

Tulsa Law Review

Volume 47
Issue 2 *Symposium: Justice Aharon Barak*

Fall 2011

The Judicial Discretion of Justice Aharon Barak

Ariel L. Bendor

Zeev Segal

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Ariel L. Bendor, & Zeev Segal, *The Judicial Discretion of Justice Aharon Barak*, 47 *Tulsa L. Rev.* 465 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol47/iss2/10>

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THE JUDICIAL DISCRETION OF JUSTICE AHARON BARAK

Ariel L. Bendor* & Zeev Segal**

Aharon Barak has fervent admirers as well as harsh critics. An extraordinarily large percentage of Israelis claim to be knowledgeable about Barak and his pursuits. Many Israelis seem to have an opinion about him. No other judge in Israel approaches this level of public renown. This may seem surprising, given that Barak is not a politician, nor is he in the habit of granting interviews. On the rare occasions he appears in public, he reads from prepared notes. Most significantly, he enjoys this status in the wake of professional achievements that, by and large, the public knows nothing about.

A clear, accessible presentation of Barak's views, as they emerged from our talks, will not only provide a better understanding of his opinions, but will allow a serious critical accounting of their breadth, flaws, and weaknesses. Reading Barak's writings and conversing with him revealed how superficial, inaccurate, and sometimes distorted the public grasp is of his judicial and jurisprudential work. Our discussions shed light on the complexity of his thinking on many subjects, so inconsistent with the sound bytes and clichés — “the constitutional revolution,” “judicial legislation,” “everything is justiciable,” “judicial activism,” “the enlightened public” — that captured the headlines. These phrases are perceived in the public mind as encapsulating Barak's philosophy. Our talks laid bare another Aharon Barak, very different from the one people thought they knew.

In this final chapter we will attempt to present and analyze the main points of Barak's principal doctrine — his theory of judicial discretion. We will explore the ambivalence inherent in this theory, which sees judicial discretion, the freedom given to judges to choose between different decisional alternatives, as a core component of law, but also proposes a set of rules for how judges should use their discretion.

I. BETWEEN CONSCIOUS AND NORMATIVE JUDICIAL DISCRETION

Aharon Barak distinguishes between discretion in the conscious (or psychological) sense, and normative judicial discretion. Barak's focus is on normative discretion. He

* Frank Church Professor of Legal Research, Faculty of Law, Bar-Ilan University, Israel.

** Zeev Segal (1947-2011) – Associate Professor of Law, Department of Public Policy, Tel-Aviv University, Israel.

This article is based on the Epilogue chapter of the book by Ariel L. Bendor & Zeev Segal, *The Hatmaker – Talks with Justice Aharon Barak* (2008, Hebrew). Translation to English – Sharon Neeman. If not stated otherwise, all the quotations are from the book.

sees discretion as the power granted to judges to choose between one or more alternatives, all of them lawful. This definition presumes, of course, that judges will not choose mechanically, rather thinking, researching, and weighing the options carefully. However, judicial discretion is not a psychological concept. It reflects a normative position.

Barak's theory of judicial discretion is based on the premise that not all legal problems have a single solution. In Barak's words, "the overwhelming majority of judicial decisions, even if they contain some psychological element of thought, judgment and reasoning, do not constitute judicial discretion." Talk about the judicial role and how it is exercised is relevant only when judicial discretion comes into play — when judges are faced with a choice. In Barak's view, judges have discretion only when a number of alternatives exist, all of them within the law.

Indeed, deliberating and deciding non-banal legal questions almost always involves "discretionary consciousness," i.e., professionals will reach decisions and carry out their professional duties only after weighing the data and considering various alternatives and modes of action. But the existence of conscious discretion (or "psychological" or "mental" discretion, to use Barak's terminology) does not necessarily mean that there are several correct decisions or modes of action or, in the legal context, that there are several lawful decisional alternatives. Normative judicial discretion exists only when the law allows for a choice between equally permissible alternatives.

It is clear from Barak's writings, and even more from our discussions, that he does not regard normative discretion as a marginal phenomenon. Although most disputes brought to court are "easy cases," solved without judicial discretion, in Barak's opinion the "hard" cases, where discretion is called for, "affect social life."¹ Every one of the twelve decisions that Barak cites as the most important in his career was the product of judicial discretion. In his opinion, judicial discretion reflects the uncertainty that sits at the core of law, emanating from the inadequacy of language, from the ambiguity of words and legal rules, and from the limitations of those who created the law.

II. THE EXERCISE OF JUDICIAL DISCRETION AS AN OXYMORON

Aharon Barak has suggestions on how judicial discretion should be exercised.² He believes that discretion is never absolute. His approach is that judges should use discretion in a way that fulfils their role. They need to choose the legal alternative that is most able to bridge the gap between jurisprudence and life, while safeguarding the constitution and its values.

There is inherent inner tension in Barak's approach. On the one hand, he defines judicial discretion as the complete freedom to choose between various alternatives: "Judicial discretion is not a psychological concept. It reflects a normative position."³ On the other, he lays down objective, normative guidelines for exercising it. How does one reconcile this conflict, of granting free choice to judges while placing limitations on it, and claiming that the choice must be "objective," i.e., removed from the judge's world?

1. See AHARON BARAK, *JUDICIAL DISCRETION* (Yadin Kaufmann trans., 1989).

2. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* xiii (2006).

3. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* xiii (2006).

This is an oxymoron, a contradiction in terms that Barak does not resolve.

Barak's jurisprudence is thus characterized by tension between his insistence that judicial discretion exists in the normative sense, granting freedom of choice between lawful alternatives, and his attempt to narrow it down by proposing guidelines and criteria for its application. While his criteria limit judicial discretion, they do not eliminate it. Nevertheless, the tension remains, because if, after applying the criteria the court is left with a single lawful option, then normative judicial discretion no longer exists. On the other hand, if, after applying the criteria, several options remain, the criteria have not helped in making a decision, and judicial discretion will ultimately be exercised without any guidelines or restrictions.

III. IS JUDICIAL DISCRETION A SIGNIFICANT PHENOMENON?

Is judicial discretion used widely, or is it a marginal (and possibly esoteric) phenomenon that rarely comes into play? To what extent do the cases that judges perceive as "hard" require the use of judicial discretion (meaning that they have no single correct solution, as opposed to cases where legal scholars simply disagree on the solution)?

In order to decide cases brought before them, judges must interpret the statute under which the dispute will be resolved. In doing so, says Barak, they serve as the "mouthpiece of the legislator."⁴ They repeat the language of the statute without establishing any new legal norm. This is true for most cases, but not all. Sometimes there are "hard cases" which involve creating a law. In such cases, the judges may have no applicable law, or the law may be vague. When this happens, judges make a new law.⁵

Barak thus distinguishes between "easy cases," in which the judge acts as a mouthpiece, and "hard cases," in which judicial creativity is called for. However, most issues brought before the court will fall into neither of these categories. As Barak says, no sane lawyer would argue that a horse is a "motorized vehicle" in the sense that it appears in the Israeli Compensation of Traffic Accident Victims Act, 1975, or that a car driven on the roads is not a motorized vehicle.⁶ As reasonable lawyers will not employ these arguments, the court will not be called upon to decide in this kind of case or serve as a mouthpiece for the legislator. Barak explains in the Hebrew version of his book, *The Judge in a Democracy*: "My ownership of the watch I wear poses no serious legal problems. If someone else claims it is his just because he likes it, he is not going to get it. No judicial discretion is necessary. This is an easy case."⁷ Barak is of course right: Not only would such a case not require judicial discretion, but it is very unlikely it would ever come to court.

In fact, the majority of cases heard by the Israeli Supreme Court are not "easy" or as inane as whether a horse is a motorized vehicle. Nor do most fall into the "hard" category; for example, deciding whether the refusal of the Ministry of the Interior to

4. Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 ISR. L. REV. 1 (1999).

5. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 306 (2006).

6. AHARON BARAK, *JUDICIAL DISCRETION* 36 (Yadin Kaufmann trans., 1989).

7. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 31 (2004) (Hebrew).

permit a soccer stadium to be built in a certain location in Jerusalem,⁸ or the Attorney General's decision not to indict certain public figures due to lack of public interest,⁹ are within the bounds of reasonability. "Ordinary" legal cases, including some that are very interesting and challenging from a professional legal standpoint, are not "easy" or "hard" in the sense that Barak uses these terms. They have no banal solution that is obvious to all human beings, or least to all reasonable professional lawyers. And yet the assumption is that there is only one right answer to these questions, and that lawyerly expertise may find it. They fall into a category of "intermediate cases," to use Barak's terminology.¹⁰

There are disputes also in the intermediate cases. In the end, all litigation is the product of dispute, and the attorneys who represent the aggrieved parties present arguments that are legitimate, for the most part, in a court of law. But one cannot assume from this that all possible resolutions of the dispute are equally valid. When citing the rationale for their decisions, even in cases of dissent, the existence of several legitimate options is rarely noted by the judges. Barak himself acknowledges on only a few occasions that his decision was ultimately a choice between equally valid alternatives. Indeed, when adjudicating ordinary cases, the job of the Court is to search, however hard it may be, for that one correct decision, without bringing in judicial discretion.

These legal intermediate cases might be compared to disputes between experts in other fields. These experts may disagree, but not about the fact that there is only one right answer. Take the diagnosis of an illness or prescribing treatment for it. It is not uncommon for doctors to disagree about what is wrong with a patient. Different doctors, each making intelligent and skilled use of their professional knowledge, may reach different diagnoses. Each of these doctors arrives at the diagnosis by discretion. In other words, the doctors weigh all the data (*inter alia*, the facts at their disposal, medical knowledge gleaned from professional literature, and work experience) and assess the importance of each component. The conclusion, the diagnosis or treatment plan, reflects the relative weight the doctor has assigned to the various components.¹¹ From a psychological standpoint, each of the doctors has exercised discretion; from a professional standpoint, each has acted properly and reasonably using legitimate medical criteria. However, this does not make all the conclusions, which may be different and even incompatible, right. Even if there is no way of knowing for sure which of the diagnoses is correct at that particular moment, one can say with certainty that only one of them (and not necessarily one reached by the doctors in question) is right. The others are wrong, or at least inaccurate or incomplete.

In the judicial process, something similar happens with regard to establishing facts. Factual disagreements between judges are quite common. Often these disagreements are not about whether the party that bears the burden of proof has sufficiently proven the facts (as in criminal cases, where the prosecution must prove a crime was committed beyond all reasonable doubt), but about the facts themselves. In other words, judges

8. Compare HCI (High Court of Justice) 581/87 Zucker v. Minister of Interior, 42(4) PD 529 (1989) (Hebrew).

9. Compare HCI 935/89 Ganor v. Attorney General, 44(2) PD 485 (1990) (Hebrew).

10. AHARON BARAK, JUDICIAL DISCRETION 39 (Yadin Kaufmann trans., 1989).

11. Compare Ariel L. Bendor, *On Aristotelian Equality, the Fundamental Right to Equality, and Governmental Discretion*, 8 REV. CONST. STUD. 1, 2-4 (2003).

looking at the same case may reach different conclusions about the facts involved, although it is clear that in practice only one set of facts occurred. Of course, the fact that experienced, reasonable judges doing their job properly and exercising discretion are liable to reach different factual conclusions does not make it possible for conflicting factual versions to co-exist.

In the vast majority of cases, this is also true in regard to legal questions. The fact that a case is emotionally trying and judges disagree on legal questions does not mean that no single correct answer exists. This will continue to be the case even if a variety of legitimate interpretations are proposed, in the sense that lawyers or judges who support them would not be considered unprofessional or incompetent.¹²

IV. JUDICIAL DISCRETION AND PURPOSIVE INTERPRETATION

1. *Purposive interpretation*

Interpretation is the core of judicial activity, from interpretation of a constitution and Basic Laws, to interpretation of statutes, and interpretation of contracts and wills. It was Aharon Barak who brought the theory of purposive interpretation into Israeli law. True, interpretation based on the purpose of norms existed in Israel also before Barak,¹³ but Barak has developed a detailed, complex and original theory of purposive interpretation, inculcating it through his legal decision-making and academic writing.

Barak's approach is based on the integration of subjective components (subjective purpose; authorial intent, and subjective teleology) and objective components (objective purpose, the reasonable author's intent and the legal system's fundamental values, and objective teleology) so they work simultaneously, rather than at different phases of the interpretive process.¹⁴

In Barak's view, the goal of interpretation in law is to actualize the purpose of a legal text.¹⁵ He presents this approach as axiomatic. He does not seriously explore other possible goals of interpretation, such as promotion of certainty. Moreover, even if the goal of interpretation includes actualizing the subjective purpose of the creators of the norm, purposive interpretation is not necessarily the optimal way to do so. As more pragmatic jurists have argued, Barak's purposivism makes it more difficult for creators of norms — whether they be government authorities or private individuals who draw up a contract or write a will — to shape the norm in a way that insures the actualization of their purpose.

Barak argues that purposive interpretation is based on three components: language, purpose and discretion.

12. At a farewell party for vice president of the Supreme Court, Theodore Orr, Barak said: "He disagreed with me, and in that, he was certainly wrong, but even a reasonable judge can be wrong sometimes."

13. See, e.g., HCJ 409/72 Hatar v. Druze Religious Tribunal in Haifa, 27(1) PD 449, 452 (1973) (Hebrew): "A known principle in legal interpretation is that words and phrases can mean different things from one statute to another. Their meaning in a given statute can be ascertained in large measure by studying the essence and purpose of the statute and the context in which they appear."

14. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 120-80 (2005).

15. *Id.*

2. *The language component*

The first component in interpretation is the linguistic factor. Language shapes the range of semantic possibilities. The legal meaning of the text — explicit or implicit — is extracted from this linguistic pool. The interpreter cannot lend a text meaning that is not supported by its language. The language component is vitally important: it sets the limits of interpretation.¹⁶ Barak explains that constitutional considerations of democracy, the rule of law, and separation of powers prevent the judge from investing a statute with meaning that is not borne out by its language.¹⁷ Similarly, a contract interpreted in a way that stretches its semantic meaning violates the autonomy of the parties and constitutional role of the court as the interpreter of an existing text, not the creator of a new one.¹⁸

The question is whether this rationale is sufficient. If the goal of interpretation is actualizing the purpose of a legal norm, and language is the means for achieving this, why must the interpretation be within the borders of the language? In practice, this linguistic demand is not always strictly adhered to. On more than one occasion, the Supreme Court has interpreted a statute in a manner that, while not contradicting the text, has clearly deviated from its literal meaning.

For example, Barak ruled by majority vote that the language of Basic Law: The Judiciary, which states that the Supreme Court is entitled to schedule an additional hearing in a case heard “by three justices,” does not mean the Court cannot hold an additional hearing in a case heard by a panel of five justices or more.¹⁹ The linguistic sense is that three is the minimal number, not the maximum, wrote Barak.²⁰ One of the dissenting justices, Theodore Or, argued that he did not have any “linguistic sense” that the Basic Law allowed for a panel of five or more: “I don’t feel any such thing for the simple reason that ‘three’ is not ‘five,’ and not ‘seven,’ or any other number apart from ‘three.’”²¹ Another opinion delivered by Barak in which he held that the phrase “no other court” meant “courts in general, with the exception of the High Court of Justice,” also appears to be at odds with the language, even if his interpretation dovetails with the purpose of the interpreted statute.²²

The most significant example of a reading of a statute that diverges from its wording is the Supreme Court’s interpretation of the term “in good faith” as it appears in the Contracts (General Part) Act, 1973. According to the Act, the parties are expected to “act in customary manner and in good faith.” This applies to negotiating a contract, implementing it, fulfilling its obligations, and enjoying the rights granted under it. The

16. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 97-109 (2005).

17. See, e.g., *id.* at 372-75.

18. *Id.* at ch. 13.

19. See VA (Various Applications) 1481/96 (CFH (Civil Further Hearing) 2401/95) Nahmani v. Nahmani, 49(5) PD 598 (1996) (Hebrew). The day after a panel of five delivered its opinion, Zeev Segal wrote in *Haaretz* daily newspaper: “This judgment does not have to be the final word. ... The statute allows for a further hearing when a case is heard by a panel of three, but this can be interpreted as allowing a further hearing when the panel is larger than three.” Zeev Segal, *On Nahmani*, HAARETZ (Mar. 31, 1995) (Hebrew).

20. *Nahmani* decision, *supra* note 19, at 603.

21. *Id.*, at 613 (1996) (Or, J., dissenting).

22. HCJ 212/03 Herut – The National Jewish Movement v. Chairman of the Central Elections Committee for the Sixteenth Knesset, 57(1) PD 750, 756 (2003) (Hebrew).

Court ruled that “good faith” is based on the objective criteria of how honest, reasonable people would behave. Justice Mishael Cheshin, in a minority decision, wrote that the term “good faith” is subjective in its very essence. It involves a state of mind, not external principles and standards.²³ Indeed, applying an “objective” interpretation to the term “good faith,” which is wholly subjective, basically dispenses with the limitations of language and gives complete priority to purposive considerations.

3. *The Purposive Component*

The second and most important component is purpose. Barak says that “. . . [t]he purpose of a norm is an abstract concept, composed of both its subjective and objective purpose. The first reflects the intention of the text’s author; the second, the intention of a reasonable author and the fundamental values of the legal system. The first reflects, at varying levels of abstraction, an actual intention; the second reflects, at varying levels of abstraction, a hypothetical intention. The first reflects a historical-subjective intention; the second reflects a social-objective intention. The first is a fact established in the past; the second constitutes a legal norm that reflects the present.”²⁴

In his academic writing, Barak developed a complex theory for the order of priorities in cases where the subjective and objective purposes clash.²⁵ Nevertheless, the impression is that Barak and many other justices tend to give dominant weight to the objective purpose on the few occasions when there is such a clash.

This is particularly evident in the interpretation of the Basic Laws. Although Israel’s human rights laws — Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation — were only passed by the Knesset in the early 1990s, the Supreme Court’s interpretation of them under Barak has led to outcomes that differ from the Knesset’s intent. The right to human dignity provided for by the Basic Law was stretched by the Court to include other major civil liberties, such as freedom of expression²⁶ and the right to equality,²⁷ which the Knesset has consistently refused to anchor in a basic law. Barak himself set down the main interpretive points soon after these two Basic Laws were approved.²⁸ According to Barak, the objective purpose has been given priority so as not to enslave today’s generation to the values of past generations.²⁹ This was not the thinking when the Basic Laws were promulgated, but since that time, they have been interpreted in a way that has deviated from the clear subjective purpose of the Knesset.

Many Supreme Court justices also tend to follow Barak’s approach in interpreting “ordinary” statutes, giving preference to the objective purpose when it clashes with the

23. See, e.g., CA (Civil Appeal) 6339/97 Roker v. Solomon, 55(1) PD. 199 (1999) (Hebrew).

24. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 90 (2005).

25. AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 182-206 (2005).

26. See HCJ 10223/03 “The National Census” Ltd. V. Attorney General, paragraphs 22-27 of the opinion of Justice Miriam Naor (2008) (Hebrew).

27. See HCJ 6427/02 Movement for Quality Government in Israel v. The Knesset, paragraphs 35-40 of the opinion of Chief Justice Barak (2006) (Hebrew).

28. See AHARON BARAK, *INTERPRETATION IN LAW, VOL. III: CONSTITUTIONAL INTERPRETATION* (1994) (Hebrew).

29. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 127-135 (2006).

subjective. For example, in one of her decisions Justice Tova Strasbourg-Cohen, citing Barak, wrote: “The subjective purpose, which has not been clearly and unambiguously enunciated [in the statute], must take a back step to the objective purpose.”³⁰

4. *The Discretion Component*

The third component of purposive interpretation is discretion. “I think it is a critical component of every system of interpretation,” says Barak. “It is a myth to think we can build any system of interpretation without it. Purposive interpretation openly acknowledges that. Without judicial discretion, interpretation could not fulfill its aim in law.”³¹

In his approach to interpretive discretion, as toward judicial discretion as a whole, Barak is outspoken but ambivalent. On the one hand, he presents interpretive discretion as something that is forced upon a judge and cannot be avoided. He writes, “Such “law creating” (“legislative”) activity is not a reflection of judicial imperialism. It is an indication of the uncertainty inherent in the law itself. Law is not mathematics. Law is a normative system. So long as we cannot predict the future, so long as language does not enable generalizations that extend to all relevant situations, so long as we cannot overcome human limitation, we will have to live with uncertainty in law. . . .”³² Yet at the same time, and sometimes even in the same breath, Barak speaks in favor of discretion. He writes that “. . . society cannot attain the rule of law without a measure of discretion. Law without discretion ultimately yields arbitrariness.”³³

Another issue about which Barak is very ambivalent is the manner in which discretion is exercised. On the one hand, he states that “interpretive discretion cannot be bound by restrictions.” On the other, he sets out guidelines for exercising it: “the judge has a duty to exercise his discretion reasonably. . . . The test for this is an objective one. It includes in its duty, of course, a prohibition against arbitrariness, yet it consists of more than this. At the center of this determination lies the requirement that the judicial discretion be rationale and that it consciously take into account the structure of the normative system, of the judicial institutions that create and apply these norms, and of the interrelationships among the judicial and legislative and executive branches of government.”³⁴

On the one hand, Barak acknowledges the subjectivity of interpretive discretion: “. . . A judge’s interpretation is the product of his or her personality and life experience; the product of the balance he or she strikes between certainty and experimentation, security and change, reason and emotion.”³⁵

But on the other hand, Barak also demands that judges eschew the personal and preserve their objectivity. Even when exercising interpretive discretion, judges are not free to do as they wish: “Judges may not act according their personal predilections. Or

30. CA 2112/95 Customs and VAT Department v. Elka Holdings Ltd., 53(5) PD 769, 796 (1999) (Hebrew).

31. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 207 (2005).

32. Aharon Barak, *The Role of a Supreme Court in a Democracy*, 53 HASTINGS L.J. 1205, 1206 (2001-2002).

33. AHARON BARAK, JUDICIAL DISCRETION 261 (1987).

34. *Id.* at 25.

35. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 212 (2005).

individual values, when they are inconsistent with the values of the system. Judges must make the best decision they can, taking into account objective considerations.”³⁶

When we asked Barak about his most important decisions, he cited twelve judgments, all of them, according to him, the product of judicial discretion. In each of these cases, his rationale is carefully documented, but in none of them does he write that he interpreted the law according to an “intuitive sense of the just solution.”

V. JUDICIAL DISCRETION AND JUSTICIABILITY

The question of justiciability revolves around whether a dispute brought before the Court or a public body such as the Attorney General’s office can or should be resolved by them. In Barak’s decision on the Ressler case he distinguished between “normative justiciability,” which is absolute, and “institutional justiciability,” which is partial, albeit very broad.

Absolute normative justiciability means that the law has, or should have, a say on every action or decision of human beings, government authorities or private corporations. In other words, every human act is either permissible or forbidden from a legal standpoint, and the State either allows or prohibits it. This is what is meant by Barak’s statement that “law fills the whole world.”³⁷

The significance of “everything is justiciable” in the normative sense is that the law as a system of norms, and not necessarily the court as an institution, takes a stand, or is supposed to take a stand, on every human action or decision. That makes “everything is justiciable” a logical conclusion. This is not a worldview, a value judgment, or a political opinion, with which one can identify or disagree. The same act cannot be simultaneously permissible and forbidden, or non-permissible and non-forbidden. It must be one or the other. Perhaps it would be simpler and more convenient if not everything were justiciable. But the widespread arguments against broad justiciability, both moral and political, do not grapple with the logical essence of absolute justiciability in the sense described above. Indeed, law is relevant — as a matter of logic, as a matter of what is, not what is desirable — to all human actions or omissions, and not just the tiny fraction of cases that reach the courts.

Alongside normative justiciability, in Barak’s view, there is institutional justiciability. Institutional justiciability concerns, Barak says, “the question of whether the dispute should be adjudicated in a court of law at all.”³⁸ In his words: “The question is not whether it is possible to decide the dispute according to the law and in court; the answer to that question is yes. The question is whether it is desirable to decide the dispute — which is normatively justiciable — according to legal criteria in court.”³⁹ Barak’s position in regard to institutional justiciability is that the courts are not obliged to decide every case brought before them that they are capable of deciding. Nevertheless, institutional justiciability must be as broad as possible, and courts should withhold

36. *Id.*

37. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 179 (2006).

38. *Id.* at 183.

39. 910/86 Ressler v. Minister of Defense, 42(2) PD 441, 488-89 (1986) (Hebrew). See BARAK, *supra* note 37, at 183.

judgment in cases within their authority only in rare cases. That is because there is “no harm to a democratic regime when judicial review declares actions of governmental bodies employing political considerations illegal if these bodies have broken the law. To be more precise, the Court does not review the internal logic and practical efficiency of political considerations. It examines the legality of the consideration. Such an inquiry does not harm democratic rule in any way. In a democratic regime, there is nothing that allows a majority to break the law promulgated by that regime, or says that political decisions can violate the law. Even the most political decisions must be anchored in the law.”⁴⁰

However, Barak’s view that everything is justiciable from a normative perspective and that the Court should strive for the broadest possible institutional justiciability is hard to reconcile with his views on judicial discretion. From the standpoint of normative justiciability, his claim that “the world is filled with law” (in other words, every human behavior is subject to the law)⁴¹ conflicts with his claim that there are “hard cases,” in which the law does not provide criteria for reaching a decision. As for institutional justiciability, which Barak expands based on considerations related to the separation of powers, democratic government, and the rule of law, these considerations are vastly weakened when judges have no law to guide their decision and may choose between several alternatives of equal lawfulness.

VI. BARAK AT HIS BEST: JUDICIAL DISCRETION OR EXPOSING THE LAW?

Would Aharon Barak exert such a powerful influence over law and jurisprudence in Israel, and in the realm of academic teaching and writing, if he were only appreciated for his wise discretion in balancing interests, or his intuitive sense of justice?

Aharon Barak is at his best when engaged in the analytical, rational, deductive, and occasionally inductive exposure of the applicable law. His greatness as a jurist lies in his ability to find simple answers to questions that previously seemed complex.

Thus, for example, in his virtuoso decision in the Rosen case,⁴² which he handed down soon after his joining the Supreme Court, he helped to clarify the ridiculously convoluted phrasing of the Commodities and Services (Control) Act, 1957, which had made life difficult for generations of Israeli judges. Article 3 of this Act states, *inter alia*, that “the Minister shall not use the authority granted under this Act unless a reasonable basis exists for assuming that some measure must be taken for an essential purpose.” Article 1 of the Act defines “essential purpose” as “a measure the minister perceives as essential” for accomplishing a series of general objectives. Under what circumstances would a “reasonable basis” be sufficient, and under what circumstances would the minister have to deem the measure “essential?” In his decision, Barak extracted three

40. 910/86 Ressler v. Minister of Defense, 42(2) PD 441, 492 (1986) (Hebrew).

41. Moreover, some behaviors and decisions have legal significance that goes beyond what is permissible or forbidden. For example, the decision of a governmental authority to revoke a license, if reached in accordance with the law, can stop someone who was authorized to do something from carrying out his plan. In other words, the authority wields legal power, and a ruling that its decision is permissible (or not forbidden) does not express its main legal significance. But the minimal legal reference to a human action is permitting or forbidding it.

42. ACJ 790/78 Rosen v. Minister of Trade, Industry and Tourism, 33(3) PD 281 (1979) (Hebrew).

separate components from this fuzzy wording, all of them prerequisites for invoking the minister's authority under the Act — a measure to be taken, a specific purpose, and the relationship between the two. Barak wrote that the specific purpose would need to pass only the test of reasonability, while the relationship between the purpose and the intended measure would need to pass the test of essentialness — a stricter criterion. In this (relatively) clear and simple interpretation, which also helped the Supreme Court interpret similar acts,⁴³ Barak used no judicial discretion.

Of special note is Barak's 1995 opinion on the United Mizrahi Bank case,⁴⁴ which he regards as the most important judgment to be handed down in Israel.⁴⁵ In his opinion Barak recognized the supreme constitutional standing of the Basic Laws and the authority of the courts to strike down "ordinary" statutes that contradict basic laws. In our discussions, Barak said he exercised judicial discretion here. But in this opinion, and the long line of books, articles, and legal opinions in which he expounds his theory of the Basic Laws enjoying the status of a constitution, there is no mention of judicial discretion. Moreover, those who disagree with Barak, even if they know the literature well, tend to say he is simply wrong rather than arguing that his decision may be legal and reasonable, but he should have chosen another option, just as legal and reasonable.

In the long run — and Barak agrees on this — the two major roles of the judge, bridging law and reality⁴⁶ and defending the Constitution and its values,⁴⁷ are not articulated exclusively, or even mainly, through judicial discretion. They are put into practice first and foremost by the judge's ability to explore the applicable law, even if it is not explicit or spelled out in a way that leaves no doubt.

Moreover, the Supreme Court is called upon to fulfill these two roles only on rare occasions. Even if these lofty roles require exercising normative judicial discretion (and Barak does not claim this is necessary in all cases), when one considers how infrequently the Court acts in these capacities, it is hard to accept the idea that discretion is an essential component in bridging law and reality and in defending the Constitution and its values.

The fear is that the judicial discretion upon which Barak places so much emphasis will be perceived by lawyers and the general public not as a supplement to legal know-how and professionalism, but as a substitute for them, or even worse — evidence that they do not exist. This fear is not hypothetical. As professors of law, one of our jobs is to convince students that public law is not limited to the discretion of judges in general, or to the discretion of Barak in particular.

Barak does not deny that his approach is eclectic, drawing on a variety of legal philosophies without fully committing to any of them. As he himself stresses: "From the outset of our studies in law school until the end of our professional lives, we are exposed to various philosophical approaches to the law: positivism, naturalism, realism, legal process, critical legal studies, law and sociology, law and economics, feminism, and

43. See, e.g., HCJ 2994/90 Poraz v. Government of Israel, 44(3) PD 317 (1990) (Hebrew).

44. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 (1995) (Hebrew).

45. See ARIEL L. BENDOR & ZEEV SEGAL, *THE HATMAKER – TALKS WITH JUSTICE AHARON BARAK* 251 (2008) (Hebrew).

46. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 5 (2006).

47. *Id.* at 20.

others. I have found these theories to be of great interest, for each has an element of truth. Nonetheless, human experience is too rich to be imprisoned in a single legal theory. . . . Indeed, in my view, only by considering all the theories and giving each of them the appropriate weight it is possible to understand the role of the judge.”⁴⁸

Barak’s judicial realism is manifested by the very fact that he recognizes the existence of judicial discretion. But Barak writes little and says little about his exercise of true judicial discretion — the “subjective” kind, which is not constrained by any rule.⁴⁹ In the end, the most important aspect of judging, according to Barak, lies not in judicial discretion but in its boundaries. Ultimately, these boundaries demarcate the large expanses of law where true judicial discretion does not exist.

VII. THE HATMAKER

Despite all the above, Aharon Barak is etched in the public mind as a revolutionary judge who has frequently exercised discretion in interpreting and even creating the law. There is no question that without Barak, the decisions of the Supreme Court and life in Israel would be very different from what they are today. Barak has been instrumental in promoting freedom of expression and leading Israel toward a constitutional revolution.

For a very long time, the court system in Israel was identified with Barak. Those who attacked the judicial activism of the Supreme Court really meant Barak, even when other justices wrote the opinions. Barak was the Israeli judiciary personified.

In the past, the Israeli judicial system enjoyed a large measure of institutional prestige and its courts inspired public trust. Barak, more than the founding fathers of the Israeli Supreme Court and more than his colleagues, stood out as a star in the legal firmament, a prodigy, even before his appointment as chief justice. This appointment placed him in center stage, impacting on the whole system, for good and for bad. The drop in public esteem of the Supreme Court had much to do with Barak’s emphasis on judicial discretion. In the eyes of the public, the justices, who were not elected by the Israeli public, were using discretion and their personal “agenda” to intervene in the defense and economic policies of the elected arms of government — the Knesset and the Cabinet. Barak is no doubt aware of his special power and standing, but he plays modest. As he put it during our talks, his colleagues in the Supreme Court “saw that I am not a revolutionary for the sake of being a revolutionary. They understood that I am not some academic trying to stir up trouble, but really a very pragmatic person who is giving the Court tools to develop.” These supposedly modest sentiments actually enhance the sense of Barak’s powerfulness and his awareness of it.

Aharon Barak has reshuffled the deck and changed the rules of the game. Public eagerness to hear what he has to say, as the hatmaker of the Israeli legal system for over three decades, has not died down despite his retirement from the bench. His judicial hat has descended on the world of Israeli law and will remain there in the days to come.

48. *Id.*, at 116-17.

49. *Id.* at 67. Barak writes that “at the end of judicial activity, towards the conclusion of judicial decision making – in situations of judicial discretion – justice is the appropriate value with which the judge should decide. . . . When the other values do not lead to decision, it is appropriate for the judge to turn to his sense of justice.”