



The Jurisprudential Legacy of Justice Aharon Barak¹

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After a distinguished career as a professor of law at the Hebrew University and as Attorney-General of Israel, Aharon Barak served on the Israel Supreme Court for twenty-eight years and for the last eleven years of that period as its President. Aharon Barak stands out not only for his jurisprudential brilliance and for the contribution he has made to the law of his own country and other democracies, but also for his warmth and unpretentious manner. Add to that a ready and slightly mischievous sense of humor and one can begin to understand the respect in which he is held by his friends and colleagues in many countries of the world.

It is important to locate the jurisprudential legacy of Aharon Barak in the context in which it was built. Judges in new democracies have the particularly difficult task of building an enduring legal foundation upon which succeeding generations can build. From personal experience as a member of the first South African Constitutional Court, I know that this is a huge responsibility. Our work in South Africa was done in the calm and joyful atmosphere of a secure and popular democracy, in which the vast majority of our people rejoiced in the creation of a constitutional state at the end of 350 years of racist oppression. Perhaps most important of all, we were given a detailed written Constitution that articulates, in generous terms, all internationally recognized fundamental human rights. It also makes provision for the clear separation of the three organs of government and safeguards the independence of the judiciary. We have been faced with a rampant crime rate and a population that clamors for strict law enforcement, but we are at peace with our neighbors. We trade and interact freely with all nations on our continent and in the rest of the world.

¹ I am delighted to contribute this essay to inaugurate a series that will reflect on the jurisprudential legacy of Justice Aharon Barak, who recently retired as the President of the Supreme Court of Israel. At the outset, I must disclose that over the past two decades I have enjoyed the pleasure and privilege of a warm friendship with Aharon Barak and his wife, Elika. She has recently retired from her position as the Deputy President of the Labor Court of Israel.

The Israel Supreme Court has had to build its jurisprudence in a very different and more difficult atmosphere. From the day on which the Court was founded in 1948, the people of Israel have been in successive states of war and insecurity. As Americans have learned since September 11, 2001, it is in times of fear and violence that freedom and democracy come under the greatest strain. It is precisely in such times that the vulnerable inner core of democracy requires protection. The popular representatives of the people, not unnaturally or surprisingly, tend to pander to and accommodate the demands of a fearful electorate. It is only the judiciary that can place itself above the fray and dispassionately examine the responses of the legislature and executive to those popular demands.

Justice Barak gave the clearest picture of his own judicial philosophy in a lecture he delivered at Harvard Law School in September 2006 upon receiving the Gruber Justice Prize.² He is unashamedly what, in U.S. terms, would be regarded as an “activist judge.” According to his philosophy, a judge in a democracy (and especially in an apex court) has two main roles: “bridging the gap between law and society” and “protecting the constitution and democracy.”³ The first requires judges to balance the need for changes in the law to reflect the changing values of society with the need for stability. The second requires judges to maintain and protect the constitution and democracy. I would suggest that the unstated premise is that, particularly in times of stress and fear, those tasks should not be entrusted solely to the popularly elected representatives of the people. Such testing times require independent and courageous judges to protect the constitution and, indeed, the very laws that are fundamental to democracy.

Justice Barak has always taken seriously the basis upon which a constitutional democracy is founded, namely that the popular branches of government do not have a free hand. Even the will of a substantial majority of the electorate cannot legitimize the violation of fundamental human rights. The constitution in a democracy contains thresholds beyond which the demands of even all of the electorate cannot trespass. That is what a bill of rights seeks to ensure. In 1995, the first case considered by the South African Constitutional Court required it to determine the constitutionality of the death sentence. The Court assumed that public opinion was in favor of its retention. This is what Justice Chaskalson, the former Chief Justice, said:

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favor. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would return us to parliamentary sovereignty, and a retreat from the new legal order

² Aharon Barak, Retired President, Supreme Court of Israel, Address upon receiving the 2006 Gruber Justice Prize at Harvard Law School (Sept. 21, 2006), *available at* <http://www.petergruberfoundation.org/justice/Barak%20lecture%202006.htm>.

³ *Id.*

established by the 1993 Constitution. By the same token the issue of the constitutionality of the capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our rights will be protected.⁴

That is what judicial review is all about. In countries with a system of judicial review, it is the constitution itself that requires the judges to test the lawfulness of legislation against the provisions of that constitution. It is not that the judges have chosen this task—it is thrust upon them by the supreme law, the constitution.

In Israel there is no written constitution. However, over a period of years the Israeli Knesset passed what are called Basic Laws. Those Basic Laws protect the human rights of all people who live in Israel. Not without great controversy, Justice Barak led his Court in deciding that all the laws of the Knesset had to conform to the Basic Laws and that the Supreme Court had the power to review the laws and declare invalid those that did not so conform.⁵ The standing of the Supreme Court, and especially its President, was such that the other branches of government have accepted that right in the courts. In the words of Barak: “Democracy, then, is based on the simultaneous existence of both the rule of the majority and the rule of values which characterize democracy.”⁶

Some of the issues that have been decided by the Israel Supreme Court over the past few decades have only recently become relevant in other democracies facing terrorism and the threat of war. I would hope that judges, academics, and the practicing legal profession in those democracies will consult and benefit from the jurisprudential legacy of Aharon Barak. He has never suggested (as has been suggested by one conservative commentator in the United States) that judges “are simply intellectually and morally superior to other actors in the nation’s politics.”⁷ He has never suggested (as has also been suggested by the same commentator) that the rule of law should be “replaced by the rule of judges.”⁸ No judge has been more respectful of his people or their representatives than Aharon Barak. No judge has been more concerned for the protection and safety of his people. No judge has been

⁴ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at 120-121 (S. Afr.).

⁵ CA 6821/93, 1908/94, 3363/94 United Mizrahi Bank v. Migdal Cooperative Village [1995] IsrSC 49(4) 221.

⁶ Barak, *supra* note 1.

⁷ Robert H. Bork, *Barak’s Rule*, 27 *AZURE* (Israel), Winter 2007 (reviewing AHARON BARAK, *THE JUDGE IN A DEMOCRACY*), available at <http://www.azure.org.il/magazine/magazine.asp?id=349>.

⁸ *Id.*

more concerned for the human rights of the Arab minority in Israel or of the condition of those millions who are under Israeli occupation.

Barak's jurisprudential legacy is that, even in times of war, the democratic values of the state should not be subverted. It is precisely those values that are anathema to the Osama Bin Ladens of the world. If democracies voluntarily surrender those values, then those who oppose them will have won. It is a victory that should never be allowed, or indeed, even contemplated.

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