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## Judicial Discretion: Is One More of a Good Thing Too Much?

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## JUDICIAL DISCRETION: IS ONE MORE OF A GOOD THING TOO MUCH?

*David B. Sentelle\**

JUDICIAL DISCRETION. By *Aharon Barak*. Translated from the Hebrew by *Yadin Kaufmann*. New Haven: Yale University. 1989. Pp. xiv, 270. \$27.50.

In reviewing this text<sup>1</sup> by a Justice of the Supreme Court of Israel, I am mindful of the duty of anyone who writes for publication. Because the reader has given up something, specifically time or energy that might have been devoted to other entertaining or informative pursuits, the writer has a duty to provide something in return, that is, entertainment or information. Since few read reviews of legal texts for entertainment, the law book reviewer is obligated to provide information. That information should, I think, answer the following three questions: (1) Is this a "good" book? (2) Given a finite amount of time for side reading in the law, is this book a worthwhile expenditure of one's time? (3) Given a finite budget for the expansion of one's law library, should one buy this book? In the case of Justice Barak's newly translated text, the answer to the first question is certainly "yes"; the answer to the second, at least for American readers, is "probably not"; and the answer to the third is "no."

As to whether this is a good book, as I said, it is. Justice Barak writes clearly, treats subjects thoroughly, organizes well, and has produced a text that is a good deal more readable than many legal writers are capable of crafting. He draws on a broad personal background, having been a law professor at Hebrew University Law School since 1960, its Dean from 1974 to 1975, and serving several years as his country's attorney general, which involved service as legal advisor to peace negotiations with Egypt, including Camp David. Since 1978 he has served on his nation's highest court.

Barak draws from a wealth of material — Israeli, English, American, and French — heavily skewed to English-language sources. His aim is set out on the first page of his preface to the book: to answer the question, "How is the judge to exercise his discretion in the 'hard cases,' those in which he faces a number of lawful possibilities as to the legal norm itself?" (p. ix). He recognizes and draws from the wealth

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1. A. BARAK, *JUDICIAL DISCRETION* (1989).

of suggested answers already in the literature, considering a range of options from traditional-declaratory to positivist-realist thought — a spectrum of sources including Frank, Hart, and Dworkin. He cites and relies on Cardozo and Holmes, and conspicuously Justice Moshe Landau of his own Supreme Court.

Even in translation (and I confess that I lack the ability to read him in the original Hebrew), he displays a crisp, well-paced style, avoiding the pedantry and viscosity so many writers on the “heavier” legal topics either prefer, or can’t escape.

Nonetheless, my answer to the second question remains negative. The American reader with finite time for side reading in the law probably should not expend it on this volume. Granted, Justice Barak has dealt with the problem of judge as lawmaker, and judge as bridger-of-the-gaps-in-the-law in a skillful and scholarly fashion. Granted, he has done a craftsman-like job compiling the best, or at least the most representative thoughts on this subject — from Montesquieu to Cardozo, Hart, and Dworkin, with stops along the way for Greenawalt and Raz and various others, including a couple of my colleagues. Even so, it still probably isn’t worth the time of any legal reader who lacks the deepest and widest interest in the subject.

Barak thoroughly carves the kernel from each of his varied sources. The problem is, having compiled the kernels into a single text, he adds very little to what he has compiled. Consider the first section of his two-section work, which is devoted to the sources of judicial discretion. The central analysis here (an analysis which underlies the second section treating “[l]imitations of [j]udicial [d]iscretion” (p. 11)) depends upon a division of the universe of cases into three categories — “easy,” “intermediate,” and “hard” (pp. 36-40). Barak first describes the easy cases: “many are the legal norms whose meaning with respect to a given system of facts is so simple and clear that their application involves no judicial discretion” (p. 36). Similarly, in the intermediate cases, “in the final analysis, the judge has no discretion in deciding them,” but

[w]hat sets them apart from the easy cases is . . . that in the intermediate cases both sides appear to have a legitimate legal argument supporting their position. A conscious act of interpretation is needed before the judge can conclude that the argument is in fact groundless and that there is only one lawful solution. [p. 39]

In the third category, the hard cases, “the judge is faced with a number of possibilities, all of which are lawful within the context of the system” (p. 40).

Certainly, there is nothing wrong with this analysis. Barak is easily able to find support for everything he writes about each of his categories. The trouble is, he is too easily able to find support. The analysis and almost everything he says about each category within his analysis is not only documentable, it has been documented. For exam-

ple, the three categories into which he has divided the litigation universe differ only slightly in terminology from the same analysis conducted by my colleague Harry T. Edwards in his article *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*.<sup>2</sup> Barak's analysis of his three categories differs hardly at all from Judge Edwards' analysis of cases divided into "easy," "hard," and "very hard" categories.<sup>3</sup> Edwards, in turn, draws from and cites Greenawalt's *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*.<sup>4</sup> Barak, Edwards, and Greenawalt all hark back to Justice Cardozo's book, *The Nature of Judicial Process*.<sup>5</sup>

Let me make it emphatically clear that I am in no way accusing Barak of plagiarism. He cites all his sources, and gives full credit everywhere it is due. The problem is, he adds very little to it. Although he applies the three-division universe of cases to a broader field than did Edwards — Barak treats *all* cases, not only appellate ones — this difference is almost immaterial to an understanding of jurisprudence. Thus, the reader who wishes only a synopsis of legal thought on the jurisprudential or philosophical underpinnings of judicial discretion as a source of law, and on the implications of the exercise of judicial discretion for the development of the body of law can spend less time and effort on the Edwards and Greenawalt articles while missing little that the Barak volume could add to those two excellent treatments. The reader wishing an in-depth knowledge, and who is willing and able to expend the time and effort, is far better advised to go to Barak's sources at the outset than to spend a few hours reading what amounts to a compendium only to wind up reading the sources anyway.

This lack of novelty pervades the text. In the section on limits of judicial discretion, for example, in a chapter dealing with judicial policy and models of adjudication, Barak does a fine, brief job of explaining three models: the declaratory model, the policy model, and the model of legislation as an incident to adjudication. As to the first, the declaratory model, he rejects the idea drawn from Montesquieu that "[t]he judge is the mouthpiece of the legislature and repeats the language of the law" (p. 230), just as he rejects Blackstone's idea that "[t]he judge expounds the rule hidden in the system" (p. 230). Even in his brief treatment he gives a passing wave to Dworkin as a modern apostle of a similar model. While he sees in the model some positive

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2. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 389-92 (1984).

3. *Id.*

4. Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

5. B. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* (1921).

features, he rejects it "as a model of judging," because "it does not reflect reality and is useless. It is based on a fiction . . ." (p. 232).

As to the policy model, under which "the judge determines the society's values as he sees them and formulates the law accordingly" (p. 231), thus affording the judge absolute discretion, he gives a good roadmap to its history in two brief but well-documented paragraphs. He notes its support among the "realists" of the 1930s and its reflection in the views of the modern Critical Legal Studies school (p. 231). He then rejects it as an inappropriate model, which does not describe judicial reality, and, when taken to its extreme, reaches the end of adjudication, as distinct from legislation (p. 232). Finally, he accepts the model of limited judicial discretion, represented by "legislation as an incident to adjudication" (p. 232). He notes its consistency with modern positivists and the members of the legal process school, citing Hart, McCormick, Sacks, and Fuller (p. 232).

Again, everything he has to say is most interesting, but his conclusion adds little or nothing to Chief Justice Holmes' formulation in his *Southern Pacific Company v. Jenson* dissent:<sup>6</sup> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Insofar as further analysis is required, Cardozo added that to the English-language treatment of the subject decades ago,<sup>7</sup> and at least a sufficient body of scholarship has since been erected on the Holmes and Cardozo foundation by Hart, Dworkin, and probably too many others.

I am not as disparaging of Justice Barak's book as I may sound in these last few paragraphs. I am not saying that he wasted the time of all readers in writing the book, for this is not the case at all. I am simply saying that the reading of it may not be worth the time of the *American* or *British* reader. I do not doubt that Justice Barak's work is a worthwhile addition to the legal scholarship of modern Israel. That ancient nation is still a young state. Because modern Israel began its separate legal structure — as distinct from its British colonial roots — only in 1948, it is likely that legal scholarship there does not yet offer the wealth of theoretical and philosophical treatments of the judge as lawfinder or lawgiver abounding in the English language. My suspicion is strengthened by Barak's heavy reliance on English-language — *i.e.*, British and American — sources. No doubt, his work is a valuable contribution to the foundation of the independent thought of a separate Israeli jurisprudence. Some day, Barak and Landau may occupy in Israeli legal scholarship a role not unlike that of Cardozo and Holmes in American jurisprudence. But again, the American reader already has Holmes and Cardozo and volumes of scholarly

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6. 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

7. See B. CARDOZO, *supra* note 5.

treatments of their judicial thought. I therefore doubt that many American readers will find the volume — well-done though it is — worth the expenditure of finite side-reading time.

As to the prospect of purchasing the book, I merely reiterate what I just said about reading it. If you want to add it to your library, you might find it a valuable source for quick reference to other writers on judicial discretion, including the legal realists, positivists, and the like. But I doubt that it would leave the shelves in most American law libraries after the first reading for anything other than a reference guide to other sources. *Judicial Discretion* will undoubtedly be a valuable source in Israel, but not in the United States.