retract his declaration of renunciation up to its acceptance by the debtor. The bilateral nature of the act is absolutely clear due to the demand for the debtor's consent. Even in France, there is no lack of jurists critical of this structure who would prefer that there be a possibility for renunciation by the creditor's unilateral act.⁴² But the accepted view is that, inasmuch as a gift is viewed as a bilateral, legal transaction, which is based upon the agreement of donor and donee, there is no reason to change the system for the renunciation of debts alone, which, too, is a form of gift.⁴³

Viewing renunciation of debts as a form of gift brings French law to the demand for *intention de liberalite', animus donandi*: absent intention to benefit, there is no renunciation. Therefore, French law does not consider renunciation a compro-

38. Zeltner reaches a similar conclusion concerning English law, see 2 ZEEV ZELTNER, *THE LAW OF CONTRACTS OF THE STATE OF ISRAEL* 130 (Tel Aviv, in Hebrew, 1976): "In such circumstances, there is a fundamental rule concerning recourse to English law that renunciation and remission be effected by contract, a rule that, in English law, derives from the very requirement of consideration."

39. *CODE CIVIL* [C. CIV.] arts. 1282 - 1288 (Fr.).

40. 4 JEAN CARBONNIER, *DROIT CIVIL* 514 (Paris, 1974); HENRI MAZEAUD ET AL., *LECONS DE DROIT CIVIL, OBLIGATIONS* 1101 (Paris, 1973).

41. C. CIV. arts. 1285 and 1287 (Fr.).

42. 2 GEORGES RIPERT & JEAN BOULANGER, *TRAITÉ DE DROIT CIVIL* 690 (Paris, 1957); 4 CARBONNIER, *supra* note 40, at 514; MAZEAUD ET AL., *supra* note 40, at 1001. On the theory of Juristic Act (*act juridique*) in general, see GEORGE WHITCROSS PATON & DAVID PLIMLEY DERHAM, *A TEXTBOOK OF JURISPRUDENCE* 315 *et seq.* (4th ed. Oxford, 1972).

43. MAZEAUD ET AL., *supra* note 40, at 1107.

mise agreement (*concordat*), whereby creditors waive part of their rights. Because creditors do not compromise in order to benefit the debtor, they believe that only this course will offer a measure of satisfaction.⁴⁴ Many jurists have argued that a distinction should be drawn between remission of debt based upon agreement with *animus donandi*, and unilateral renunciation of a right deriving from an obligation. In their opinion, the object of the renunciation in the latter case is not to benefit the debtor, but to liberate the creditor from the burden of a debt that is more troublesome than it is worth. This approach, too, is rejected because a contract is a legal bond between two parties, and every matter concerning that bond is subject to the agreement of both parties. Therefore, remission of debt (*remise of dette*) is a form of agreement.⁴⁵

A further question is whether a remission of debt is necessarily gratuitous, or whether it may be granted for consideration. Generally speaking, remission of a debt is by nature given gratuitously, as an indirect form of gift. However, there is the possibility for the remission of a debt to form an element grounding a transaction for consideration.⁴⁶ This opinion is not unanimously held, and there are jurists who argue that remission can be granted gratuitously, as a gift lacking form.⁴⁷ In our opinion, the former approach is preferable. Renunciation can be granted either gratuitously or for consideration, and remission of debt can form an element of a transaction such as delegation or novation.⁴⁸ The legal reality requires both forms of renunciation.

F. GERMAN LAW

German law explicitly treats a "Contract of release" and an "acknowledgment that the debt does not exist:"

1. An obligation expires if the debtor is released from the obligation by agreement with the creditor.

44. *Id.* at 1102.

45. 1 PIERRE RAYNAUD & GABRIEL MARTY, *DROIT CIVIL, LES OBLIGATIONS* 853 (Paris, 1962).

46. 4 CARBONNIER, *supra* note 40, at 514.

47. MAZEAUD ET AL., *supra* note 40, at 1101 *et seq.*

48. 1 RAYNAUD & MARTY, *supra* note 45, at 853.

2. The same applies if the creditor by contract with the debtor acknowledges that the obligation does not exist.⁴⁹

The language of the law makes it clear that the subject is a contract of release. Thus, agreement - a meeting of the minds - is required. The accepted view is that a debtor's silence is construed as consent to the remission of his debt,⁵⁰ but it is emphasized that no legal consequences arise from unilateral remission.⁵¹

Remission is viewed as a form of gift. However, it can also come about as the result of a prior obligation to grant remission under given circumstances. Similarly, remission can form part of an agreement or a more general transaction, in which case its fate will be the same as that of the entire transaction itself.⁵² A distinction should be drawn between the contract of release and the *pactum de non petendo* (an agreement not to sue). In the latter case, the obligation continues to exist, but the debtor is granted a defence (*exception*) that neutralizes the creditor's action.⁵³ In German law, too, a distinction is made between release, which is a contract, and renunciation. Release is viewed as a sub-class of renunciation. Release refers only to obligations, whereas renunciation is a broader concept that refers to other rights as well.⁵⁴

E.J. Cohn clearly defines the distinction for jurists versed in the Common Law:

As the doctrine of consideration plays no part in German Law, German Law has no difficulty whatsoever in recognizing the validity of a contract by which the creditor - with or without consideration - releases the debtor from his liability.

49. Bürgerliches Gesetzbuch [BGB] (Civil Code), § 397, (I.S. Forrester *et al.* trans., New Jersey, 1975) (F.R.G.).

50. 1 KARL LARENZ, LEHRBUCH DES SCHULDRECHTS, ALLGEMEINER TEIL 217 (11th ed. 1976); 1 JUERGEN ESSER, SCHULDRECHT, ALLGEMEINER TEIL 179 (4th ed., 1920).

51. WOLFGANG FIKENTSCHER, SCHULDRECHT 207 (7th ed. Berlin, 1985).

52. LARENZ, *supra* note 50.

53. *See id.* at 219 on *pactum de non petendo*; ADOLPH BERGER, ENCYCLOPEDIA OF ROMAN LAW 615 (Philadelphia, 1953).

54. 2 SOERGEL-SIEBERT, KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH 492 (1967).

This contract (*Erläss*) is not subject to any form (section 397, BGB). It may therefore, be implied from the attitude of the parties. Its effect is the immediate discharge of the debtor.⁵⁵

There are certain exceptions to the contractual character⁵⁶ of renunciation in the laws of obligations; for example, the case of deposit under sections 372 - 386 of the BGB.⁵⁷ That procedure concerns a situation wherein the debtor deposits payment of his debt to the creditor's account in a public institution established for that purpose. The debtor retains the right to withdraw the funds as long as the creditor has not given notice of acceptance of the deposit. The debtor's right of withdrawal ceases if he declares to the institution that he waives his right to recover the deposit.⁵⁸ This is an exceptional case which proves the rule that, in the law of obligations, renunciation is bilateral.⁵⁹

Under certain circumstances, failure to exercise a right over a period of years is tantamount to renunciation.⁶⁰ However, the law always requires that there be both *intention* to renounce and *knowledge* of this requirement. It must be clear to the parties, beyond all doubt, that renunciation of a debt is involved. Another example of renunciation by conduct can be found in the case where a divorcing couple drafts an agreement for the division of their property and later the parties remarry. The second marriage can be viewed as a renunciation of the rights that would have arisen from the divorce agreement. Certain rights can be renounced only to the extent established by law, as in the case of maintenance payments,⁶¹ or minimum wages. Lastly, as renunciation of debt constitutes a contract between the creditor and the debtor, German law establishes that a renunciation contract cannot be made for the benefit of a third party.⁶²

55. 1 ERNST JOSEPH COHN, *MANUAL OF GERMAN LAW* 236 (2d ed. London, 1968).

56. PALANDT *BÜRGERLICHES GESETZBUCH* § 397, 436 (46th ed. München, 1986).

57. BGB, §§ 372 - 386 (F.R.G.).

58. BGB, § 376 (2) (1) (F.R.G.).

59. See also in the case law 722 RGZ 171; 110 RGZ 418.

60. 16 RGZ 1865 (F.R.G.).

61. BGB § 1360 (A); see also §§ 1616, 1615 (E) (F.R.G.).

62. PALANDT, *supra* note 56.

G. SWISS LAW

Swiss law treats remission of debts as follows:

A partial or total discharge of an obligation by agreement need not be formal, even where the contracting thereof by law or arrangement between the parties required a particular form.⁶³

It is clear from the Code's language that an agreement between the parties is required. Remission of a debt can be by way of gift, but in such cases the requirements for gifts - other than those regarding form⁶⁴ - must be fulfilled.

If the renunciation concerns proprietary rights, Swiss law, too, distinguishes between remission, which is a contract - a bilateral, juristic act - and renunciation, which is both broader and unilateral. The *causa* for remission of an obligation can be either of a beneficiary character (*donandi*), or of a normal, transaction nature (*acquirendi*), as in the case where a creditor releases a debtor on the condition that the debtor promptly pays another obligation.⁶⁵

H. ITALIAN LAW

The point of reference in Italian law is the "Declaration of remission of debt," which establishes:

The declaration of the creditor remitting the debt extinguishes the obligation when it is communicated to the debtor (1334), unless the latter declares within a reasonable time that he does not wish to avail himself of it.⁶⁶

63. Schweizerisches Obligationenrecht, Code des obligations, Codice delle obbligazioni [Code of Obligations, OR, Co, Co], § 115 (Discharge by agreement) (Switz.).

64. 6 BERNER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, OBLIGATIONEN, 604 (Bern, 1941-1945); THOMAS GUHL, DAS SCHWEIZERISCHE OBLIGATIONSRECHT 268 *et. seq.* (Zurich, 1972).

65. PIERRE ENGEL, TRAITE DES OBLIGATIONS EN DROIT SUISSE 514 *et seq.* (Neuchatel, 1973).

66. CODICE CIVILE (Civil Code) [C.c.] art. 1236 (M. Betrams, G.E. Longo, and J.H. Merryman trans. New York, 1969) (Italy).

The traditional approach viewed *remissione* as a unilateral, legal transaction. In other words, the creditor's declaration suffices to discharge the obligation upon receipt of notice by the debtor, unless the latter gives timely notice of his desire not to benefit from the remission. The opportunity to void the effect of remission is given to the debtor as he may have an interest in fulfilling his obligation. This interest may be not only a moral one, expressing the common desire to keep promises, but may be commercial as well. Not every debtor wishes to be portrayed as unable to fulfill his obligations absent remission by his creditors. Such a situation could raise doubts in the minds of other present or potential creditors. We have here another aspect of the principle *nolenti non fit donatio*. This doctrine views *remissione* as a unilateral act that requires acceptance (*recettizia*) and that remains pending for a period, conditional upon the debtor's non-opposition. Opposition, too, is a unilateral act requiring acceptance that need not take a particular form. The possibility of a declaration of opposition does not, according to the traditional view, change the nature of remission from a unilateral act to a bilateral one - a contract. The result of the debtor's refusal is the revival of the original contract, but without those guarantees that existed prior to the remission and which automatically ceased upon the discharge of the primary contractual relationship. As stated, this is the approach of traditional doctrine,⁶⁷ as well as of the case law.⁶⁸

However, this approach has, in the past, been subjected to the criticism of important jurists,⁶⁹ and this criticism has gained strength. It is argued that one cannot create an abstract structure for remission, since remission occurs at several different times: sometimes in accordance with the structure of article 1236, which is a particular contractual form (*particolare forma*

67. Ernesto Tilocca, *Remissione del debito*, in 15 NOVISSIMO DIGESTO ITALIANO 389 *et seq.* (Torino, 1968); ALBERTO TRABUCCHI, *ISTITUZIONI DI DIRITTO CIVILE* 571 (27th ed. Padova, 1985); PIETRO RESCIGNO, *MANUALE DEL DIRITTO PRIVATO ITALIANO* 632 *et seq.* (Napoli, 1985).

68. See Judgment of May 10, 1967 Cass. n. 959 (according to which the result of acceptance is to make the remission irrevocable); See also, Judgment of June 24, 1968 Cass. n. 2111 (attributes the same result to the passage of reasonable time without the debtor's opposition) (Italy).

69. GIUSEPPE STOLFI, *TEORIA DEL NEGOZIO GIURIDICO* 50 *et seq.* (Padova, 1947); FRANCESCO CARIOTA FERRARA, *IL NEGOZIO GIURIDICO* 140 *et seq.* (Milano, 1948); EMILIO BETTI, *TEORIA GENERALE DEL NEGOZIO GIURIDICO* 293 (Torino, 1950).

contrattuale); at times in the traditional contractual form; and at other times as a unilateral act, which does not require any steps be taken by the debtor, if the parties have so agreed in advance and have so empowered the creditor.⁷⁰ The relationship between remission and renunciation (*rinuncia*), too, has given rise to differences of opinion,⁷¹ though this is beyond the scope of our present study.

I. SPANISH LAW

In the Spanish code, we find reference only to remission,⁷² with a distinction drawn between explicit remission (the creditor makes a formal declaration), and implied remission (for which the circumstances lead to the conclusion that the creditor waives his right).⁷³ When a note is held by the debtor, it is presumed that the note has been freely transferred to him by the creditor, unless otherwise proven.⁷⁴ It is also presumed that the free transfer of a note was performed by way of remission, and not for consideration.⁷⁵

Remission is considered to be a legal transaction performed without consideration,⁷⁶ and the laws of gifts apply.⁷⁷

In Spain, too, the question has been raised as to whether

70. PIETRO PERLINGIERI, *REMISSIONE DEL DEBITO E RINUNCIA AL CREDITO* (Napoli, 1968); *See his MODI DI ESTINZIONE DELLE OBBLIGAZIONI DIVERSI DALL'ADEMPIMENTO*, 168 *et seq.* (Bologna, 1975).

71. *See* Tilocca, *supra* note 67, for a discussion of the problems and references to the opposing literature.

72. Código Civil (Civil Code) [C.Civ.], arts. 1187-1194 (Spain): "De la Condonacion de la deuda". The doctrine also employs other terms, such as *Quita*, *Remision*, *Renuncia*. *See* 3 JOSE CASTAN TOBENAS, *DERECHO CIVIL ESPAGNOL COMUN Y FORAL*, 393 (Reus ed., Madrid, 1978).

73. *See* 3 TOBENAS, *supra* note 72, at 397. As, for example, delivering the promissory note to the debtor (C.Civ. art. 1187, § 1 (Spain)) or delivering the security interest, though in this case the remission is only of the right to hold the security interest and not of the debt itself.

74. C.Civ. art. 1189 (Spain).

75. *See* C.Civ. art. 1188 (Spain). This system of presumptions has been subject to criticism under the doctrine, *see* 3 TOBENAS *supra* note 72, *loc. cit.* *See also infra* the section concerning the Argentinean code.

76. *See* 1 JOSE PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL* 364 (Barcelona, 1959). This scholar objects to the very notion of remission for consideration. In his opinion, it is the absence of consideration that characterizes remission.

77. C.Civ. art. 1187 (Spain).

remission is a unilateral or a bilateral act. Ruggiero is of the opinion that remission is unilateral and, therefore, the creditor's intent is sufficient to discharge the obligation. The debtor cannot prevent the remission, and not every remission is to the debtor's benefit.⁷⁸ According to Sanchez Rebullido, only explicit remission requires the debtor's consent and, therefore, such remission is a bilateral act.⁷⁹

But there are jurists who argue that the question has been improperly posed. According to Puig Brutau, it is irrelevant to establish, *a priori*, whether remission is unilateral or bilateral: the question is whether the creditor may withdraw the remission. In Brutau's opinion, where the creditor has unambiguously declared his intent to remit a particular debt, he may not withdraw the remission.⁸⁰ Therefore, remission is unilateral in character, ensuring the debtor's interest and faith. But the fact that the law applies the rules of gifts to remission, including the requirement of consent⁸¹ is sufficient - in the opinion of Castan Tobenas - to establish that remission is bilateral.⁸² Moreover, according to articles 632 and 633 of the Spanish code, the debtor's consent must be given in writing.⁸³ In the case law, we find a strict approach to this requirement. The Supreme Court, in a decision from November 21, 1935, held that unless the debtor consents, remission cannot be inferred from the fact that the creditor sent a letter of waiver and did not act to collect for a period of thirteen years. Therefore, the Court allowed the creditor to withdraw his remission.⁸⁴

78. See 3 TOBENAS, *supra* note 72, at 394.

79. *Id.*

80. See 1 BRUTAU, *supra* note 76, at 362-363.

81. C.Civ. arts. 618 and 629 (Spain).

82. See 1 BRUTAU, *supra* note 78, at 363. According to Puig Brutau, this assertion is quite weak. The consent of the other party does not characterize remission, because even absent consent the remission will be valid as an "implied remission."

83. C.Civ. art. 632-33 (Spain). Article 632 establishes that a gift of chattels requires the consent of the donee as long as the transfer of the object is not made simultaneously. Under article 633, a gift of real property requires a notarized protocol. The donee may express his consent in that protocol or in a separate protocol.

84. See the decision in LEON MEDINA Y MARANON, LEYES CIVILES DE ESPAÑA 338 (Reus ed., Madrid, 1943). See criticism of this decision in 1 BRUTAU, *supra* note 76, at 367 and in 3 TOBENAS, *supra* note 72, at 395.

J. LATIN AMERICAN LAWS

We shall now briefly review the codes of Latin America. It was to these codes that Prof. Tedeschi referred the Israeli legislature for a desirable model of "legal technique:"

. . . it is worthwhile considering whether it would not be wiser to adopt a more precise technique, such as is characteristic, for instance, of a number of South American codes, especially since a number of well-known European jurists tend to prefer this technique for various reasons.⁸⁵

In general, Latin American laws do not distinguish between renunciation and remission, often considering them one and the same.⁸⁶ In several countries, such as Chile⁸⁷ and Uruguay,⁸⁸ a distinction is drawn between an explicit remission and an implied remission, performed by handing over or destroying a note. Other countries, such as Brazil,⁸⁹ Venezuela⁹⁰ and the Dominican Republic,⁹¹ treat only implied remission.

In our brief discussion, we focus on Argentinean law, which clearly distinguishes between renunciation and remission.⁹² In Argentina, renunciation is defined as a legal transaction, whereby a person holding a right (personal, proprietary, or intellectual) abandons it. Remission is a particular form of renunciation that relates to a creditor's rights alone.⁹³ Here, too, we find scholars seeking to refine this distinction. They urge a differentiation between 1) renunciation in the broad sense, wherein a person completely renounces his right (*in totum*), and 2) renunciation in the narrow sense, as where a person waives timely

85. Guido Tedeschi, *On the Technique of the Future Legislation in Israel*, in *STUDIES IN ISRAEL LAW* 69, 81 (Jerusalem, 1960).

86. See Código Civil para el Distrito Federal [C.C.D.F.] (Civil Code) § 2209 (Mex.). Código Civil (Civil Code) § 1515 (Uru.).

87. Código Civil [Cód. Civ.] (Civil Code) § 1654 (Chile).

88. Código Civil [C.C.] (Civil Code) § 1517 (Uru.).

89. Código Civil [C.C.] (Civil Code) § 1053 (Braz.).

90. Código Civil [C.C.] (Civil Code) § 1326 (Venez.).

91. Código Civil [C.C.] (Civil Code) § 1282 (Dom. Rep.).

92. Código Civil [Cód. Civ.] (Civil Code) §§ 868-887 (Arg.). See §§ 868-875 for renunciation and §§ 876-887 for remission.

93. GIORGIO BORDA, *MANUAL DE OBLIGACIONES* 377, 382 (Buenos Aires, 1974).

performance of an obligation. In the latter case, we have but an extension of the date of performance, and not a waiver of the right itself. Renunciation of a debt falls within the framework of renunciation in the broad sense.⁹⁴

In Argentina, as well, renunciation is considered a bilateral, legal transaction, as the debtor's consent is required.⁹⁵ Renunciation can be made either for consideration or gratuitously.⁹⁶ In the latter case, the question of the relationship between renunciation and gift arises. The accepted view is that by giving a gift, one transfers ownership of property,⁹⁷ where as renunciation encompasses every transfer, even abandonment. Indeed, because it is often difficult in day-to-day practice to distinguish between gift and renunciation, various proposed amendments to the code would expand the definition of gift to include renunciation.⁹⁸ Due to the bilateral nature of renunciation, the renouncing party may withdraw his renunciation as long as there has been no acceptance by the debtor. But this is subject to the proviso that the withdrawal not harm third-party interests, which arise between the date of renunciation and the date of withdrawal.⁹⁹

In Argentinean law there is no presumption of renunciation. Therefore, we may speak of a renunciation only when we encounter a formal declaration or an unambiguous fact.¹⁰⁰

Like renunciation, remission may be general or partial, and either for consideration or gratuitous. When remission is used in the general sense, it refers to an act done without consideration:¹⁰¹ a wilful or necessary act, such as remission in the course of receivership. Remission can be explicit or implied. Contrary

94. 2 JOSÉ J. LLAMBIAS, *CÓDIGO CIVIL ANOTADO* 857 (Buenos Aires, 1978).

95. *CÓD. CIV.* § 868 (Arg.). However in the case of renunciation of proprietary rights it is a unilateral act. BORDA, *supra* note 93, at 378.

96. *CÓD. CIV.* § 869 (Arg.).

97. *CÓD. CIV.* §1789 (Arg.).

98. Thus it may be that there is no difference between 1) *A* giving *B* a sum of money as a gift and 2) *A* lending money to *B*, only later to waive his right to repayment: BORDA, *supra* note 93, at 381; JOSÉ J. LLAMBIAS ET AL., *COMPENDIO DE DERECHO CIVIL*, 535 (Buenos Aires, 1976).

99. The same rule appears in regard to gifts: *CÓD. CIV.* §1789 (Arg.).

100. See the case law brought in 2 LLAMBIAS, *supra* note 94, at 872.

101. In Argentina, as in many other countries, doctrine basically claims that remission can be only gratuitous. Where there is consideration, we may speak in terms such as transaction, novation, or *datio in solutum*.

to other jurisdictions, such as Chile, explicit remission in Argentina need not be made in ceremonial form, even when the debt has been drawn up in a notarized protocol.¹⁰²

The Argentinean code itself gives an example of implied remission: the creditor gives the note to the debtor of his own free will, so long as the debtor does not claim that the debt has already been discharged.¹⁰³ Another presumption in Argentinean law is that if the note is in the possession of the debtor, then it is presumed to have been given to him of the creditor's free will.¹⁰⁴

K. THE NETHERLANDS CIVIL CODE

The bilateral character of remission of debts finds expression in the new Netherlands Civil Code.¹⁰⁵ In Extinction of Obligations we find:

1. An obligation lapses if the creditor makes an offer to his debtor to renounce it, and the latter accepts that offer.

2. A gratuitous offer to renounce (remission of debt), which has come to the knowledge of the debtor and has not been refused forthwith, is deemed to be accepted.¹⁰⁶

The commentary specifically addresses the distinction between renunciation and remission:

It is not clear whether the word "remission" in articles 1474 *et. seq.* of the existing code denotes every renunciation of a claim, or only gratu-

102. Cód. Civ. § 885 (Arg.).

103. Clearly, this example does not rule out the possibility of other cases of implied remission.

104. Cód. Civ. § 878 (Arg.), which is based upon § 1282 of the Napoleonic Code. The norm had already been the subject of criticism in France: see 2 RIPERT & BOULANGER, *supra* note 42, at 692. In Argentina, it was recommended that both presumptions be repealed, and that the rules of renunciation and remission be unified. See 3 JOSÉ J. LLAMBIAS, *TRATADO DE DERECHO CIVIL, OBLIGACIONES* 171 (Buenos Aires, 1977).

105. NEW NETHERLANDS CIVIL CODE, *PATRIMONIAL LAW*, bk. 6 (Deventer/Boston, 1992).

106. *Id.* bk. 6.1, § 10 (Neth.).

itous renunciation. In order to exclude any possible misunderstanding, the draft uses the word "renunciation" for every juristic act whereby a creditor relinquishes his claim, and, in accordance with common usage, the word 'remission' is used to denote gratuitous renunciation only.

According to some legislation, a simple declaration by the creditor that he renounces his claim is sufficient to cause the obligation to lapse. The draft has not adopted that view, because it should not be possible to thrust upon another person gifts which he does not want to accept from the donor. However, if the statute were to provide, as some other codes do, that a contract between creditor and debtor is required for every renunciation, then that would suggest that mutual consent must be proved in all cases. This would go too far in the other direction; for cases where the debtor objects to remission occur so rarely that the absence of any reaction may be interpreted as an assent. The proposed article therefore provides that an offer of remission which has come to the knowledge of the debtor, and has not been rejected by him forthwith, is deemed to be accepted. The rule promotes legal security, because it cuts off any dispute on whether the debtor has consented to the remission or not.¹⁰⁷

In the new Code we find renunciation by contract (1) and the presumption of agreement of the debtor (2):

Art. 160 (6.2.4.14a)

(1) An obligation is extinguished by a contract between creditor and debtor whereby the creditor renounces his claim.

(2) An offer to renunciate by gratuitous title, addressed by the creditor to the debtor, is deemed accepted when it has come to the attention of the debtor and he has not rejected it without delay.

107. *Id.* Text at 36, and Commentary at 234.

II. RENUNCIATION AND REMISSION IN ISRAELI LAW

A. INTRODUCTION

We have not conducted the foregoing comparative survey in order to indicate any particular foreign solution, nor to find the source from which the Israeli legislature directly or indirectly drew its legal principles. We accept the principle that "in the new Israeli legislation, there is no such direct-technical absorption, but only a general, indirect-conceptual relationship to foreign legal systems."¹⁰⁸

In treating this question, Professor Barak writes:

Even in the framework of "operative" jurisprudence, we are not forbidden - and it appears to us as desirable - to turn to the foreign system from which the primary concept was drawn. Such recourse extends the depth of thought and can expand the options for construction. But it is not essential.¹⁰⁹

In light of the above, we shall return to our legal system.

It seems clear that by the term *vitur*, the Israeli legislature means renunciation, and by *mehilah* it means remission of debt, just as those terms were translated in the Ministry of Justice's authorized translation of the Gift Law, 1968.¹¹⁰ As we have seen, these terms are well-known in the legislation and literature of those countries that have adopted a code system. What system has been adopted by the Israeli legislature? It seems clear that the legislature considered cases of renunciation and of remission made in the form of agreements: "[a] gift is completed by the donor transferring to the donee the ownership of the subject of the gift, while it is agreed between them that such subject is disposed by way of gift;"¹¹¹ and "[t]he donee is presumed to have

108. Yadin, *supra* note 7, at 365.

109. Barak, *supra* note 7, at 21.

110. As stated above, it should be noted that *vitur* was translated as waiver in Contracts (General Part) Law § 55 (c), 27 L.S.I. 117 (Isr.). *Vitur* is similarly translated in the Family Law Amendment (Maintenance) Law, § 12,13 L.S.I. 73 (1959) (Isr.). And in light of this we examined the meaning of waiver in English Law.

111. Gift Law, § 2, 22 L.S.I. 113 (Isr.).

agreed to the gift, unless he notifies the donor of its rejection¹¹²

B. RENUNCIATION AS A BILATERAL ACT

It follows therefore, that renunciation and remission are viewed as bilateral acts done without consideration. However, this does not exhaust the subject. We must examine the language of the law precisely. The law states: '[a] gift may consist in the donor's renunciation of a right against the donee or in the donor's remission of an obligation. . . .'¹¹³ The law does not say that *every* renunciation or remission takes the form of a gift. The legislature established that there are cases, perhaps many cases, in which it views renunciation and remission as instances of gifts to which the Gift Law applies. In drafting the Gift Law, the legislature considered *gifts*, and everything is therefore treated from that perspective. Had the legislature intended to specifically treat the subject of renunciation and remission, no doubt it would have begun with a definition along the lines of section 1 (c) of the Gift Law: '[a] gift is a transfer of the ownership of property otherwise than for consideration.'¹¹⁴ Thus it would have added: 'Renunciation is', and 'Remission is'

It follows that a person desiring to give a gift may choose to do so by means of renunciation or remission, and in many instances renunciation and remission will be viewed as gifts. In those cases, renunciation and remission are done without consideration, and the Gift Law will apply. In such cases, the legislature has clearly established the bilateral, consensual character of the transaction.¹¹⁵ But here, too, we must view the matter from the proper perspective. We are concerned with a dispositive norm that, for example, the remission will have valid force by the donor's unilateral decision alone. Similarly, the parties may establish that the renunciation and remission shall not be granted "without consideration" but as a regular transaction for consideration. As Justice Orr noted:

112. *Id.* § 3 (Isr.).

113. *Id.* § 1 (c) (Isr.).

114. *Id.*

115. *Id.* §§ 2 - 3 (Isr.).

Only when the renunciation is made without consideration may we view it as a gift. The renouncer of the right must intend to benefit the receiver, while it must be clear that the renunciation is given without consideration.¹¹⁶

Moreover, we find elsewhere that renunciation can be either for consideration or gratuitous, such as “the gratuitous renunciation of a right.”¹¹⁷

It follows that in current Israeli law, the character of renunciation is neutral, just as the character of transfer is neutral in the question of whether the transfer is done for consideration or gratuitously. The Sale Law¹¹⁸ applies in the former case, while the Gift Law applies in the latter. All is dependent upon the will of the parties, as it arises from their contract and conduct. So it is in the case of renunciation and remission. A person may renounce a right within the framework of a larger transaction, in consideration for a price or other benefit, or he may renounce the right from a desire to benefit another person. If, for instance, Reuben wishes to give fifty shekels to each of his four children, and if one of his children owes him fifty shekels, then Reuben can remit that debt; the remission will be deemed a gift. Thus “a gift may consist in the donor’s renunciation . . . or the donor’s remission . . .” If the parties did not establish otherwise, then this is a bilateral, legal transaction; it is assumed that the donee consents.

Thus the character of renunciation is bilateral, as is a transfer. If the remission results from a transaction, then it is clear that the parties must decide upon the terms. If the transaction is gratuitous, the presumption of section 3 of the Gift Law will apply. It is our opinion, that this also should be the preferred result in the case of renunciation by conduct. Clearly, the presumption of consent is not seen as strong as actual consent, but such is the nature of unilateral contracts, in which the act of one party is given greater expression than that of the other.

116. *Amina Abed v. Nemni* 37(ii) P.D. 606, at 615 (1983) (Isr.).

117. Land Appreciation Tax Law § 63, 17 L.S.I. 193 (1963) (Isr.).

118. Sale Law, 17 L.S.I. 193 (Isr.).

C. THE REASON FOR REMISSION

In order to establish which rule shall apply to remission, we, and the judge, must examine the reason for granting the remission. By this we do not mean the *causa* in the strict sense employed by various continental systems, but in the sense commonly employed by laymen. In other words, a person may grant remission: as the result of another, general transaction; because he is under an obligation to do so (for example, where in a will to the benefit of *A* there is a *modum* obligating him to grant remission to *B*); or because he wishes to benefit another. As with a normal gift, the remitter may stipulate a condition or obligate the debtor to perform some act in regard to the gift.¹¹⁹

D. CONSEQUENCES OF REMISSION AND ITS LIMITS

The discharge of the primary debt, as a result of renunciation or remission, brings with it the discharge of ancillary obligations, such as guarantees, and allows for the removal of real encumbrances, such as mortgages. Clearly, a debtor will be discharged of his obligations only to the extent set by the creditor.

E. RENUNCIATION AND REMISSION BY CONDUCT

The presumption of the beneficiary's consent enables us to recognize renunciation and remission by the creditor's conduct. Indeed, extreme care is necessary to establish that the creditor actually intended a waiver by the method of renunciation and remission. At times, a person is willing to accept only part of his due today, and this readiness, in itself, should not be viewed as a waiver-by-conduct of the remainder of his rights.¹²⁰ "It is well established, that in order to infer waiver from a person's conduct, that conduct must be clear, emphatic and unambiguous."¹²¹ Moreover, the conduct must comprise of "some explicit

119. Gift Law, § 5, 22 L.S.I. 113 (Isr.).

120. We entirely agree with the decision of the Supreme Court in *Mizrahi v. Israel*, 40(iii) P.D. 163 *et seq.* (1986) (Isr.). Per J. Goldberg, this case may be viewed as one wherein "a person acted due to the necessity of the circumstances and not due to the weighing of the commercial value, which is like a waiver of the remainder of the debt."

121. *Ben-Haim v. Cohen*, 34(i) P.D. 564, at 570 (1980) (Isr.).

expression of actual waiver."¹²²

The returning of an instrument to the debtor by the creditor is a special form of conduct. It is generally presumed that the debtor received the instrument of the creditor's own will. However, this will, alone, is not sufficient to discharge the contractual relationship. Rather, it must be accompanied by an intention to relinquish the instrument forever. The person granting the waiver must be cognizant that he held an enforceable legal right. On the other hand, if the debtor willingly received the instrument, and his conduct reflected his intention to benefit from the discharge of the debt, he cannot later withdraw his consent and refuse the remission.

A waiver of guarantees should not be construed as giving rise to a presumption of the remission of the entire debt.

F. THE POSSIBILITY OF WITHDRAWAL BY THE REMITTER

In matters of renunciation and remission, different debtors may have different interests. One may be interested in giving his immediate consent in the hope that the creditor will no longer enjoy a right of withdrawal; another may wish to reject the remission and to pay his debt. It is, therefore, important to ascertain at what point a waiver is realized.

From the language of section 3 of the Gift Law, it appears that the presumption of consent applies only from the moment that the donee becomes aware of the gift, for the donee's silence is deemed consent, but not his lack of knowledge.¹²³ Thus, until the moment that the beneficiary becomes aware of the remission, the remitter may withdraw. But once the debtor has become aware of the remission, the presumption of consent comes into force. The creditor can no longer withdraw the remission, and the debtor can avail himself of a "reasonable time" in which to consider whether to accept the remission. Should he take no action during that "reasonable time," the debtor will be deemed to have consented to the remission.

122. *Winter v. Pfeffer*, 24(ii) P.D. 541, at 548 (1970) (Isr.).

123. *Cf.*: 2 ZELTNER, *supra* note 38, at 79; Rabello, *supra* note 4, § 51; Tilocca, *supra* note 67, at 412 *et seq.*

G. REJECTION OF REMISSION

We have already had the opportunity to mention that the debtor enjoys the possibility of refusing a remission. We should now like to treat this more thoroughly.

If, in every instance of gift, the donee is granted the opportunity to reject the gift by giving notice to the donor within a reasonable period of becoming aware of the gift,¹²⁴ then this right should be even more stringently defended in the case of remission. Here we speak not of a simple gift, made without the existence of a prior obligatory relationship between donor and donee, but of the very opposite. Remission occurs in a creditor-debtor relationship, in which the debtor has not yet fulfilled his obligation.

The possibility of refusing to accept the remission is intended to protect the debtor's interest in fulfilling that obligation. That is, it is intended to defend the debtor's interest to be discharged, not by remission, but by fulfilling his obligation in some manner that comprises an element of performance and payment. We are not concerned here with the debtor's interest in a timely discharge of his obligation,¹²⁵ although remission, too, discharges a debt. We are concerned with protecting an interest that differs from discharge, which is the debtor's interest in performing the contract.

Furthermore, section 40 of the Contracts (General Part) Law¹²⁶ should not create difficulties, primarily because in that case it is generally not intended that the debt be discharged and the debtor released from his obligation. Rather, it is to be assumed that the person, who paid the creditor, will have recourse to the debtor to obtain reimbursement.

It is, therefore, clear that the presumption of consent is

124. Gift Law, § 3, 22 L.S.I 113 (Isr.).

125. This interest is protected, *inter alia*, in §§ 39, 43 (b) Contracts (General Part) Law; and in §19 Sale Law, which states: "The buyer shall pay the price to the seller and shall take delivery of the thing sold."

126. See Contracts (General Part) Law, § 40, 27 L.S.I. (Isr.): "An obligation may be fulfilled by a person other than the debtor, unless according to the nature of the obligation or to the agreement between the parties, the debtor must fulfill it personally."

valid only from the moment that the debtor is aware of the remission. The debtor's silence is taken to express consent, but not so his ignorance.

The debtor must express his rejection of the remission within a "reasonable time" from his awareness, thus nullifying the presumption of consent. It is not entirely clear whether we have here a case of suspensory condition or of resolute condition. On the Continent, too, similar cases have yielded different solutions. In our opinion, the preferable solution is a resolute condition. That is, the presumption of consent comes into force from the moment that the debtor becomes aware of the remission (section 3 of the Gift Law). And, indeed, a debtor usually will happily accept the discharge of his debt, and will gratefully view it as a gift. Therefore, it is desirable to bring about the consequences of the transaction at this early stage, and thereby bringing the legal situation in line with what generally occurs (*quod plerumque accidit*).¹²⁷

In light of the above legal construction, it is clear that in the event of the rejection of a remission, the original obligation is revived. The discharge of the obligation is not final, but rather conditional, and the condition can potentially revive the prior legal relationship. The condition does not act directly upon the primary transaction, but acts upon the remission alone. The debtor's rejection cancels the remission; the discharge of the obligation is without force, and the obligation continues *ex tunc*. But, absent such rejection, the condition is rendered null after a reasonable period elapses from the time the debtor becomes aware of the remission, and the remission comes into force, finally discharging the debtor's obligation.

The rejection of remission enters into force when notice is received by the grantor, as reflected in section 3 of the Gift Law. Up to that point, and generally as long as the creditor continues to stand by his remission, the debtor may withdraw his rejection and enjoy the remission.¹²⁸

Rejection of the remission can be made in any form,

127. See on the burden of notice: Guido Tedeschi, *Burden and Frustration* 16 MISHPATIM 335, at 353 *et seq.* (1987).

128. Cf. *Estate of Wessner v. Gutman*, 229(i) P.D. 315 (1975) (Isr.).

whether written, oral, or by conduct, such as returning the letter to the creditor. But rejection may only occur within a reasonable period. Thus, for example, performance of the obligation immediately following receipt of notice of remission will certainly be viewed as a rejection of the remission. However, this will not be the case when the performance is effected after the passage of a long period of time, under circumstances in which the debtor did not otherwise inform the creditor of his rejection of the remission.

Non-rejection of the remission is expressed passively, by conduct that we construe to be consent under section 3 of the Gift Law. The debtor's inaction therefore finds expression as objective conduct.¹²⁹

Rejection of the remission should not be viewed as a form of renunciation, just as the rejection of a gift should not be so viewed. Particularly in a system, such as ours, in which the element of consent is emphasized (even as a result of the presumption of consent), the rejection of a remission or of a gift should be viewed as expressing a desire not to enter into an agreement, without attributing to the debtor or donee any other intention.¹³⁰

The right to reject remission is, in our opinion, afforded to every primary debtor in the case of multiple debtors. Section 55(c) of the Contracts (General Part) Law establishes: "If the creditor discharges one of the debtors . . . the other is discharged to the same unless. . ." Clearly, if the other debtor does not wish to benefit from the remission, he may employ his right to reject the remission and its consequences, at least insofar as he is concerned. Indeed, the discharge of the other debtors is not a necessary consequence *ex lege*. The law allows the remitter to express other desires ("unless a different intention appears from the discharge") for as many remissions as debtors. In the case of

129. See FRANCESCO SANTORO-PASSARELLI, *DOTTRINE GENERALI DEL DIRITTO CIVILE* 121 *et seq.* (Napoli, 1959); PIETRO RESCIGNO, *STUDI SULL'ACCOLLO* 120 *et seq.* (Milano, 1958); KLAUS MANIG, *DAS RECHTSWIRKSAME VERHALTEN* 279 (Berlin, 1939).

130. By this we reject the theory of FRANCESCO ALLARA, *LE FATTISPECIE ESTINTIVE DEL RAPPORTO OBBLIGATORIO* 254 (Torino, 1952), according to which rejection of remission is 'a type of renunciation of the remission.' *But see* LUIGI FERRI, *RINUNZIA E RIFIUTO* 20 *et seq.* (Milano, 1960).

the rejection of the remission by one of the debtors, the rejection will be effective only in regard to his part of the debt.

Another question which we shall leave for further study is whether another creditor of the debtor can reject the debtor's rejection due to an interest that the creditor may have in releasing the debtor from his obligation. Similarly, we shall leave open the question of whether a revived debt returns to the same situation that existed before the remission and, especially, whether the ancillary obligations - such as guarantees - revive, as well.

H. REMISSIONS AND AN OBLIGATION TO REMIT

The type of remission that we have discussed up to this point results in the debtor's automatic release from his obligations. Thus, we face an instance of a gift *in liberando*. The same result occurs when the donor renounces a specific right toward the donee, such as in renouncing a security interest or a mortgage.¹³¹ In such cases, the following statement of Maimonides is apt:

If he remits a debt that he holds against another, or gives him the deposit held by him - it is a gift that is transferred by oral statement alone, without need for anything else.¹³²

The case is different where, instead of an immediate release and the real result achieved in that case, the remission or renunciation is expressed as a promise to release the debtor at a later date. Such a promise - if not undertaken as part of a more general transaction that benefits both sides - is an obligation to grant a future gift. Such an obligation to release the debtor in the future requires a written instrument, and the party making the promise can withdraw it as long as the donee (the debtor) does not change his situation in reliance thereon.¹³³ Such a right of withdrawal does not exist where the remitter waives it in writing.

131. See also Gabriela Shalev, *Promise, Estoppel and Good Faith* 16 MISHPATIM 295, at 321 (1987).

132. *Maimonides*, 3:3, *Laws of Acquisition and Gift*.

133. *Gift Law*, § 5, 22 L.S.I, 113 (Isr.).

Similarly, the remitter may withdraw his obligation if the debtor acts in a disgraceful manner towards him or his family, or if there is a considerable deterioration of his economic situation.¹³⁴

I. REMISSION AS FULFILLMENT OF AN OBLIGATION BY THE REMITTER

Remission may be granted for numerous reasons. A person may conclude that he should remit, not as an act of good will, nor because remission is worthwhile in the framework of his commercial relationship with the debtor, but because he is obligated to do so due to another obligation that is external to the creditor-debtor relationship. If, for example, *B* owes a debt to *A*, it is possible, that as part of the obligation, *A* may find himself obligated toward *C* for some payment or to remit *B*'s debt. Thus, *A* appears both as creditor and as debtor. He is "obligated" to remit the debt of the person who is "obligated" to him.

Generally, such situations arise as a result of an obligation placed upon a beneficiary, as where *C* establishes in his will that *A* will be his heir (or will receive a gift) but that the inheritance (or gift) is restricted by a *modus* requiring *A* to remit *B*'s debt. Clearly, in such cases the primary debt is discharged only when the actual remission is effected (and not by the obligation to remit alone, or by placing the duty upon the beneficiary or donee).

In such cases, remission is not granted out of the creditor's desire to benefit the debtor, but due to his desire to fulfil the obligation placed upon him by an external source, e.g., from a preliminary contract of a duty placed upon him by the testator. Nevertheless, we should not conclude that we face a special instance of remission. In the relationship between *A* and *C*, one remains the creditor and the other the debtor. Remission does not change its character in accordance with whether the creditor remitted the debt due to an obligation or of his own free will. In both cases, the result is the loss of a right, on the one hand, and the discharge of an obligation, on the other.

In none of the situations we have considered does the

134. *Id.* § 5 (c).

debtor become a party to the creditor's obligation, and the debtor may reject the remission. It is, however, possible that in the event of a rejection, we may view the rejection as an instance of the exercise of a right contrary to customary manner and the requirement of good faith.¹³⁵ But this possibility must be approached with care. As Rescigno writes concerning Italian law:¹³⁶

The formation of the final contract as performance of the preliminary contract is an act that is no less obligatory than the performance of the contract. The only difference is that two parties appear as obligated parties. Therefore, we must view the act of each party as a separate act, without confusing it with the act of the other obligated party.¹³⁷

In certain cases, it is possible to view an obligation requiring a creditor to grant remission as a contract to the benefit of a third party.¹³⁸

J. TESTAMENTARY REMISSION

There is an instance in which it would appear that the legislature views the remission of an obligation as a unilateral act. The Succession Law states:

A will can be expressed in terms of gift, release, acknowledgement, or in any other terms.¹³⁹

This is a unilateral act, because a testamentary bequest is a unilateral, legal transaction. However, we do not face an instance in which the rules of gift or remission apply to such an act, but just the opposite. The language of the law must be pre-

135. Contracts (General Part) Law, § 39, 27 L.S.I. 117 (Isr.).

136. PIETRO RESCIGNO, *INCAPACITA' NATURALE E ADEMPIMENTO* 117 (Napoli, 1957).

137. *Id.* at 119 *et seq.* For Israeli law *cf.* Izhak Englard, *The Capacity and Guardianship Law, 5722 - 1962*, in COMMENTARY ON LAWS RELATING TO CONTRACTS, (Guido Tedeschi ed., in Hebrew, Jerusalem, 1977).

138. Contracts (General Part) Law, §§ 34-38 27 L.S.I. 117 (1973) (Isr.). *See also* Gabriela Shalev, *Contracts for the Benefit of a Third Party*, in COMMENTARY ON LAWS RELATING TO CONTRACTS, (Guido Tedeschi ed., in Hebrew, Jerusalem, 1977).

139. Succession Law, § 54 (c), 19 L.S.I. 58 (1965) (Isr.).

cisely construed. What we have here is not a gift or a remission resulting from the testator's death, as section 8 (b) of the Succession Law states:

A gift made by a person, which is intended to vest in the donee only upon the death of the donor, is not valid unless it was made by a will in accordance with the provisions of this Law.¹⁴⁰

Therefore, what we have in our example is actually the language of a gift or a remission, when in fact, there is neither a gift nor a remission, but a will made in that language. Therefore, the Law of Succession is to be applied here.

K. FUTURE REMISSION UNDESIRABLE

Up to this point we have considered cases in which a person remits an existing right or an existing debt. But there are cases in which a person waives a future right. As for gifts, here, too, the Gift Law provides no special arrangement.¹⁴¹ The Family Law Amendment (Maintenance) Law, 1959, considers waiver of maintenance payments, stating:

12. (a) An agreement as to, or a waiver of, the maintenance of a minor does not bind the minor, so long as it has not been confirmed by the Court.

(b) An agreement as to, or a waiver of, the maintenance of a person of full age shall be made in writing; it may be confirmed by the Court.

140. In our opinion, this section of the Succession Law should be given a restricted interpretation, and it should not be deemed to include gifts of future property. Regarding renunciation, where there are results that are in part *inter vivos* and in part *mortis causa*, the rules of gifts or of succession will apply accordingly. See also Rabello, *supra* note 4, at 49; REPORT ON GIFTS § 6 (Civil Code Revision Office, Montreal, 1975): "A gift which takes effect, partly *inter vivos* and partly on the death of the donor, is subject to the rules governing gifts and those governing wills, according to the circumstances." This Article is based on the second part of Article 77. It makes no mention of 'future property.' This concept is made superfluous as a result of Article I." On the problems arising today in the identification of future property in Quebec, see H. Roch, *Donations, testaments, legs, executeurs testamentaires* in 5 TRAITE DE DROIT CIVIL DU QUEBEC 114 *et seq.* (Montreal, 1953).

141. Rabello, *supra* note 4, at 47 *et seq.*

13. (a) The Court may vary the provisions of an agreement, a waiver, or a judgment, if it thinks fit to do in view of circumstances which have come to the knowledge of the applicant, or of a change in circumstances which has occurred, after the agreement, waiver or judgment . . .

Referencing the Gift Law, Professor Tedeschi has pointed out that, in [the Israeli] legal system, renunciation can be effected only by agreement.¹⁴² Clearly, the Maintenance Law relates to the legal situation that preceded the enactment of the Gift Law. Following the enactment of that law, the Maintenance Law must be accordingly construed, and we may state that it was the legislative intent to distinguish between the case where a general agreement concerning maintenance is made and the case where the beneficiary of the maintenance waives it. In such a case, the agreement can be effected by inaction, as a consequence of the application of section 3 of the Gift Law.

The difficult question that arises is whether renunciation of maintenance is always permitted, or whether situations exist in which it is desirable to avoid the force of renunciation, as where the renouncing party will be bereft of any real support, due to the renunciation, and will find himself in a situation intolerable for him or for society. In such a case, the law allows for rectifying the situation through the intervention of the court. Generally speaking, the waiver of future property should be viewed as a promise to waive a future right, and, therefore, the waiver may be withdrawn in the event of a considerable deterioration in the grantor's economic situation or of disgraceful conduct towards the grantor or his family (section 5(c) of the Gift Law).¹⁴³

Professor Tedeschi rightly noted that it would be desirable to completely proscribe renunciation of maintenance, as the possibility for such renunciation often serves as a means for applying pressure in the course of divorce litigation, etc. The legislature has recognized the possibility of precluding renunciation, as in section 65(a) of the Succession Law, 1965:

142. Guido Tedeschi, *Duty of Maintenance in Israel Civil Law*, in 6 MISHPATIM 242, at 247 *et seq.* (1975).

143. As for renunciation by a minor, Capacity and Guardianship Law, § 20 (3), 16 L.S.I. 106 (1962) (Isr.) should also be kept in mind.

As agreement relating to maintenance under this Chapter or a waiver thereof, if made in the lifetime of the deceased, is void, and if made after his death, requires approval of the Court.

Up to now, we have treated renunciation in favor of a donee, but it is clear that there are situations in which it would be desirable to prohibit renunciation in favor of the donor and his creditors, as well. This matter receives partial attention in sec. 63 of the Succession Law. Whatever [Israel's] opinion may be concerning the possibility of drawing analogies from this norm,¹⁴⁴ it is clearly desirable that a general norm in the form of the *Actio Pauliana* treats the issue of whether gifts and renunciations are made to the detriment of creditors.¹⁴⁵

L. RENUNCIATION AND REMISSION IN THE FUTURE CODE: SOME COMMENTS *DE IURE CONDENDO*

From our examination we may conclude that workable solutions can be found in existing laws. The question of whether renunciation and remission are unilateral or bilateral acts is a general one that requires the legislature's decision in favor of one or the other opinion. In the meantime, the Israeli legislature has chosen the course of bilaterality, with certain restrictions, and it does not stand alone in this respect. But what of the future?

For some years now, the Ministry of Justice has been preparing a part of the codification of Israel's civil law. A committee, under the chairmanship of Justice Aharon Barak,¹⁴⁶ has been appointed to review the draft code. In perusing the Draft, we find that renunciation is first mentioned in Part B ("Contracts, General Provisions"), Chapter 3 ("Performance of Contracts"). Following the provisions regarding set-offs and guarantees, we find section 093 that establishes:

144. Rabello, *supra* note 4, at 37 *et seq.*; URIEL PROCACCIA, *BANKRUPTCY LAW AND CIVIL LEGISLATION IN ISRAEL* 129 *et seq.* (Jerusalem, in Hebrew, 1984).

145. C. 7.75; D. 42.8.

146. I wish to express my thanks to the Committee Chairman, Prof. Aharon Barak, for allowing me to quote the Draft.

Renunciation

(a) Renunciation of a right may be effected by the creditor's notice to the debtor.

(b) The renunciation is retroactively voided if the debtor informs the creditor of his rejection within a reasonable time after receiving the creditor's notice.

It would appear that we have before us a change in direction by the future legislature, by which renunciation is portrayed as a unilateral act. However, let us continue our examination. Section 117(c) of the Draft - which parallels section 55(c) of the Contracts (General Part) Law - states:

If the creditor discharges one of the debtors of his obligation, he is presumed to have discharged the others, as well.

The explanatory notes explain that the term "waiver, remission, compromise or otherwise have been eliminated as unnecessarily casuistic."

We shall not here consider this particular point, but we note that the elimination of reference to renunciation, as in sec. 55(c) of the Contracts (General Part) Law, does not eliminate the institution itself, but seems simply to allow for the discharge of debtors by means other than renunciation and remission.

Section 208 of the Draft, concerning gifts, states:

Expanding the subject of the gift
A gift may be made by renunciation of a right or by remission of an obligation.

In order to complete the picture, it should be noted that the presumption of consent is preserved in regard to gifts. Section 204 states:

It is presumed that the donee agrees to receive the gift. However, the gift is retroactively nullified if the donee informs the donor of its re-

jection within a reasonable period after he is informed of it.

Moreover, the presumption of acceptance, presently found in section 7 of the Contracts (General Part) Law, is preserved almost verbatim in section 026 of the Draft:

An offer which is exclusively for the benefit of the offeree is presumed to have been accepted by him unless he notifies the offeror of his rejection within a reasonable time after receiving it.

From the above examination, it would appear that we are faced with an internal contradiction. The legislature is free to choose whatever arrangement it deems fit regarding: offers that only benefit the offeree; gifts; renunciation; and remission - a unilateral approach or a consensual approach that requires a real or supposed meeting of minds by way of a presumption of consent. But the legislature must be consistent in its choice. In the Draft there is a glaring contradiction between section 026 and section 093. While the former establishes a presumption of consent, the latter assumes that we are concerned with a unilateral, legal transaction, that the beneficiary may reject (by means of another unilateral, legal transaction). It is difficult to ascertain under what circumstances section 093 would have effect, for if the remission forms part of a more general transaction, clearly the express consent of the other party is required. But if the remission is made without consideration, then even before turning to the question of gifts, the presumption of consent under section 026 will take effect.¹⁴⁷

Although the former case concerns a contract and the latter a unilateral act, both cases concern transactions that are completed with the debtor's knowledge or upon his receiving notice. They are conditional upon a subsequent rejection within a reasonable time. It is difficult to establish whether we are faced

147. See the commentary to § 7 of the Contracts Law in Gabriela Shalev, *Formation of Contract*, in COMMENTARY ON LAWS RELATING TO CONTRACTS, 55 *et seq.* (Guido Tedeschi, ed., in Hebrew, Jerusalem, 1977). Among the examples brought by Prof. Shalev of offers that only benefit the offeree is an offer to discharge a debtor of his debt (p. 56). However, Shalev's distinction between such an offer and a gift leaves some doubts in light of § 1 (c) of the Gift Law.

with a case that falls within the framework of section 026 or section 093. The matter becomes even more complicated when sections 204 and 208 come into play, placing gratuitous remission within the consensual-bilateral framework. It should be noted that even under section 093 itself, the Jewish law principle that "a person is benefitted even in his absence" is not adopted.¹⁴⁸

Let us examine the explanatory notes to section 093:

This is a new provision. Book XII of the Mejele "On Settlement and Release" was voided by section 62(1) of the General Contracts Law, as it was thought that no further need of it existed. But arguments have been heard, primarily from Professor Tedeschi, that a "gap" was thus created. Therefore, it is now suggested that we return to this subject. Instead of mentioning renunciation and remission (which are one and the same) as was done in the Gift Law, section 1(c), it is now suggested here and also in the chapter on gifts, to speak of renunciation alone.

Subsection (a): The provision brings only the principle question of renunciation by unilateral notice. Of course, this is not to prevent renunciation by way of agreement between the creditor and the debtor.

Subsection (b): This provision and its phrasing follow sections 26 and 51 above.

It would seem that several factors were not taken into account. First, Professor Tedeschi's comment was made when the Gift Law was still in draft form and before enactment of the Contracts (General Part) Law. As we observed, Professor Tedeschi agrees that after the repeal of section 12 of the Mejele renunciation is consensual.¹⁴⁹ In our opinion, renunciation and remission should not be viewed as equivalent. They are two different legal concepts, even though remission of debts is generally viewed within the broader framework of renunciation of rights. But there is a difference between the two, as the vast literature on the subject attests.¹⁵⁰ It is, therefore, only proper that section

148. See the discussion of this point in Rabello, *supra* note 4, at 83 *et seq.*

149. See *supra* note 10.

150. We refer to the literature mentioned above. Generally, the term renunciation is

208 continue to speak of renunciation and remission, the explanatory notes notwithstanding.¹⁵¹

We may, therefore, conclude that the "new provision" that is urged for the new code has no right to exist in the legal framework that the code itself establishes, unless the legislature excludes sections 026, 204 and 208. But the "future legislature" does not face a vacuum, as codification is pending. A guiding principle of law requires that stability and certainty be preserved. Therefore, it is necessary to strive for change only when the existing law is not compatible with new realities or is wrong from its inception.

In our opinion, it is necessary to establish a general provision treating the matter of discharge by means of other than the usual method of discharge through payment. Such means may include, for example: *confusio*, *compensatio*, *remissio*, *novatio* and impossibility that arises after the formation of a contract, due to causes that cannot be attributed to the debtor. Such a general provision would allow for broad treatment of the question of discharge of obligations and would also make an important contribution to the theory of contract. In any event, the attempt to treat the subject of remission in the general part of the section on contracts, as well, is praiseworthy. In this framework, we would retain the presumption of consent, as established in section 7 of the Contracts (General Part) Law. It seems to us that the ideas underlying the provision is a contractual principle that requires a person's consent to acts that appear to be done entirely for his benefit, while taking into account that, in practice, in the majority of cases a person accepts that which

used in regard to proprietary rights, such as mortgages, while remission is used in regard to obligation.

151. We should emphasize that despite the dogmatic difference (unilateral as opposed to bilateral act), in fact there is no difference between the two provisions. On the basis of § 333 of the law, the remitter notice to the debtor is, in fact, sufficient, and we have already concluded that, regarding the debtor, the creditor's notice becomes effective immediately upon its coming to the debtor's notice. Similarly, we have already concluded that the rejection operates *ex tunc*, just as is proposed in the case of a unilateral act. Even at present, renunciation is realized after the creditor's notice to the debtor, taken together with the presumption of consent! Nevertheless, it is possible that there would be differences insofar as the date of realization of the renunciation itself, the possibility of withdrawing the renunciation, the question of the death of either the debtor or creditor, the question of the debtor's capacity, etc. Clearly the legislature did not intend to bring about changes in these matters.

is done to his benefit.

In our opinion, we should not draw a distinction between cases of unilateral acts¹⁵² that require rejection by the beneficiary, and bilateral acts that require consent. The contractual principle that is expressed by the presumption of consent and that allows for the donee's rejection of a unilateral benefit should be a consistent principle throughout the code, while allowing the parties to choose otherwise, should they so desire. In so doing, the legislature will not change the course already plotted - a path that appears to conform in principle to Jewish law, as well as to progressive legislation (such as article 1 of section 10 of the Netherlands Civil Code (Book 6)).

As we have seen, even in the case of codes, such as the Italian code, which appear to establish a unilateral principle, there is no lack of jurists who argue that the act is, in fact, bilateral. If the situation is already clear in our system, why complicate matters? We would waive such a change.

152. We should emphasize that Israeli law recognizes a large number of unilateral juristic acts, such as: rescission due to mistake (§ 14 of the Contracts Law), duress (§ 17) and extortion (§ 18); a beneficiary's notice of rejection of a right that is his under a contract to the benefit of a third party (§ 35); appropriation of payments (§ 50); choice between alternative obligations (§ 51); setting off (§ 53); rescission of a contract for breach (§ 7 of the Contract (Remedies for Breach of Contract) Law, 25 L.S.I. 71 (1970)); creation of agency by the principal's authorization of the agent (§ 33 of the Agency Law, 19 L.S.I. 231(1965)); etc. See Barak, *supra* note 7. The matter requires further examination and study.

