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## Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries

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# JUDICIAL CONVERSATIONS AND COMPARATIVE LAW: THE CASE OF NON-HEGEMONIC COUNTRIES

Daphne Barak-Erez\*

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## INTRODUCTION

The growing awareness to the role of comparative law and to the possibilities for professional interactions between judges has developed a discourse of judicial dialogues that crosses country borders.<sup>1</sup> The Article wishes to look more closely into this discourse and to evaluate qualitatively the circumstances in which citations from other countries are used by judges. It does so by focusing on and by looking into an important case-study that would exemplify the importance of assessing the details of this transnational judicial

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1. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

discourse. This case-study is the citations of the jurisprudence of Aharon Barak, Israel's renowned former Chief Justice.

Following this introduction, Part I of the Article reviews the theoretical issues that inspire the study. Part II presents the justifications for looking into the case-study of Aharon Barak as a paradigmatic example for the study of citation practices across borders. Part III of the Article presents the study conducted on the citations of Barak's jurisprudence by other courts and the main findings of this study. Part IV of the Article offers an analysis of the main findings. The Conclusion highlights the implications of the study for the future research of comparative law and judicial behavior.

### I. COMPARATIVE LAW MEETS JUDICIAL STUDIES

The ambition to look more closely into the question of cross-border citation practices is informed by two strands in current literature: the critical evaluation of comparative law and the growing interest in judicial behavior.

(1) *Critical Comparative Law* — The first source of inspiration of this study is the growing criticism on what is perceived as hegemony and cultural biases in the practice of comparative law. Scholars have often pointed out that comparative law has been traditionally focused on western legal systems such as the Anglo-American tradition and the continental tradition.<sup>2</sup> Moreover, it is a well-known fact that United States' case law has been very influential on judicial-decision making abroad, but hardly the other way around.<sup>3</sup>

(2) *Judicial Behavior and Reputation* — In addition, the current study is informed by the growing interest in citation practices of judges — who gets cited and when. This question has been intensively researched, but with a focus on citation practices within the United States.<sup>4</sup> The current study goes beyond the assumptions and criteria used for the empirical research focused on domestic courts. In domestic contexts, the studies focus on judges who have the same judicial rank. Therefore, differences in the tendencies to cite each of them are interpreted as reflecting their professional reputation. In contrast, a study focused on judges from other countries would probably reflect also the normative attitude toward the legal systems they are associated with, and would only partially stand for their individual reputation. Needless to say, the degree to which courts are open for the idea of using foreign precedents as “persuasive authority”<sup>5</sup> varies among systems.

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2. See, e.g., Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 225, 231-32 (1999).

3. See, e.g., Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988).

4. The research in this area has been originally focused on the assessment of judicial reputation by following patterns of citations. See, e.g., RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 20, 41, 48, 56, 105, 130 (1990); Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 84 (1983); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CALIF. L. REV. 23, 32-34 (2004); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 373-76 (1999); Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 337-38 (1998); William M. Landes, Lawrence Lessig & Michael Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271-72 (1998). Later on, it developed to include also measuring biases in citation practices. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?* 37 J. LEGAL STUD. 87, 89 (2008).

5. For the concept of “persuasive authority,” see Chad Flanders, *Toward a Theory of Persuasive Authority*,

However, these differences have only marginal impact on the analysis offered because it looks into courts that do cite foreign sources.

(3) *Judicial Behavior and Distinctions between Foreign Jurisdictions* — The question of where to look for relevant decisions as a source of inspiration has always been part of the debate on the use of comparative law, and yet never got the full attention it deserves. The topic has been controversial since one of the main oppositions to the use of comparative law is the seeming lack of guiding principle with regard to the choices of relevant sources of inspiration.<sup>6</sup> Anne-Marie Slaughter, who inspired the discussion around judicial discourse, only mentioned the lack of reciprocity between the United States Supreme Court and the courts that cite it.<sup>7</sup> Other scholars pointed at general considerations that merit distinctions between jurisdictions, but in a manner that left the variety for the judges quite broad. One study pointed to “major criteria,” which included three factors — the distinction between democracies and non-democracies; common characteristics in the social and cultural realms; and the similarity in the principles that govern the specific case (e.g. recognizing freedom of speech as a fundamental principle).<sup>8</sup> These criteria hardly say anything, but for the clear disqualification of legal systems of authoritarian regimes for this purpose. Another study, authored by Eric Posner and Cass Sunstein,<sup>9</sup> supposedly offered more specific criteria, but with only marginal additional practical value. Posner and Sunstein founded their justification for the use of foreign law on the Condorcet Jury Theorem, stating that under certain conditions, a widespread practice, accepted by a number of independent actors, is highly likely to be right. Accordingly, they endorsed the following criteria: making recourse to the law of democracies; refraining from the study of too many legal systems (while supporting the practice of making reference to more than a few); and avoiding the laws of countries with very small populations.<sup>10</sup> They also address issues of language and thus, support reference to jurisdictions whose legal materials are translated into English. These criteria lead them to point to a pool of more countries than those which are currently caught by the radar of comparative law (they suggest to refer to “ten or twenty countries, including the Western liberal democracies, plus countries like India, Japan, Brazil, Israel, and South Korea”).<sup>11</sup> Against this background of highly indefinite criteria, it is interesting to assess what happens on the ground.

The specific focus of this Article is on the degree to which judges are willing to refer to precedents coming from small or non-hegemonic countries (assuming that they pass the preliminary tests described above). The question is not whether cases coming from the United States, United Kingdom, or Germany get cited and thus serve as a source of

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62 OKLA. L. REV. 55, 55-56 (2009); H. Patrick Glenu, *Persuasive Authority*, 32 MCGILL L.J. 261, 261, 263, 295-96 (1987).

6. Notable is the dissent of Justice Scalia in *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“Court’s discussion of ... foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) [was] meaningless dicta.”).

7. Slaughter, *supra* note 1, at 104.

8. Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 411-38 (2005).

9. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

10. *Id.* at 169-70.

11. *Id.* at 170.

inspiration and guidance, but rather what is the potential of precedents coming from other countries to become influential or to be at least considered. The question is obviously very broad, and the Article does not profess to fully investigate it, but rather to offer tentative directions for additional research, based on a meaningful case-study.

A relatively early example of a research which focused on the use of foreign decisions was an empirical analysis conducted by David Zaring, who studied the use of foreign decisions by federal courts in the United States.<sup>12</sup> In this context, Zaring searched for citations coming from 14 countries and 2 international organizations, and one of the questions he addressed was “who cites, and who is cited?”<sup>13</sup> His findings pointed at the popularity of Canada (who came first by a significant margin) and France.<sup>14</sup> The origin of citations was, however, only one of the issues Zaring studied, and he sufficed himself by speculating, in this regard, that “[i]t appears that judges may follow economic relationships and traditional ties when searching for authority abroad.”<sup>15</sup>

More recently, Gelter and Siems looked into the issue of the country of origin of citations in a study which focused solely on the use of comparative law by European courts. Their findings point to the lack of reciprocity between courts regarding the tendency to draw on the experience of one another and to the existing hegemony of certain countries even among the relatively close community of European courts.<sup>16</sup>

## II. AHARON BARAK AS A CASE-STUDY

The choice of Aharon Barak as a case-study for uncovering judicial tendencies to cite from other countries has been a very easy one. On the one hand, he is one of the most well-known judges of his time, highly respected and widely published, as well as a world known scholar. In addition, he has served as a Supreme Court Justice for twenty-eight years,<sup>17</sup> and thus was able to author many important decisions as well as to acquire a reputation that would merit citation. On the other hand, Barak served on the Supreme Court of a small country — Israel. Israeli law as such did not serve as the basis of any other system in the world (in contrast to the laws of countries which were in the past colonial powers). In addition, the formal language of Israeli law is Hebrew, which is not spoken anywhere else in the world (although the major precedents of the court are being translated and currently available also on the English website of the Israeli Supreme Court).<sup>18</sup> It is also worth noting that the practice of comparative law is common in the Israeli Supreme Court (in decisions of precedential importance) and was extensively used

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12. David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006).

13. *Id.* at 320.

14. *Id.* at 324-25.

15. *Id.* at 325.

16. See Martin Gelter & Mathias Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe* 6 (Fordham Law Legal Stud. Research Paper No. 1719183), available at <http://ssrn.com/abstract=1719183>; Martin Gelter & Mathias Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten European Supreme Courts* 17 (Maastricht Eur. Private Law Inst., Working Paper No. 2011/03 2011), available at <http://ssrn.com/abstract=1722721>.

17. Aharon Barak served as a Supreme Court Justice between 1978 and 2006.

18. For the English website of the Israeli Supreme Court, see THE STATE OF ISRAEL: THE JUDICIAL AUTHORITY, <http://elyon1.court.gov.il/eng/home/index.html> (last visited Jan. 26, 2012).

by Barak himself.

These statements — especially regarding the world-wide reputation of Chief Justice Barak — are worth exploring further, in order to stress the importance of this case study. Barak's international stature may be exemplified by using some of its most well-known expressions. In 2002, Barak received the great honor of being invited to write the traditional annual "Foreword" of the *Harvard Law Review*.<sup>19</sup> United States Supreme Court Justice Elena Kagan, the former Dean of Harvard Law School, had referred to him as her "hero," and these remarks even served as a source of controversy during her confirmation hearings when she was criticized for this support by conservative jurists who had reservations regarding Barak's activist judicial approach as well as regarding the use of comparative law by the United States Supreme Court in general.<sup>20</sup> Barak has also published extensively in the United States during the years on the bench, especially in matters pertaining to his judicial philosophy.<sup>21</sup> These publications also served as a focus for professional attention not only due to their value, but also because of critiques of some of his views by conservative judges and scholars such as Richard Posner<sup>22</sup> and Robert Bork.<sup>23</sup> At the same time, Barak's writings have been cited as inspiring by other scholars.<sup>24</sup>

### III. FACTS: CITATIONS OF AHARON BARAK BY OTHER COURTS

Against this background, taking into account Barak's solid status as a scholar and his deep involvement in the practice of comparative law, the question is what has been the degree of usage of Barak's precedents outside Israel.

#### *a. Methodology*

The research plan was based on reviewing databases of case-law in various jurisdictions in the world. The research was designed to include mainly websites of courts in the so-called Anglo-American world — due to the fact that Barak's writings are available — either his translated opinions or his books — first and foremost in English. In addition, English-speaking countries are the ones that Israeli case law had the strongest connections to (taking into consideration the emergence of Israeli law from the British-influenced colonial legal system, which existed in Palestine during the time of the British Mandate). Accordingly, the research used websites which covered Britain and Ireland

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19. Aharon Barak, *The Supreme Court, 2001 Term- Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 19-162 (2002) [hereinafter *Judge on Judging*].

20. See Sheryl Gay Stolberg, *Praise for an Israeli Judge Drives Criticism of Kagan*, N.Y. TIMES, June 24 2010, [www.nytimes.com/2010/06/25/us/politics/25kagan.html](http://www.nytimes.com/2010/06/25/us/politics/25kagan.html).

21. AHARON BARAK, JUDICIAL DISCRETION ix (Yadin Kaufmann trans., 1989) [hereinafter JUDICIAL DISCRETION]; AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW xi-xii (Sari Bashi trans., 2005) [hereinafter PURPOSIVE INTERPRETATION]; AHARON BARAK, THE JUDGE IN A DEMOCRACY x (2006) [hereinafter THE JUDGE IN A DEMOCRACY].

22. See RICHARD A. POSNER, HOW JUDGES THINK 362-68 (2008); Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007, 12:00 AM), <http://www.tnr.com/article/enlightened-despot>.

23. Robert H. Bork, *Barak's Rule*, AZURE, Winter 2007, at 125, available at [http://www.azure.org.il/download/magazine/1119AZ\\_27\\_bork\\_review.pdf](http://www.azure.org.il/download/magazine/1119AZ_27_bork_review.pdf).

24. See, e.g., VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 115-16, 125 (2010).

(“Bailii”);<sup>25</sup> the United States (through Lexis and Westlaw); India (the official site of the Supreme Court);<sup>26</sup> Australia (the official site of the High Court);<sup>27</sup> New Zealand (the official site of the Supreme Court);<sup>28</sup> Canada (“Canlii”)<sup>29</sup> and (the official site of the Supreme Court);<sup>30</sup> and South Africa (“Saflii”).<sup>31</sup> In addition, the research covered the websites of the European Courts<sup>32</sup> as well as the website of the German Constitutional Court.<sup>33</sup> For the purpose of finding relevant citations the searches used various terms – Barak, Aharon Barak; Israel and H.C.J. (the abbreviation used for indicating cases given by the Israeli Supreme Court residing as the High Court of Justice).<sup>34</sup> In addition to this systematic search, the research tried to verify findings by informal conversations with jurists in other jurisdictions, which led to two additional findings (one coming from Poland and the other from the Czech Republic). Searches have been last updated in September 2010.

It is important to note that this methodology has its limitations. It cannot trace more subtle forms of influence which are not expressed in direct citations. It is reasonable to assume that judges who meet in professional events and read landmark cases from other countries may be influenced by forms of thinking and precedents they were exposed to even when they do not directly acknowledge this influence. This is, however, a shortcoming inherent to all empirical studies of this sort and is not unique to the present context.

#### *b. General Description of the Findings*

The study indicated sixty-one cases in which Aharon Barak was cited, either as a Justice or Chief Justice of the Supreme Court of Israel or as a scholar who wrote noted books and articles in vast areas of law. The distribution of the findings among the various jurisdictions is detailed in *Table 1* which reveals the following: U.S. courts cited Aharon Barak on eighteen different occasions, out of which four citations referred to Barak’s opinions as a Supreme Court Justice and fourteen referred to his scholarly work; courts in the United Kingdom cited Aharon Barak on eight different occasions, out of which five referred to his opinions as a Supreme Court Justice and three referred to his scholarly work; the courts in Canada cited Aharon Barak on twelve different occasions, out of

25. BRITISH AND IRISH LEGAL INFORMATION INSTITUTE, <http://www.bailii.org> (last visited Jan. 26, 2012).

26. SUPREME COURT OF INDIA, <http://www.supremecourtindia.nic.in> (last visited Jan. 26, 2012).

27. HIGH COURT OF AUSTRALIA, <http://www.hcourt.gov.au> (last visited Jan. 26, 2012).

28. SUPREME COURT OF NEW ZEALAND, <http://www.justice.govt.nz/courts/the-supreme-court/Index> (last visited Oct. 17, 2011).

29. CANLII, <http://www.canlii.org> (last visited Jan. 26, 2012).

30. SUPREME COURT OF CANADA, <http://www.scc-csc.gc.ca> (last visited Jan. 26, 2012).

31. SOUTH AFRICAN LEGAL INFORMATION INSTITUTE, <http://www.saflii.org> (last visited Jan. 26, 2012).

32. EUROPEAN COURT OF HUMAN RIGHTS, [http://www.echr.coe.int/ECHR/homepage\\_en](http://www.echr.coe.int/ECHR/homepage_en) (last visited Jan. 26, 2012); THE COURT OF JUSTICE OF THE EUROPEAN UNION, [http://europa.eu/institutions/inst/justice/index\\_en.htm](http://europa.eu/institutions/inst/justice/index_en.htm) (last visited Jan. 26, 2012).

33. THE FEDERAL CONSTITUTIONAL COURT, <http://www.bundesverfassungsgericht.de/en/index.html> (last visited Jan. 26, 2012).

34. Then, the findings were also reviewed to make sure that they do not cover references not relevant to the current research. *See, e.g.,* Ariel Sharon v. Time Inc., 575 F.Supp. 1162, 1164 (S.D.N.Y. 1983) (Barak is mentioned in this case as a member of the Kahan Committee, which inquired the massacre in the Sabra and Shatila refugee camps during the Lebanon war).

which six referred to his opinions as a Supreme Court Justice and six referred to his scholarly work; the Supreme Court of India cited Aharon Barak in nine cases, which all referred to his scholarly work; the courts in South Africa cited Aharon Barak on two different occasions, out of which one referred to an opinion he wrote as a Supreme Court Justice and one referred to his scholar work; the courts in New Zealand cited Barak one time, referring to his scholarly work, and the courts in Ireland cited Barak once, citing one of his opinions. In addition, among jurisdictions outside the so-called Anglo-American legal world, the findings were the following: the European Court of Human Rights cited Aharon Barak once, referring to one of his opinions as a Supreme Court Justice; the Czech Constitutional Court cited Aharon Barak scholarly work once and the Polish Constitutional Court cited Aharon Barak in one of its decisions referring to several opinions which he gave as a Supreme Court Justice.

*Table 1 – Distribution of Citations among Jurisdictions*

Country	Number of citations	Number of cases cited	Number of scholarly sources cited
United States	18	4	14
United Kingdom	8	5	3
Canada	12	6	6
Australia	7	4	3
India	9	0	9
European Court of Human Rights	1	1	0
South Africa	2	1	1
New Zealand	1	0	1
Poland	1	1	0
Czech Republic	1	0	1
Ireland	1	1	0
<b>Total</b>	<b>61</b>	<b>23</b>	<b>38</b>

Evaluating the findings from a different angle — not by reference to the legal system the citing court belongs to but rather to the sources for the citations — among the sixty-one different court decisions which cited Aharon Barak, twenty-three referred to his opinions as a Supreme Court Justice and thirty-eight referred to his scholarly work. Further analysis of the twenty-three occasions in which Aharon Barak was cited as a Supreme Court Justice or a Chief Justice is offered in *Table 2*, which sorts these judgments by their subject matter. This table shows that among this group, the decisions which attracted most of the international interest were given in the area of national security — on eleven different occasions (among the twenty-three) other courts decided to refer to Aharon Barak's opinions in the field of national security, in many of them to his famous opinion resisting the use of torture in interrogations.<sup>35</sup> The second group of opinions

35. H CJ 5100/94 Pub. Comm. Against Torture in Isr. v. State of Israel 53(4) PD 817 [1999] (Isr.) [hereinaf-



which attracted international attention included five opinions in the field of bioethics and new medical technologies. On five occasions the different courts cited Aharon Barak's opinions in other areas of constitutional law and human rights and on two other occasions the courts referred to the decision in the *Demjanjuk* case,<sup>36</sup> which dealt with an indictment of a World-War II Nazi criminal.

*Table 2 – Distribution according to the Subject Matter of Barak's Opinions*

Subject Matter	Number of Citations
National Security	11
Bioethics	5
Holocaust	2
Human Rights and Constitutional Issues	5

Based on these basic findings, the following analysis looks more closely into the more noted occasions in which the different courts cited Aharon Barak, either as a Supreme Court Justice or Chief Justice or as a scholar, offering additional commentary and evaluation of the context of these comparative law citations.

*c. Decisions in the Area of National Security*

As already indicated, most of the cited opinions of Aharon Barak were those given in the context of national security, and most notably Barak's decision on the prohibition on torture.<sup>37</sup> More specifically, the torture decision was cited eight times by different courts. It is worth noting that this decision was given in 1999 — in proximity to the September 11<sup>th</sup> terror attack, and thus gained even special significance on the discourse of comparative law.

In *A. v. Secretary of State for the Home Department House of Lords*,<sup>38</sup> the House of Lords considered the admissibility in a British court or tribunal of evidence that may have been produced through torture conducted by foreign officials, without the complicity of the British authorities. More specifically, the case addressed hearings in the context of the Anti-terrorism, Crime and Security Act 2001 enacted as a response to the 9/11 terror attacks, which allowed the British government to deport non-citizens suspected in involvement in international terror. The House of Lords accepted the appeal and dismissed the possibility to use such evidence. The main opinion of the court was written by Lord Bingham of Cornhill. Lord Carswell, who wrote a concurring opinion, cited Aharon Barak's famous words in the *Israeli Torture Case* as a source of inspiration for retaining high moral standard in an open democratic society:

Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and

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ter *Israeli Torture Case*].

36. CrimA 347/88 *Demjanjuk v. State of Israel* 47(4) PD 221 [1993] (Isr.).

37. See *Israeli Torture Case*, *supra* note 35.

38. *A v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.) (appeal taken from U.K.).

recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they

strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>39</sup>

The British case did not deal with exactly the same legal question decided by the Israeli Supreme Court in the *Israeli Torture Case*, but the reference reflects an understanding that the two courts shared the same values when they discussed the issue of torture.

Previous to this decision, in *A. v Secretary of State for the Home Department Court of Appeal*,<sup>40</sup> the British Court of Appeal considered the same case and got to a different result — the majority (Lord Justice Pill and Lord Justice Laws) rejected the appeal, while Justice Neuberger accepted it. In this opinion, Lord Justice Laws referred at length to the decision of the *Israeli Torture Case*. In his judgment he quoted Aharon Barak's words, which were later quoted also by the House of Lords, as well as additional sections from his decision:

This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, thereby requiring the authorisation to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty 'befitting the values of the state of Israel', is enacted for a proper purpose, and to an extent no greater than is required (see art 8 of the Basic Law: Human Dignity and Liberty).<sup>41</sup>

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39. *Id.* at para. 150.

40. *A v. Sec'y of State for the Home Dep't*, [2004] EWCA (Civ) 1123, [2005] 1 W.L.R. 414 (Eng.) (appeal taken from U.K.).

41. *Id.* at para. 250.

Justice Laws' opinion referred to Barak's judgment in a detailed manner. It described the background of the Israeli Supreme Court's decision, which was presented as highly relevant to the British context as well. It was described as an important presentation of the limits of power in democracy: "This decision of the Supreme Court of Israel illustrates, if I may respectfully say so, a basic truth which applies in any jurisdiction where public power is subject to the rigour of democracy and the rule of law."<sup>42</sup>

Interestingly, Justice Neuberger, who wrote the minority opinion in the Court of Appeals, also referred to Barak's judgment – for the purpose of rejecting the argument of necessity:

[I]n rejecting the argument based on necessity or exceptional circumstances, I derive support from the decision of the Supreme Court of Israel in HCJ 5100/94 *Public Committee Against Torture in Israel v Israel* (1999) [53(3) PD 817]. In that case, the Israeli Supreme Court had to consider the lawfulness of the use of torture carried out by Israeli security troops on suspected terrorists. Their conclusion in paragraph 38 was this:

According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorisation regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. . . . An investigator who insists on employing these methods, or does so routinely, is exceeding his authority.<sup>43</sup>

It is interesting to note that Barak's words were cited in this context by contradicting decisions and by judges who held different views, in a way that acknowledged his decision as the main authority in this area.

The Canadian courts cited Aharon Barak's opinion in the *Israeli Torture Case* in four different occasions. The first occasion was *Suresh v. Canada (Minister of Citizenship and Immigration)*,<sup>44</sup> where the Supreme Court of Canada addressed the question of whether a refugee from Sri Lanka could be deported back to his homeland, despite the possibility that he may face torture there. The appellant was detained by Canada due to terrorist suspicions. He applied for judicial review, alleging that the decision in his matter was unreasonable, that the procedures under the relevant law were unfair, and that this law infringed sections 2(b), 2(d) and 7 of the Canadian Charter of Rights and Freedoms. In deciding this case, the Canadian Supreme Court referred to the decision in the *Israeli Torture Case* as an example for the rejection of torture as a legitimate tool to fight terrorism.<sup>45</sup> However, this citation did not have direct bearing on the result of the decision. It

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42. *Id.* at para. 251.

43. *Id.* at para. 495.

44. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (Can.).

45. *Id.* at para. 74.

only reflected the court's conviction regarding the rejection of torture as a legitimate choice for fighting terrorism.

Another Canadian decision, which discussed the *Israeli Torture Case*, was *In The Matter Of an application under section 83.28 of the Criminal Code*.<sup>46</sup> In this decision, an accused in a plane bombing case challenged the constitutional validity of section 83.28 of the Canadian Criminal Code, arguing that its investigative hearing provisions violated the Canadian Charter of Rights and Freedoms by infringing on the individual's right to maintain silence and protect oneself against self-incrimination.

The court cited Aharon Barak's opinion in the *Israeli Torture Case*<sup>47</sup> in a manner that referred to its general spirit:

This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.<sup>48</sup>

In *Re Canadian Security Intelligence Service Act (Canada)*<sup>49</sup> the Canadian Security Intelligence Service ("CSIS") asked the Court, for the first time since the enactment of the Canadian Security Intelligence Service Act ("CSIS Act"), to issue warrants pursuant to section 21 of the Act. Here as well, the court cited Aharon Barak's opinion in the *Israeli Torture Case*:

This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.<sup>50</sup>

This citation was used here once again to elaborate on the idea that the response to terrorism should be conducted within the rule of law and while preserving the cherished liberties which are essential to democracy.

Finally, a Canadian court cited Aharon Barak's opinion in the *Israeli Torture Case* in *Khadr v. Canada*,<sup>51</sup> which concerned the matter of a sixteen year old Canadian citizen, who was arrested in Afghanistan by American troops and held as a detainee in Guantanamo Bay. He was accused of involvement in international terrorism, and spent seven years in Guantanamo Bay, while Canada refused to ask for his extradition. Eventually, he applied to a Canadian court and requested to receive all the relevant information held by Canada in order to assist him in his trial in Guantanamo Bay. The decision given

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46. Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42, [2004] 2 S.C.R. 248 (Can.).

47. *Id.* at para. 7.

48. *Israeli Torture Case*, *supra* note 35, at para. 39.

49. Canadian Security Intelligence Service Act (Re) (F.C.), [2008] 3 F.C.R. 477 (Can.).

50. *Id.* at para. 40.

51. *Khadr v. Att'y Gen. of Can.*, 2008 FC 807, 59 C.R. (6th) 284, 175 C.R.R. (2d) 345, 331 F.T.R. 1.

Justice Mosley dealt with the harsh methods of investigation used against Khadr, and concluded that they were indeed in breach of international human rights law. In this context, he referred to the *Israeli Torture Case*, in which Chief Justice Barak discussed similar methods of investigation:

Canada's international human rights obligations include the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, ("UNCAT"), to which the US is also a signatory. The application of this Convention to specific types of interrogation practices employed by military forces against detainees was discussed by the Supreme Court of Israel in *Public Committee against Torture in Israel v. Israel* 38 I.L.M. 1471 (1999). The practice of using these techniques to lessen resistance to interrogation was found to constitute cruel and inhuman treatment within the meaning of the Convention.<sup>52</sup>

This decision is an interesting example for the use of Barak's judgment not only for the purpose of declaring allegiance to the protection of human rights in times of threat to national security but rather for the purpose of analyzing the facts of the case.<sup>53</sup>

The High Court of Australia referred to Aharon Barak's opinions in the field of National Security on three different occasions. In *Al-Kateb v. Godwin*,<sup>54</sup> the High Court of Australia dealt with the Migration Act 1958, which allows for an administrative detention of aliens who enter the country unlawfully. The appellant in this case was a stateless Palestinian born in Kuwait. He was detained and asked to be removed from custody, but there was no state to which he could be deported. The question was whether the Migration Act of 1958 permitted a stateless person to be detained indefinitely, and if so, whether this was permissible under Australia's Constitution. The majority of the court concluded that the Migration Act enables an administrative detention even when there are no prospects for its ending, and that such detention is not unconstitutional. In contrast, in a minority opinion, Justice Kirby held that the Act should be interpreted as not allowing for an indefinite administrative detention and supported his judgment by referring to the opinion of Aharon Barak in the *Israeli Torture Case*, as cited again by Aharon Barak himself in his decision on the Israeli Security Barrier, known as the *Beit Sourik Case*:

This is the destiny of a democracy - she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to

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52. *Id.* at para. 87. Justice Mosley went on to conclude: "The practice described to the Canadian official in March 2004 was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview." *Id.* at para. 88.

53. It is worth noting that this matter was the subject of more litigation, which also got to the Supreme Court of Canada. See *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 (Can.).

54. *Al-Kateb v Godwin* (2004) 219 CLR 562 (Austl.).

overcome her difficulties.<sup>55</sup>

The *Beit Sourik Case* was cited in two other dissenting opinions authored by Justice Kirby. In *Thomas v Mowbray*,<sup>56</sup> the court dealt with the validity of Subdivision B of Division 104 of the Commonwealth Criminal Code, authorizing the imposition of “interim control orders.”<sup>57</sup> The case dealt with interim control orders which were applied to an Australian citizen, who was accused of involvement in international terrorism. These measures were used after his acquittal due to the fact the evidence against him was produced through torture. The majority of the court dismissed his argument against the constitutionality of the measures used against him. Justice Kirby, who was dissenting, quoted here as well Barak’s decision in the *Beit Sourik Case* (to support the general claim that civilized nations adhere to the protection of human rights even in the face of threat to national security). In *Re Colonel Aird*,<sup>58</sup> the High Court of Australia recognized the constitutionality of military tribunals established for dealing with conduct regarded as “service connected” or for the purpose of enforcing and maintaining discipline among the defence forces (discussing the case of a rape committed overseas by a member of the Australian army on leave). Justice Kirby who dissented once again referred here as well to the *Beit Sourik Case* as comparative law example to the obligation of the court to protect basic human rights.<sup>59</sup>

An example from another jurisdiction comes from the decision of the Polish Constitutional Court in *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy*.<sup>60</sup> The court had to decide a challenge to Article 122a of the Act of 3 July 2002 (the Aviation Law) regarding its conformity with Articles 38, 31.3, 26 and 30 of the Polish Constitution. The Court stated that there was no need for reinterpretation of human rights standards in order to protect public safety from terrorist attacks, and added that it shares this view with other courts, including the House of Lords, the Federal Constitutional Court of Germany and the United States Supreme Court. In this context, the court also referred to Aharon Barak’s opinions in the *Israeli Torture Case* as well as other decisions on national security and human rights in the occupied territories.<sup>61</sup>

Finally, it should be noted that Barak’s decision in the *Israeli Torture Case* had visibility in the context of the decision of the European Court of Justice in *Kadi v. Council of the European Union*,<sup>62</sup> although formally speaking it was not cited in the decision itself.<sup>63</sup> In this case, the court analyzed the legality of the freezing of assets of individuals suspected as involved in aiding terrorist organizations based on the United Nations

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55. HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. 58(5) PD 807 [2004] (Isr.) [hereinafter *Beit Sourik Case*].

56. *Thomas v. Mowbray* (2007) 233 CLR 307 (Austl.).

57. *Id.*

58. *Re Colonel Aird* (2004) 220 CLR 308 (Austl.).

59. It should be noted, however, that this reference was in a footnote and there was neither an elaborated discussion nor a quote of Aharon Barak’s opinion in this case.

60. Judgment K 44/07 of September 30, 2008, *Orzecznictwo Trybunalu Konstytucyjnego*, 2008, no. 7A, item 126.

61. HCJ 3278/02 Ctr. for the Def. of the Individual v. Commander of IDF Forces in the W. Bank, 57(1) P.D. 385 [2002] (Isr.); HCJ 3239/02 Marab v. Commander of IDF Forces in the W. Bank 57(2) P.D. 349 [2002] (Isr.). These Israeli decisions are listed but not discussed beyond that.

62. Case C-402/05, *Kadi v. Council of the E.U.*, 2008 E.C.R. I-6351.

63. Accordingly, this decision is not included in the empirical data presented in the tables.

Security Council resolutions in this area. The court found that Security Council's measures were unfair to the appellant who did not have an opportunity to challenge his inclusion in the lists of people and organizations supporting terrorism. This decision followed the view presented in the opinion which Advocate General Maduro presented to the court. That opinion included the following citation from Barak's decision in the *Israeli Torture Case*:

It is when the cannons roar that we especially need the laws . . . Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no “black holes”. . . . The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.<sup>64</sup>

Advocate General Maduro cited Barak's opinion to demonstrate his argument that the measures used to suppress international terrorism should be in conformity to the rule of law and the protection of human rights.

#### *d. Bioethics and Medical Innovations*

A second area of law in which Barak's decisions were cited is that which deals with bioethics and medical innovations. In this context, several courts cited two of Barak's most famous opinions as a Supreme Court Justice - in the *Nahmani* affair,<sup>65</sup> which dealt with a controversy on the fate of frozen embryos (which were the fruits of a long and complicated IVF procedure) between an estranged husband and wife and in *Zeitsoff v. Katz*,<sup>66</sup> which dealt with a wrongful life tort action. These opinions were cited on five different occasions — the decisions in the *Nahmani* case were cited on three occasions, and the *Katz* case was cited in two judgments.

With regard to the *Nahmani* affair, it is interesting to note that the Israeli Supreme Court decided this case twice — based on its special power to rehear a case that poses complicated and innovative questions. In its first decision, the Court, in the majority decision of four justices, one of whom was Justice Barak, against the minority opinion of the fifth Justice, ruled for the husband who opposed the continuation of the surrogacy procedure without his consent. Eventually, the Court changed its ruling and decided in another majority decision (of seven justices against four in the minority which included Justice Barak) for the wife — for whom the process was, for practical purposes, the last chance for becoming a biological mother.

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64. *Kadi*, at para. 45 (citing *Israeli Torture Case*, *supra* note 35, at paras. 61-62).

65. CA 5587/93 *Nahmani v. Nahmani* 49(1) PD 485 [1995] (Isr.); CFH 2401/95 *Nahmani v. Nahmani* 50(4) PD 661 [1996] (Isr.) (in which this matter was reheard and re-decided by the Israeli Supreme Court). For an analysis of these decisions, see also Daphne Barak-Erez and Ron Shapira, *The Delusion of Symmetric Rights*, 19 OXFORD J. L. STUD. 297 (1999).

66. CA 518/82 *Zeitsoff v. Katz* 40(2) PD 85 [1986] (Isr.).

*Kass v. Kass*<sup>67</sup> was an American case similar to the basic features of the *Nahmani* affair. It involved a husband and wife who sought to have a child and underwent in vitro fertilization. After the marriage ended, the wife sought possession of the pre-zygotes, which had been frozen for future implantation. The trial court awarded possession to the wife, and the husband sought review. The Appellate Division of the Supreme Court of New York reversed, finding that while the wife had a fundamental right to procreate and the husband had a fundamental right to avoid procreation, the controlling factor was the existence of a consent form, signed by the parties, which controlled the disposition of unused pre-zygotes. Because the consent form provided for the in vitro fertilization program to maintain possession of the pre-zygotes in the case of divorce, the wife was improperly awarded possession. One of the dissenting judges pointed out that cryogenic preservation raised dilemmas abroad as well, and within this discussion mentioned the two *Nahmani* decisions, although the judge did not elaborate on them due to the lack of available translation (at the time).<sup>68</sup>

*Evans v. United Kingdom*<sup>69</sup> was a decision of the European Court of Human Rights which dealt with a challenge to the United Kingdom IVF law, according to which both parties must give their consent for IVF procedures to continue or the embryos must be destroyed. The case concerned a couple who stored frozen embryos before the wife had to go through serious medical procedures. Later, the couple broke up, and the man opposed the idea of using the stored embryos created from his sperm.

The appellant claimed that as treatment was already under way, the potential father should not have the right to stop it. The European Court of Human Rights, while sympathetic to the situation, decided that although the matter could have been regulated differently, the law did not infringe human rights in a manner that necessitated judicial intervention. For the purpose of making this decision, the court explored how other jurisdictions have addressed the issue and within this comparison cited the *Nahmani* second decision.<sup>70</sup> The court noted that the Israeli view is different, but mentioned that there was also a minority opinion supported by Chief Justice Barak.

The third reference to the *Nahmani* affair, was in the United States case of *A.Z. v. B.Z.*<sup>71</sup> which exemplifies an indirect form of reference to comparative law. In this case, the Supreme Court of Massachusetts held that the procreative right of a woman must yield to the right of a man not to be forced to procreate. While the decision did not spe-

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67. *Kass v. Kass*, 663 N.Y.S.2d 581, 583 (N.Y. App. Div. 1997).

68. The relevant passage from the opinion of Judge Miller states the following:

Cryogenic preservation has caused controversy abroad as well. The Supreme Court of Israel initially rejected a divorced woman's decision to implant frozen pre-zygotes over the objections of her former husband (see, *Nachmani v. Nachmani*, Mar. 30, 1995, C.A. 5587/93). However, upon further review and reconsideration by the entire court (see, Gordon, *Court Upholds Legitimacy of Second Hearings*, JERUSALEM POST, Mar. 3, 1996, at 12), a 7-to-4 majority awarded possession of the pre-zygotes to Mrs. Nachmani, finding that once fertilization had occurred through IVF, 'the positive right' to be a parent overcame 'the negative right not to be [one]' (Friedman, *A Victory for Life*, Westchester Jewish Week, Sept. 20, 1996, at 1, 39). Unfortunately attempts to obtain an English translation of the decision have been unsuccessful.

*Id.* at 596. The appeal in this case did not change the decision. See *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

69. *Evans v. United Kingdom*, App. No. 6339/05, 43 Eur. H.R. Rep. 21 paras. 7-8, 12-13 (2006).

70. *Id.* at para. 49.

71. *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).



cifically cite the *Nahmani* case, the court did use it as an example to support its view — referring to academic writings which analyzed it.<sup>72</sup> The *Nahmani* decision was not mentioned in the decision, but there is external evidence to support the argument that the court indeed looked into it — the judge who authored this decision specifically stated so in a law review article she published on the uses of comparative law.<sup>73</sup> Once again, here the reference was to the first *Nahmani* decision rather than the second one.

The other Israeli decision that served as a point of reference in the area of bioethics and modern medicine was the *Katz* case, which recognized, in a majority decision, the possibility of bringing a “wrongful life”<sup>74</sup> tort action. Aharon Barak was one of the Justices who formed this majority.

In *Harriton v. Stephens*,<sup>75</sup> when the High Court of Australia debated the issue of wrongful life, it referred to similar cases from around the world, and among them the *Katz* case.<sup>76</sup> The *Katz* decision also served as a point of reference to a Canadian court in the decision given in *Bovingdon v. Hergott*<sup>77</sup> (in Ontario). In this case, the defendant was a doctor who prescribed drugs to the plaintiff. Her baby was born with disabilities. The plaintiff alleged that lack of information regarding the risks of the medicine deprived her of the choice to attempt pregnancy without taking fertility drug. The Canadian court cited Barak’s opinion in the *Katz* case,<sup>78</sup> observing that it would be worthy to look into it.

#### *e. Other Human Rights and Constitutional Cases*

Courts in the UK, South Africa, Ireland and Canada cited additional opinions of Aharon Barak in the area of human rights and constitutional law on five other occasions. Among them, three cited the *Danielowitz* case<sup>79</sup> — the leading Israeli precedent on equal rights to homosexuals.

In *Fitzpatrick v. Sterling Housing Ass’n Ltd.*,<sup>80</sup> the House of Lords discussed the question whether a homosexual partner could be considered a “spouse” entitled to inherit his partner’s rights in a flat in which they were both living together for decades. More specifically, the House of Lords had to decide whether the term “spouse” in The Rent Act 1977 could be interpreted as referring also to same-sex relationship. In the majority opinion, Lord Slynn of Hadley, referred to Aharon Barak’s opinion in the *Danielowitz* case, which dealt with the rights of same-sex partners as “spouses” for the purpose of employment benefits (as an example to the changing trends towards homosexuals’ rights

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72. *Id.* at 1055.

73. Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn From Their Children”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1647 (2004).

74. A “wrongful life” suit is a tort action against a doctor whose negligence caused the birth of disabled child (in the sense that the pregnancy was not stopped) when the action is brought by the impaired individual himself (who could not be born healthy but rather either born with the disability or not born at all). According to the majority opinion in the Israeli Supreme Court, in extreme circumstances, non-life may be considered preferable to impaired life, and thus the wrongdoer should compensate the person born with such disabilities in a manner that would better his life as far as money can help.

75. *Harriton v. Stephens* (2006) 226 CLR 52 (Austl.).

76. *Id.* at para. 266.

77. *Bovingdon v. Hergott*, 2006 CanLII 31202 (ON SC).

78. *Id.* at para. 12.

79. H CJ 721/94 El-Al Isr. Airlines Ltd. v. Danielowitz 48(5) PD 749 [1994] (Isr.).

80. *Fitzpatrick v. Sterling Hous. Ass’n, Ltd.*, [2001] 1 A.C. (H.L.) 27 (appeal taken from Eng.).

in countries outside of the UK).

Similarly, in *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*,<sup>81</sup> the Constitutional Court of South Africa referred to the *Danielowitz* case when it dealt with immigration legislation that facilitated the immigration into South Africa of spouses of permanent South African residents, but did not extend this right to gay and lesbian partners of permanent South African residents. In accepting the appeal in this case, Justice Ackermann referred to not only the *Danielowitz* case as an example of the significant changes societies outside of South Africa have faced regarding rights of homosexuals, but also to the *Fitzpatrick* case discussed above, which also referred to the *Danielowitz* decision.

The *Danielowitz* decision was once again cited in *Regina v. Secretary of State for Education and Employment*.<sup>82</sup> In this case, the court stated that, “[o]nly the worst dictatorships try to eradicate those differences.”<sup>83</sup>

In *D. (T.) v. Minister for Education*,<sup>84</sup> the Supreme Court of Ireland referred to another important constitutional decision from Israel — the *United Mizrahi Bank*<sup>85</sup> case in which the Israeli court recognized its power to practice judicial review of legislation. The Irish court dealt with the question of the state’s constitutional obligation to provide for accommodation of children with special needs. The court discussed the question of the proper level of judicial review regarding public policy, which involves budgets and specific details. The appellants claimed that the solutions offered to them by the state were not sufficient, and the judges debated whether they should intervene and enforce their constitutional rights by ordering the state to open institutions that could accommodate children with special needs. In her opinion, Justice Denham referred broadly to Justice Barak’s analysis of the place of the court in democracy. She accepted Barak’s view as explained in the *United Mizrahi Bank* case in the following passage:

I adopt this analysis of the place of judicial review and the protection of fundamental rights in a modern democratic constitution. The Constitution of Ireland, 1937 is such a modern constitution, which protects democracy, fundamental rights and the rule of law. It is a duty and obligation of the courts to protect constitutional rights and to judicially review decisions. This is done within the parameters of the Constitution and the law. Judicial adjudications are made and discretion is exercised in accordance with the Constitution and mindful of the principle of the separation of powers. However, ultimately the court is the protector and guarantor of the fundamental rights and the rule of law under the Constitution. Such a duty to guard fundamental rights should not be shirked or abdicated.<sup>86</sup>

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81. *Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Home Affairs* 2000 (2) SA 1 (CC) at 48 para. 48 (S. Afr.).

82. *Regina v. Sec’y of State for Educ. and Emp’t*, [2005] UKHL 15, [2005] 2 A.C. (H.L.) 246 (appeal taken from Eng.).

83. *Id.* at 271.

84. *D. (T.) v. Minister for Educ.*, [2001] 4 I.R. 259 (Ir.).

85. CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Coop. Vill.* 49(4) PD 221 [1995] (Isr.).

86. *D. (T.) v. Minister of Educ.*, [2001] 4 I.R. 259 (Ir.).

In other words, Barak's view on the role of a judge in a democracy had an important influence on Justice Denham's judgment. Denham was dissenting, ordering that the appeal be rejected, meaning that the High Court was right when it ordered the state to meet the appellants' needs. The other four justices, among them Chief Justice Keane, accepted the appeal, and held that the High Court was mistaken. Although the other justices did not mention Barak's approach explicitly, it is clear from the decision that as a general rule, they tended to adopt a more "conservative" view on the judicial role.

Finally, the Supreme Court of Canada cited from Barak when he discussed freedom of religion in *Bruker v. Marcovitz*.<sup>87</sup> The decision dealt with an action brought by a Jewish woman against her former husband who declined to divorce her according to Jewish religious law for many years. The defendant argued that he was entitled to practice his freedom of religion in this regard. The Supreme Court of Canada dismissed the argument and quoted from the Israeli case of *Temple Mount Faithful*<sup>88</sup> to make the case that freedom of religion should be balanced against other values and interests. In this regard, he quoted, "[f]reedom of conscience, belief, religion and worship is a relative one. It has to be balanced with other rights and interests which also deserve protection, like private and public property, and freedom of movement. One of the interests to be taken into consideration is public order and security."<sup>89</sup>

#### *f. Holocaust Trials*

Finally, in two different occasions, courts in the United States cited the decision in the *Demjanjuk* case.<sup>90</sup> In this famous decision, the Supreme Court of Israel dismissed the case against John Demjanjuk, who was accused of being "Ivan the Terrible" from Treblink. Demjanjuk was charged and found guilty at the district court level. At the appeal level, subsequent to Demjanjuk's conviction and following a death penalty sentence, the prosecution submitted to the court newly discovered evidence brought from the archives of the former USSR that shed some doubt on the conviction. Based on this evidence, he was acquitted in a decision that celebrated the gap between real-life truth and legal truth. Barak was one of the justices on the panel that acquitted Demjanjuk. This fact is of special interest because he himself survived the holocaust in Europe as a child. At any rate, the decision of the court was unanimous, and in contrast to the custom in ordinary cases, it is not mentioned who authored it. It was rather given as a decision of the court as a whole. As indicated, the *Demjanjuk* case was found to be cited twice as carrying the message that a decision in a criminal trial does not necessarily reflect the pure and absolute truth.

In the case of *United States v. Holstrom*,<sup>91</sup> the defendant was charged in state court with arson, but the charge was dismissed since the evidence was insufficient. The United States then moved forward with an indictment against the defendant for insurance fraud. After the federal charges were dismissed, the defendant challenged the institution of this

87. *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 (Can.).

88. HCJ 292/83 *Temple Mount Faithful v. Jerusalem Dist. Police Commander* 38(2) PD 449 [1984] (Isr.).

89. *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 (Can.).

90. See CrimA 347/88 *Demjanjuk v. State of Israel* 47(4) PD 221 [1993] (Isr.).

91. *United States v. Holstrom*, 246 F. Supp. 2d 1101, 1103 (E.D. Wash. 2003).

federal prosecution after her former acquittal of arson in State court and asked for compensation. The court dismissed her request holding that it could only award fees if the government's acts were frivolous, vexatious, or done in bad faith, and that none of these standards had been met. In its reasoning, the court cited Barak's opinion in the *Demjanjuk* case to exemplify the spirit of criminal trials: "[t]he matter is closed-but not complete. The complete truth is not the prerogative of the human judge."<sup>92</sup>

Similarly, in *Kuch v. United States*,<sup>93</sup> a case that involved a suit by the family of a victim of a Piper airplane crash accident, the plaintiffs failed to establish by a preponderance of the evidence that a C-17 flight took place at the time of the Piper accident. They also failed to establish that a C-17 was near the accident site when the Piper aircraft crashed. The court cited the same words of Barak's opinion in the *Demjanjuk* case<sup>94</sup> to justify its decision to stand by the facts of the case, despite its sympathy for the victim's family. The reference is once again to the general principle as stated by the Israeli court and not to the actual decision in that case.

*g. Citations of Barak's Academic Writings*

Alongside the citations of Barak's most noted opinions in his capacity as a Supreme Court Justice, the vast majority of citations by the courts worldwide referred to Aharon Barak's scholarly work — books and law journal articles. It is important to note, however, that Barak authored most of the cited sources after he was appointed as a Supreme Court Justice (during the years he served as a Justice, and later on as Chief Justice). As indicated in *Table 3* below, among the thirty-eight citations of Aharon Barak's scholarly work — eighteen referred to his views on interpretation, eight referred to his views on the role of the judiciary and judicial theory, six referred to his analysis of the proportionality doctrine<sup>95</sup> and four referred to other issues in the area of constitutional law and human rights. Only two other court cases cited Barak's scholarly work from his time as professor before he was nominated to the Israeli Supreme court (regarding vicarious liability and shareholders liability).

**Table 3 – Distribution According to Subject Matter of Scholarly Work**

Writings on Judging	Number of citations
Interpretation	18
Role of the Judiciary and Judicial Theory	8
Proportionality	6
Constitutional Law and Human Rights	4
<b>Total</b>	<b>36</b>
Pre-judicial Work	Number of citations
Vicarious Liability	1
Shareholders Liability	1
<b>Total</b>	<b>2</b>

92. *Id.* at 1111.

93. *Kuch v. United States*, No. CV-03-0355-JLQ, 2007 WL 2874974, at \*1-2 (E.D. Wash. Sept. 29, 2007).

94. *Id.* at \*4.

95. Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO. L.J. 369 (2007).

The majority of citations from Barak's academic writings referred to his theory of interpretation.

In the UK, an example to this is *Etame v. Secretary of the State for the Home Department & Anirah v. Secretary of the State for the Home Department*,<sup>96</sup> which dealt with asylum rights. Both claimants asked for the revocation of their deportation orders on the basis of section 92(4)(a) of the Nationality Immigration and Asylum Act 2002. The court decided that neither appellant had an in-country appeal right simply by virtue of having made a protection claim or having made fresh representations supported by different material in pursuit of such a claim. The court cited Barak's words in his book *Purposive Interpretation in Law*, with regard to "[d]eviating from the language of the text to avoid absurdity."<sup>97</sup> More concretely, the statutory text should be construed in the context of the scheme of the statute as a whole, and therefore, if the consequences of adopting a literal construction were so peculiar as to be characterized as absurd, then principles of statutory construction require the court to read the words in a manner that avoids the absurdity.

In the United States, the vast majority of quotations from Barak concerned his theory of interpretation, which served a source of inspiration for judges who resisted mere literal or textual interpretation. In most cases, the reference has been to his early book *Judicial Discretion*.<sup>98</sup>

In *BedRoc Ltd. v. United States*,<sup>99</sup> the petitioners, owners of properties subject to a reservation of valuable minerals under the Pittman Underground Water Act of 1919,<sup>100</sup> sued for quiet title to sand and gravel in their properties. The Court held that while the sand and gravel were minerals, they could not be considered valuable within the meaning of the Act. Justice Stevens, who dissented (and was supported by Justice Souter and Justice Ginsburg), attacked the majority's refusal to examine the legislative history of the law, considered by him as "one of the most valuable tools of judicial decision making". In this context, he referred to Barak's book *Judicial Discretion* and stated:

As Justice Aharon Barak of the Israel Supreme Court perceptively has explained, the "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" retains greater discretion than the judge who "will seek guidance from every reliable source." . . . A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the

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96. *Etame v. Sec'y of State for the Home Dep't and Anirah v. Sec'y of State for the Home Dep't*, [2008] EWHC 1140, [2008] All E.R. (D) 326 (Eng.).

97. *Id.* at para. 38.

98. JUDICIAL DISCRETION, *supra* note 21. Another case that mentioned the book *Judicial Discretion*, *Ahmad v. Wigen*, 726 F.Supp. 389, 419 (E.D.N.Y. 1989), was not counted as this was a decision on a petition for a writ of habeas corpus to prevent extradition to Israel to stand trial for murder. For the purpose of deciding this petition, the court had to discuss the Israeli legal system and the rights of defendants in it. Barak's book was mentioned here not as part of the comparative law discourse, but rather because the fairness of the Israeli system was one of the issues the court had to decide.

99. *BedRoc Ltd. v. United States*, 541 U.S. 176, 182 (2004).

100. Pittman Act, ch. 77, 41 Stat. 293 (1919).

judge's own policy preferences will affect the decisional process.<sup>101</sup> Justice Stevens used Barak's words to show that the majority's way of interpretation did not narrow judicial discretion, but rather broadened it, as it ignored information that could have affected the decision. Thus, Stevens warned, judges may prefer their own policies over that of Congress.

In *Circuit City Stores, Inc. v. Adams*, the Court addressed the question whether the Federal Arbitration Act, which excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the Act's coverage, applied to employment contracts.<sup>102</sup> The majority of the Court held that it did not. Justice Stevens, dissenting (with the support of Justice Souter, Justice Ginsburg and Justice Breyer) claimed that the majority had chosen to ignore legislative history and important considerations expressed by Congress. He quoted in this context the same words of Barak from his book *Judicial Discretion* and stated:

This case illustrates the wisdom of an observation made by Justice Aharon Barak of the Supreme Court of Israel. He has perceptively noted that the "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" has more discretion than the judge "who will seek guidance from every reliable source."<sup>103</sup>

In *Koons Buick Pontiac GMC v. Nigh*,<sup>104</sup> the plaintiff was a consumer who attempted to purchase a truck from the defendant, a dealer. He sued for a violation of the Truth in Lending Act (TILA) and was awarded compensation. The Court addressed the question whether parties who suffered no actual damage could recover more than the Truth in Lending Act's original \$1,000 cap based on subsequent amendments to the act. The Court held that he could not. Here, Barak's *Judicial Discretion* was cited in a footnote in Justice Stevens' concurrence (to which Justice Breyer joined) in order to point to the need to examine more closely legislative intent: "[w]e execute our duty as judges most faithfully when we arrive at an interpretation only after 'seek[ing] guidance from every reliable source.'"<sup>105</sup>

In *Linton v. KB Home Indiana, Inc.*,<sup>106</sup> the Plaintiff sued her former employer alleging violations of the Age Discrimination in Employment Act. Defendant moved to compel arbitration pursuant to an arbitration clause in the employment contract. In opposing the motion, the plaintiff argued that her claims were not subject to arbitration because she did not knowingly and voluntarily waive her right to a judicial forum as required by the Older Workers Benefit Protection Act's ("OWBPA"). The District Court in the Southern District of Indiana court held that the OWBPA waiver requirements do not apply to jury trial waivers in arbitration agreements. The court cited Justice Stevens' dissenting opinion in the *Circuit City* case, which based itself on Barak's book: "minimalist" judge "who holds that the purpose of the statute may be learned only from its lan-

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101. *BedRoc*, 541 U.S. at 192.

102. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

103. *Id.* at 133.

104. *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 57-58 (2004).

105. *Id.* at 66 n.1.

106. *Linton v. KB Home Indiana, Inc.*, No. 1:07-CV-0048-DFH-TAB, 2007 WL 2002134, at \*1 (S.D. Ind. July 5, 2007).

guage” has more discretion than the judge “who will seek guidance from every reliable source.”<sup>107</sup> Similarly, Barak’s book was cited by reference to Justice Stevens’ opinion in the *Circuit City* case in *Fox v. Catholic Knights Ins. Soc.*,<sup>108</sup> *State v. Courchesne*,<sup>109</sup> and *Bukowski v. City of Detroit*.<sup>110</sup>

*In Re Millcreek Twp. Zoning Ordinance*<sup>111</sup> involved a challenge to the decision of a zoning hearing board to uphold the validity of an ordinance. The appellants argued that the ordinance was substantively invalid under an equal protection analysis and that it contravened the public policy of the commonwealth and violated the federal Fair Housing Act. The court cited Barak’s *Judicial Discretion* and quoted him at length, to describe the duty of the court in interpreting a statute:

The interpreter must uncover, from among the spectrum of linguistic possibilities, that meaning which will accomplish the purpose of the statute. ‘The statute is an instrument for executing a legislative goal, and therefore it must be interpreted according to the purpose it embodies.’ ‘The judge, when he comes to interpret the statute, should ask himself: what normative social goal does this statute seek to attain?’ Indeed, it is an established rule of interpretation in most systems that a statute is to be interpreted in light of its legislative purpose and with a view to effecting its accomplishment.<sup>112</sup>

Barak’s views on interpretation were cited twice in Australia. *Re Minister for Immigration and Multicultural and Indigenous Affairs Ex Parte Ame*<sup>113</sup> was an immigration case that addressed the constitutional restraints on changing or regulating one’s citizenship status. The court cited Barak’s article “A Judge on Judging” for the purpose of substantiating its own view that it would be “useful and proper to check conclusions affecting constitutional interpretation by reference to any relevant international law, and especially as such law relates to human rights and fundamental freedoms.”<sup>114</sup>

In *Palgo Holdings Pty Ltd. v Gowans*, the Australian court had to interpret the term

107. *Id.* at \*6 n.3.

108. *Fox v. Catholic Knights Ins. Soc’y*, 665 N.W.2d 181, 196 n.13 (Wis. 2003).

109. *State v. Courchesne*, 816 A.2d 562, 584 n.28 (Conn. 2003). In this case, a defendant was convicted of murder and capital felony murder in connection with the stabbing of a mother and her unborn child. *Id.* at 567-68. The Supreme Court of Connecticut held that the state was required only to prove that the defendant killed one of the victims in an especially heinous, cruel or depraved manner. *Id.* at 590. In a separate portion of its opinion, the court discussed its approach to statutory construction and stated that it would ordinarily consider all relevant sources of meaning of a statute without first having to determine whether the language at issue is ambiguous. *Id.* at 581-84. In that context, the court referred to the words of Justice Stevens in *Circuit City* who quoted Barak, but does not add any reference of its own to Barak.

110. *Bukowski v. City of Detroit*, 732 N.W.2d 75 (Mich. 2007). In this case, the Supreme Court of Michigan discussed a case of freedom of information. *Id.* at 77. The question was whether a reporter who asked to receive a copy of an internal report on police mishandling should be answered positively. *Id.* The appellate court accepted the reporter’s appeal, but the majority opinion in the Supreme Court of Michigan reversed the decision. *Id.* at 81. Judge Kelly, dissenting, referred to Justice Steven’s dissenting opinion in *BedRoc Ltd. v. United States*, 541 U.S. 176, 192 (2004). *Bukowski*, 732 N.W.2d at 86 n.12 (Kelly, J., dissenting).

111. *In Re Millcreek Twp. Zoning Ordinance*, 4 Pa. D. & C.4th 449, No. 3313-A-1988, 1989 WL 230557 (Ct. C.P. Pa. Erie County July 25, 1989) [hereinafter *Millcreek Case*].

112. *Id.* at 458-59.

113. *Re Minister for Immigration and Multicultural and Indigenous Affairs Ex Parte Ame*, (2005) 222 CLR 439 (Austl.).

114. *Id.* at para. 121.

“pawned goods” in the context of the Pawnbrokers Act 1996.<sup>115</sup> The court held that preference for the purposive and not the literal approach is the method of statutory construction now prevails in Australia. The court cited *Purposive Interpretation in Law* to substantiate its view: “[t]he foregoing interpretive principles remain applicable where a term used in a statute has both a technical legal meaning and an ordinary meaning of everyday speech.”<sup>116</sup>

The research indicated seven other cases from India which referred to Barak’s interpretive approach. *Rameshwar Prasad v. Union of India & Anr.*<sup>117</sup> discussed the constitutional validity of the dissolution of the Legislative Assembly of the State of Bihar in 2005. Earlier cases that came up before the Court involved dissolutions of assemblies which were ordered on the ground that the parties in power had lost the confidence of the House. The present case was different — the dissolution had been ordered even before the first meeting of the Legislative Assembly on the ground that attempts were being made to cobble a majority by illegal means and lay claim to form the government in the state. The court referred in this case to Barak’s approach to constitutional interpretation as discussed in his article “A Judge on Judging”:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.<sup>118</sup>

In *New India Assurance Co. v. Wadia*,<sup>119</sup> the court had to decide who should begin to lead evidence in proceedings under the Public Premises (Eviction of Occupants Act) 1971. In this context, the court cited the following section from Barak’s book *Purposive Interpretation in Law*:

Hart and Sachs also appear to treat purpose as a subjective concept. I say appear because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator[’s] shoes, they introduce two elements of objectivity: First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members of the leg-

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115. *Palgo Holdings Pty Ltd. v Gowans*, (2005) 221 CLR 249 (Austl.).

116. *Id.* at para. 41.

117. *Prasad v. Union of India & Anr.*, A.I.R. 2006 S.C. 980 (India).

118. *Id.*

119. *New India Assurance Co. v. Wadia*, A.I.R. 2008 S.C. 876 (India).



islative body sought to fulfill their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably.<sup>120</sup>

In five other judgments as well, the Indian courts cited Barak's exact same words.<sup>121</sup>

The second significant group of citations to Barak's academic writings includes cases that refer to Barak's understanding of the role of the judiciary and judicial discretion.

In the UK, an example of this has been the case of *Oxfordshire CC v. Oxford City Council Court of Appeal*, which involved the definition of "village greens" for the purpose of the Commons Registration Act 1965.<sup>122</sup> In particular, the case dealt with the question of what could and could not be done on the grass once registered as a village common.<sup>123</sup> The Court of Appeal cited Barak's "Judge on Judging" article as follows: "[t]he primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's concern is broader, system-wide corrective action . . ."<sup>124</sup> More specifically, this quote started the section discussing the role of supreme courts and courts of appeal, which Barak described, as quoted in the decision, as "bridging the gap between law and society."<sup>125</sup>

Several United States cases referred to Barak for elaboration on judicial discretion. In *United States v. Bureau*,<sup>126</sup> the defendant challenged a judgment which sentenced him "as an armed career criminal under 18 U.S.C.S. Section 924(e)" to 182 months imprisonment, in a manner that reflected "a downward departure" under the U.S. Sentencing Guidelines Manual.<sup>127</sup> The Federal Court of Appeals of the Sixth Circuit affirmed in part and held that the district court did not abuse its discretion by sentencing the defendant as an armed career criminal, but remanded in part because it was necessary to develop a complete record as to the downward departure issue.<sup>128</sup> In a footnote, the court cited Barak's book *Judicial Discretion* and stated:

Judicial discretion means making a choice from among a number of lawful possibilities. A reasonable exercise of judicial discretion means making a choice based on appropriate considerations from among the

120. *Id.* at para. 51 (citing PURPOSIVE INTERPRETATION IN LAW, *supra* note 21).

121. *Entm't Network (India) Ltd. v. Super Cassette Indus. Ltd.*, (2008) 9 S.C.R. 165 (India); *Writ Petition (Civil) No. 2258 of 2008 Mahalakshmi Sugar Mills Co. v. Union of India*, (2008) 5 S.C.R. 793 (India); *Kannadasan v. Khose* (2009) 7 S.C.C. 1 (India); *UCO Bank v. Rajinder Lal Capoor*, A.I.R. 2008 S.C. 1831 (India); *Union of India v. Ranbaxy Lab. Ltd.*, (2008) 7 S.C.C. 502 (India). All these cases cite the same quotation from Barak's book.

122. *Oxfordshire Cnty. Council v. Oxford City Council*, [2005] EWCA Civ 175, [8]-[11], [19] (*overruled by Oxfordshire Cnty. Council v. Oxford City Council*, [2006] UKHL 25).

123. *Id.* at para. 19.

124. *Id.* at para. 20.

125. *Id.* It is interesting to note that the Court of Appeal referred to these quotes from Barak as "quoted by Baroness Hale." *Id.* at n.xi.

126. *United States v. Bureau*, 52 F.3d 584 (6th Cir. 1995).

127. *Id.* at 587-88.

128. *Id.* at 587, 594-96.

various possibilities. The selection of an option by flipping a coin would yield a lawful choice, but the choosing itself would be unreasonable. From this one may conclude that the reasonable exercise of judicial discretion requires an awareness of the act of choice.<sup>129</sup>

Here, Barak's book was used to back up the court's analysis that while it may not review the exercise of discretion on sentencing except for instances of abuse, it must be reassured from the record that discretion has indeed been exercised.

In *State of Ala. ex rel. Siegelman v. United States E.P.A.*,<sup>130</sup> the Federal Court of Appeals of the Eleventh Circuit rejected the argument that the Environmental Protection Agency ("EPA") failed to provide a meaningful opportunity for public participation. In doing so, the court relied on the fact that the EPA made available copies of relevant documents at the local public library and other state agency facilities. The EPA also made available documents upon request. The court cited Barak's book *Judicial Discretion* in analyzing the definition of "judicial discretion" and stated:

The concept of judicial discretion has been a popular subject for legal commentators over the years. Justice Aharon Barak of the Supreme Court of Israel has written the most recent treatise on this topic: the English version of his book, *Judicial Discretion*, was published in 1989. Justice Barak's treatise attempts to continue the discussion begun by Justice Benjamin Cardozo in his classic, *The Nature of the Judicial Process*.<sup>131</sup>

In *Karis v. Vasquez*,<sup>132</sup> the petitioner sought federal habeas corpus relief from his conviction and death sentence under 28 U.S.C.S. Section 2254. Respondents filed a motion to dismiss. In its judgment in this matter, the District Court in the Eastern District of California cited Barak's book *Judicial Discretion* and stated: "[t]he term discretion has more than one meaning, and indeed means different things in different contexts. A. Barak, *Judicial Discretion*, 7 (Yale Univ. Press, ed. 1989)."<sup>133</sup>

In *Pap's A.M. v. City of Erie*,<sup>134</sup> the issue was whether Pennsylvania's public indecency ordinance, as applied to prohibit nude dancing, violated the First Amendment's guarantee of free expression. The court cited Barak's book *Judicial Discretion* when it elaborated on the role of the judiciary in this context to "attain a delicate balance between majority rule and the basic rights of the individual."<sup>135</sup>

Barak's view on judicial discretion was quoted also in the Canadian case of *Wong v. Lee*.<sup>136</sup> In this case, the issue was the law that applied in an action brought in Ontario by a passenger, arising out of a car accident that occurred in New York State. The driver, the passenger, the vehicle owner and their insurers were all residents of Ontario, with no

129. *Id.* at n.9 (citing JUDICIAL DISCRETION, *supra* note 21, at 35).

130. *Alabama ex rel. Siegelman v. U.S. E.P.A.*, 925 F.2d 385 (11th Cir. 1991).

131. *Id.* at n.5.

132. *Karis v. Vasquez*, 828 F. Supp. 1449 (E.D. Cal. 1993).

133. *Id.* at 1464.

134. *Pap's A.M. v. City of Erie*, 23 Pa. D. & C.4th 337, No. 60059-1994, 1995 WL 610276 (Ct. C.P. Pa. Erie County Jan. 18, 1995)

135. *Id.* at 344. It is interesting to note that Judge Levin who wrote this decision was also the judge who authored the *Millcreek* decision, which also cited from Barak's book. *Millcreek Case*, *supra* note 111, at 458-59.

136. *Wong v. Lee*, [2002] 58 O.R. 3d 398 (Can. Ont.).

New York residents involved. Here, the dissenting opinion quoted this section from Barak's book *Judicial Discretion*:

To me, discretion is the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful. Justice Sussman referred to this definition, saying, "Discretion means freedom to choose among different possible solutions." Hart and Sacks offered a similar definition: "Discretion means the power to choose between two or more courses of action each of which is thought of as permissible." Judicial discretion, then, means the power the law gives the judge to choose among several alternatives, each of them being lawful.<sup>137</sup>

In India, Barak's judicial theory was cited in two cases. *Dharam Dutt v. Union of India*<sup>138</sup> was a case that involved a constitutional challenge to the validity of the Indian Council of World Affairs Ordinance, 2001 (No.3 of 2001), promulgated by the President of India on May 8, 2001, in an exercise of the powers conferred to him by clause (1) of Article 123 of the Constitution of India. The ordinance was superseded by an Act of Parliament while the case was pending, and the court cited from Barak's article "Judge on Judging" with regard to the questions raised by the new legislation:

Review of a new statute should focus not on the fact that it changes the previous ruling of the court, but on the fact that it undermines democracy. Moreover, everything is a question of degree. If the interpretation of a statute is met with an immediate and hasty response from the legislature in the form of new legislation, uncertainty about the law will result, and the public will lose confidence in the legislative branch. This is not the case, however, when the change in legislation after a judicial ruling reflects a thorough and deliberate examination of the ruling and an objective expression of the will of the legislature . . . [F]oundation of democracy is a legislature elected freely and periodically by the people. Judges and legal scholars ought not to forget this fundamental principle. The role of a judge in a democracy recognizes the central role of the legislature. Undermining the legislature undermines democracy. My conception of the rule of law and of the separation of powers do not undermine the legislature. Rather, they ensure that all branches of state act within the framework of the constitution and statutes. Only thus can we maintain public confidence in the legislature; only thus can we preserve the dignity of legislation.<sup>139</sup>

Finally, in *Rupa Ashok Hurra v. Ashok Hurra*,<sup>140</sup> the court addressed the issue of the binding power of former precedents, and in this context, referred generally to "Aharon Barak's treatise," as a summary of "the law existing in other countries[:]"<sup>141</sup>

137. *Id.* at para. 26 (citing JUDICIAL DISCRETION, *supra* note 21, at 7-9).

138. *Dharam Dutt v. Union of India*, (2004) 1 S.C.C. 712 (India).

139. *Id.*

140. *Hurra v. Hurra*, (2002) 2 S.C.R. 1006 (India).

141. *Id.*

The authority to overrule exists in most countries, whether of civil law or common law tradition. Even the House of Lords in the United Kingdom is not bound any more by its precedents. The Supreme Court of the United States was never bound by its own decisions, and neither are those of Canada, Australia, and Israel.<sup>142</sup>

Another group of citations consists of references to Barak's writings on proportionality. These were cited only by Canadian courts. This is obviously not a coincidence considering the centrality of proportionality analysis in Canadian constitutional law and the influence of Canadian jurisprudence on Barak's writings on proportionality. The Canadian courts cited Aharon Barak's scholarly work on six different occasions, out of which five referred to Barak's approach to proportionality, as reflected in his article on the matter published in Canada.

*Alberta v. Hutterian Brethren of Wilson Colony*<sup>143</sup> involved a 2003 amendment to Alberta's laws implementing certain requirements for photos for driver's licenses. Plaintiffs argued that "the Second Commandment prohibit[ed] them from having their photograph willingly taken," and thus objected to having their photo taken on religious grounds.<sup>144</sup> The court held that the law in this matter was "a reasonable limit on religious freedom, demonstrably justified in a free and democratic society."<sup>145</sup> The court cited Barak's view in his article on proportionality: "[T]he rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it."<sup>146</sup>

In *Toronto Star Newspapers Ltd. v. Canada*,<sup>147</sup> media organizations covering a terrorism related case challenged the constitutionality of Section 517 of the Canadian Criminal Code, which required a justice of the peace "to order a publication ban" regarding "the evidence and information produced," and "representations made, at a bail hearing" and "the reasons given for the order," if the accused applied for such a ban.<sup>148</sup> The appellants argued that this provision "unjustifiably violat[ed] the freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms."<sup>149</sup> The court held that Section 517 indeed infringed freedom of expression but decided that the limit could be justified in a free and democratic society. The court cited Barak's article on proportionality:

Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper ob

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142. *Id.*

143. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.).

144. *Id.* at para. 7.

145. *Id.* at para. 109.

146. *Id.* at para. 54.

147. *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721 (Can.).

148. *Id.* at para. 2.

149. *Id.*

jective is commensurate with the deleterious effect upon the human right.<sup>150</sup>

The court further acknowledged that the *Alberta* case had endorsed Barak's theory. The Supreme Court of Canada also referred to Barak's article on proportionality in *JTI-MacDonald Corp. v. Canada*<sup>151</sup> when it addressed the German analysis of this doctrine.<sup>152</sup>

In *Henry v. Canada (Attorney General)*, "the issue was the constitutional validity of the voter identification rules in federal elections."<sup>153</sup> The plaintiffs challenged recent amendments to the Canada Elections Act, S.C. 2000, c. 9, as infringing the right to vote guaranteed under section 3 of the Canadian Charter of Rights and Freedoms. Once again, the court cited Barak's article: "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it," which Barak describes as the "internal limitation" in the minimum impairment test, which "prevents it [standing alone] from granting protection to human rights."<sup>154</sup>

Several other citations of Barak's academic writings concern discussions of constitutional questions, including the protection of human rights.

In the United Kingdom, another case of this sort was *Secretary of State for the Home Office v. E & S*,<sup>155</sup> which addressed the questions of whether control orders under anti-terrorism legislation constituted a deprivation of liberty under Article 5 of the European Convention on Human Rights and whether the proceedings complied with the right to fair trial under Article 6 of the Convention. In this context, one of the parties to the appeal cited Barak from the same article relating to his views regarding the role of courts in reviewing anti-terrorism actions. Accordingly, the U.K. court stated that "[t]errorism does not justify the neglect of accepted legal norms . . . a democratic state acts within the framework of law and according to the law."<sup>156</sup>

Another example of citation in the context of constitutional law analysis is *Du Plessis v. De Klerk*.<sup>157</sup> In this case, the defendants' newspaper article described the flights of the plaintiff as "fuelling the war in Angola."<sup>158</sup> The plaintiff sued for defamation and other claims. As part of its analysis, the Constitutional Court of South Africa looked into approaches of other systems to the application of human rights to private law litigation (so-called "horizontal" application of human rights), and in this context, used Barak's academic writings in this area as a source for learning comparative approaches

150. *Id.* at para. 20 (citing Aharon Barak, *The Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 373-74 (2007)).

151. *JTI-MacDonald Corp. v. Canada*, [2007] 2 S.C.R. 610 (Can.).

152. *Id.* at para. 36.

153. *Henry v. Canada (Att'y Gen.)*, [2010] 7 B.C.L.R. 5th 70, para. 1 (Can.).

154. *Id.* at para. 320. The Canadian courts also cited Aharon Barak's article on proportionality in *Fédération des travailleurs et travailleuses du Québec c. Québec (Directeur général des élections)*, [2010] R.J.Q. 1129 (Can. Que.), and in *Victoria (City) v. Adams (2008)*, 299 D.L.R. 4th 193 (Can.).

155. *Sec'y of State for the Home Dep't v. E*, [2007] UKHL 47, [2008] 1 AC (H.L.) 499 (Eng.).

156. Printed Case on Behalf of Liberty at para. 12, *Sec'y of State for the Home Dep't v. E & S*, available at <http://www.unhcr.org/refworld/docid/4a7a91e92.html>.

157. *Du Plessis v. De Klerk*, 1996 (3) SA 850 (CC) (S. Afr.).

158. *Id.* at para. 1.

of other systems. More specifically, Justice Kentridge, who wrote the main opinion, used a translated transcript of the writings of Aharon Barak from his book on constitutional interpretation published in Hebrew in 1994.<sup>159</sup> The judgment addresses this text as authoritative.

In New Zealand, Barak's judicial writings on constitutional law were cited once. *Booker v. Police*<sup>160</sup> concerned the meaning of the term "behaves in [a] disorderly manner under section 4(1)(a) of the Summary Offences Act 1981," looking for "a meaning consistent with the right to freedom of expression" guaranteed by section 14 of the New Zealand Bill of Rights Act.<sup>161</sup> The court cited the following words from Barak's article *A Judge on Judging*: "[m]ost central to all human rights is the right to dignity. It is the source from which all other rights are derived. Dignity unites the other human rights into a whole."<sup>162</sup> The court quoted Barak and stated that it completely agreed with Barak's view and developed its discussion of the right to dignity inspired by this view.

Finally, the Czech Constitutional Court cited Barak's scholarly work in the area of constitutional law in *Stabilization of Public Budget-Sickness Benefits*.<sup>163</sup> In this case, the court dealt with a petition filed by dozens of senators and other official officeholders seeking to annul parts of the Act No. 261/2007 Sb., on the Stabilization of Public Budgets, and other social security and labor laws amended by it. The Constitutional Court accepted the petition in part. In this case, the court interpreted the meaning of the fundamental right to human dignity and in this context cited Barak's book *The Judge in a Democracy*.<sup>164</sup>

Only two of the cases found referred to Barak's early writings on issues of substance in the area of private law. One case of this sort comes from the United States - *Twohy v. First Nat. Bank of Chicago*.<sup>165</sup> The plaintiff was a shareholder who filed a suit against the defendant bank for breach of contract, fraud, misrepresentation, and libel. The Court of Appeals of the Seventh Circuit found that Spanish law applied to the case and precluded the plaintiff from recovery. In this context, the court cited an article by Barak on shareholders' suits.<sup>166</sup> This is a rare case of a court citing Barak prior to his appointment as a Supreme Court Justice. It serves as an example for an ordinary use of comparative law study to illustrate the view of other systems on the question at hand.<sup>167</sup>

The second case of this sort comes from Australia. *New South Wales v Lepore*<sup>168</sup> was a tort case, where the court addressed the issue of vicarious liability of a school in

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159. *Id.* at n.54 ("We have been furnished only with a typed version of four chapters of this work (perhaps in translation), which itself appears to be part of a larger work on constitutional interpretation, published in 1994."). The book mentioned seems to be AHARON BARAK, *CONSTITUTIONAL INTERPRETATION* (1994) (Hebrew).

160. *Brooker v Police* [2007] 3 NZLR 91 (SC).

161. *Id.* at paras. 1,4.

162. *Id.* at para. 177.

163. Ústavní soud České republiky 23.4.2008 [Decision of the Constitutional Court: Stabilization of Public Budget-Sickness Benefits], PL. US 2/08 (Czech).

164. *Id.* (Eliška Wagnerová, J., dissenting).

165. *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985).

166. *Id.* at 1194 (citing Aharon Barak, *Comparative Look at Protection of the Shareholder's Interest: Variations on the Derivative Suit*, 20 INT'L. & COMP. L.Q. 22 (1971)).

167. *Id.*

168. *New South Wales v Lepore* (2003) 212 CLR 511 (Austl.).

case of an assault of a pupil by a teacher. The court held that the State may be vicariously liable and remanded the case for the district court to reconsider. This was yet another case in which the court cited Barak's scholarly writings in torts — from the period preceding his judicial tenure.<sup>169</sup>

#### IV. ANALYSIS: THE CHARACTERISTICS OF THE CITATIONS OF AHARON BARAK BY OTHER COURTS

What can be learned from the usage of Barak's jurisprudence by courts and scholars in other countries? It is easier to start with some general observations. First and foremost, this study is a telling example of the hidden biases of comparative law. Although comparative law is presented as a neutral practice, in fact it tends to be the practice of importing legal precedents of hegemonic countries. The most obvious example is that of the United States legal system. The United States has been a source of ideas and legal models for other countries, but the practice of comparative law in the United States itself has been considered dubious and, at any rate, is under significant attack.

Second, issues of linguistic barriers and accessibility to materials are crucial. The linguistic barrier is very evident with regard to Israel. The Israeli Supreme Court writes in Hebrew, and therefore, only its translated decisions are potential candidates to serve as sources of inspiration (although it is true that most of its path-breaking decisions are eventually translated). It is telling to see the greater inclination of courts to refer to Barak's writings in books and articles published in English by renowned academic presses.<sup>170</sup> In some cases, academic writings of this sort also serve as a shortcut for judges to get to relevant foreign materials.<sup>171</sup>

Third, when a certain judgment or quote is cited there are higher chances that later decisions will cite the same quote (signaling that in these instances, the citing courts were also influenced by the willingness of their colleagues to be inspired from abroad). In some of these cases later citations are closer to the quote of an idiom or a proverb, than to the use of comparative law in the full sense of the word.<sup>172</sup>

Fourth, the inclination to cite may vary among individual judges. In Australia, Jus-

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169. *Id.* at n.324 (citing Aharon Barak, *Mixed and Vicarious Liability - A Suggested Distinction*, 29 MOD. L. REV. 160, 160-61 (1966)).

170. In a more nuanced manner, one can trace the differences between the tendencies of different courts to cite from either Barak's decisions or his academic writings. In the U.S., Canada, and India, the references were mostly to academic writings. Moreover, in each system other quotes dominate.

171. An illustrative example to this process is provided by a relatively recent decision of the High Court of Delhi in *Srishti School of Art, Design & Tech. v. Central Bd. of Film Certification*, (2011) W.P. (C) 6806 of 2010 (High Court of New Delhi). This judgment dealt with a decision to censor statements and visuals from a documentary film due to concerns regarding its potential effect on communal animosity between Hindus and Muslims. *Id.* at paras. 10-11, 13, 19. The Indian court invalidated the censorship decision and offered strong protection to freedom of speech. *Id.* at paras. 42-43. In doing so, it cited several Israeli cases that dealt with similar censorship powers, including a decision which concerned productions that touched on the Israeli - Palestinian conflict. The court openly stated that its reference to the Israeli cases is based on an academic article. *Id.* at para. 29 (citing Daphne Barak-Erez, *The Law of Historical Films: In the aftermath of Jenin, Jenin*, 16 S. CAL. INTERDISC. L.J. 495 (2007)).

172. There are several instances of this phenomenon. In Canada, the same quote from the article on proportionality was cited in five decisions. In India, several decisions used the same quote from the book *Purposive Interpretation*, and in the U.S. the book usually cited is *Judicial Discretion*.

tice Kirby was the leader in quoting Barak,<sup>173</sup> and in the United States Supreme Court, the leader was Justice Stevens. It is interesting to see that both tended to be in the minority when they did so.

There are also interesting lessons on the more concrete level regarding subject matters and contexts more susceptible to the use of comparative law. First, it is strikingly obvious that courts have the tendency to use Israeli judgments in contexts considered innovative, challenging and developing, most notable national security, bioethics and the rights of homosexuals.<sup>174</sup> There are probably two reasons for this. Courts feel the need to look for inspiration from the outside when the answers are less accessible in the system itself. In addition, there is an inclination to look for precedents from systems perceived as having accumulated expertise in the subject matter. This is obviously the case with Israeli jurisprudence in the context of national security. In fact, by any standard Barak's decisions on national security are by far his most influential comparative legacy (especially taking into consideration that the references to the *Nahmani* and *Katz* cases mentioned decisions in which he took part, but not to a separate opinion he authored).

It is interesting to note that the richness of Barak's contributions in "ordinary" areas of private law, such as contract law and corporate law, did not have a chance to cross borders. This is so despite the fact that he had great contributions in these areas,<sup>175</sup> which in fact reflected his main fields of academic expertise prior his nomination to the court.<sup>176</sup>

These findings are even strengthened by the fact that one of the most cited Israeli case ever seems to be the *Eichmann* decision,<sup>177</sup> which dealt with the innovative dilemma, at the time, of universal jurisdiction, in the context of judging Nazi war criminals.<sup>178</sup>

Another perspective on the same matter is that of "moral guidance." In most cases, the judges do not refer to specific legalistic models and arguments but rather to general

173. It is interesting to note in this context that Barak mentioned Justice Kirby in the introduction to this book *THE JUDGE IN A DEMOCRACY*, *supra* note 21, at xi.

174. A similar tendency to look for inspiration in the context of developing areas of law that often pose new moral dilemmas is exemplified by the adoption of foreign models and solutions by legislatures. See Daphne Barak-Erez, *An International Community of Legislatures?*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 532, 541 (Richard W. Bauman & Tsvi Kahana eds., 2006); Daphne Barak-Erez, *The Institutional Aspects of Comparative Law*, 15 *COLUM. J. EUR. L.* 477, 482-83 (2009).

175. Among his influential and original decisions in the area of contract law, for example, one should mention FH 20/82 *Adras Ltd. v. Harlow & Jones GmbH* 42(1) PD 221 [1988] (Isr.) (recognizing the right to sue for the restitution of the revenues accruing from an efficient breach of a contract) and CA 4628/93 *State of Israel v. Aprofim Hous. & Promotions (1991) Ltd.* 49(2) PD 265 [1995] (Isr.) (stating a theory of contract interpretation which negates the priority of the simple language of the contract over the circumstances that surrounded its formation). The latter is considered both revolutionary and controversial in Israel. Nothing of this controversy found its way outside Israeli borders.

176. Before his selection as Attorney General, and later on his nomination to the Israeli Supreme Court from this position, Barak was a leading private law professor at the Hebrew University of Jerusalem.

177. *Eichmann v. Att'y Gen.* of Isr. 16(3) PD 2033 [1962] (Isr.), reprinted in 36 *ILL.R.* 277 (1968).

178. Some of the judgments which cite the *Eichmann* decision are: In Re Agent Orange Product Liability Litigation, 373 F.Supp.2d 7, 88 (E.D.N.Y. 2005); *Jones v. Ministry of Interior of Saudi Arabia*, [2004] EWCA (Civ) 1394, [2005] 2 W.L.R. 808 para. 52 (Eng.); *Jorgic v Germany*, App. No. 74613/01 para. 51 (Eur. Ct. H.R. July 12, 2007); *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte*, [1999] UKHL 17, [2000] 1 A.C. (H.L.) 147 (appeal taken from Eng.); *R. (on the application of Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs*, [2008] EWHC (Admin) 2048, [2009] 1 W.L.R. 2579, para. 156; *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66-67 (2d Cir. 1975). In addition, the *Eichmann* decision was even cited by Lord Bingham of Cornhill in the decision of the House of Lords on the use of evidence collected by the use of torture in third countries. See text accompanying *supra* notes 38-39.



moral and ethical views (e.g. on the proper balance between human rights and national security). There is a special inclination to cite idioms and metaphors which carry a message (such as the dilemma of a democracy which has to fight terrorism with one its hands tied up).

With regard to Barak's special status as both a scholar and judge it is worthwhile to point out that this combination had a special influence on the choice to cite his writings. His writings on judicial issues attracted additional interest of judges due to his dual capacity and thus dual authority as both an academic and a judge. His ordinary academic writing from the time preceding his appointment to the court has been mentioned only marginally.

#### CONCLUSION

The analysis of the case-study discussed in this article lead to conclusions which can be considered alarming from the perspective of those interested in comparative law as an egalitarian practice. Judges who come from small and non-hegemonic countries have low chances of being quoted by their counterparts in other jurisdictions. The case of Aharon Barak is the exception. Does this mean that the practice of comparative law is doomed to be hegemonic or shallow? The answer is definitely not. However, it is important to realize that the blessings of comparative law are partial when the discipline does not take full account of its potential. Barak himself succeeded in crossing borders thanks to his academic stature and his rich publications in English, coupled with the unique nature of several of the decisions he gave (especially in the area of national security). At any rate, with a view to the future, it is crucial that the study of comparative law be more accountable to its hidden biases.