



## The John Marshall of Israel

There is much debate over the legacy of Aharon Barak. But what is beyond dispute is that no one has had a more profound impact on Israel's highest court than he has. Justice Barak joined the Israeli Supreme Court in 1978 and served as its chief justice from 1995 to 2006. In October, Barak spoke with *California Lawyer* editor Martin Lasden at Yale University, where he is now a visiting professor of law.



Aharon Barak

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Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics, coproduced by *California Lawyer* and UC Hastings College of the Law.

**Q.** Since we are at Yale, I thought I'd begin by throwing out the phrase "countermajoritarian difficulty," which a Yale law professor coined many years ago to describe those times when unelected judges overturn laws that reflect the will of the people. Now, since you were the chief justice who asserted the power of your court to overrule laws passed by Israel's legislature, I'm wondering whether you think this difficulty is overrated?

I think it is very much overrated. In fact, I don't think it's a problem at all. And for the following reason: I agree that the judge is a countermajoritarian force, as the judges in most countries of the world are. But that doesn't create the countermajoritarian difficulty. The countermajoritarian difficulty was created by the constitution itself. And this document binds the legislature. So what is the judge's function? The judge's function is to construe the constitution. And to the extent that judges are loyal to the constitution, they are loyal to the countermajoritarian argument.

**You were born in Lithuania, which the Nazis invaded when you were five, and I understand that your parents smuggled you out of the Jewish ghetto in a bag of some sort. How vividly do you remember your-**

**self being carried away in that fashion?**

I do remember. But I don't know how much I remember is reality and how much I remember are stories about reality. But yes, we were in the ghetto, and when we entered there were something like 30,000 Jews, and I think after the war maybe 5,000 or fewer remained.

**In 1960 you were working in the attorney general's office in Israel when Israeli agents captured Adolf Eichmann in Argentina and brought him to Jerusalem for trial on war crimes. As I understand it, you did not want to be involved at all in that prosecution and in fact managed to secure a transfer to another department. Why did you feel that way?**

Well, you know, as a Holocaust survivor it's not easy for me to go back to the memories. It's not that I was against the Eichmann trial in Israel. I thought Hannah Arendt was wrong about her criticism. But I myself just asked to be relieved.

**Eichmann, of course, was found guilty of crimes against humanity for his role in the Holocaust and was subsequently executed. Do you have a problem with the death penalty?**

Yes, I do.

**Even for these sorts of crimes?**

I do. I think it's cruel and unusual.

**So when as a sitting supreme court justice you had to rule in 1993 on whether there was enough evidence to sentence John Demjanjuk to death for being "Ivan the Terrible"—a notorious Nazi prison guard—weren't you in a very conflicted situation?**

That's right. So what were my options? To say to my chief justice, no? He needed me, and so I have done it. But if you ask me if I would like to sit in those cases, I'm sure that no judge likes to sit in those cases. But the moment you have [the death penalty] in your system, it's part of the rules of the game. You have to sit in those cases. And if you will not sit, then another judge will sit who may feel as bad as you feel about it. So I had no other choice but to resign. And that was too much. It didn't go so deep as to require resignation.

**Of all the opinions you've written as a supreme court justice, the one that's most often quoted is the one you wrote in 1999 finding that Israel's security services could not legally torture detainees even in so-called ticking time bomb cases. When you wrote that opinion, there were estimates**

**floating around that as many as 85 percent of Palestinian detainees were being subjected to the interrogation techniques you objected to. Did you have a lot of confidence that your ruling would be followed?**

Absolutely. In fact, when I left the court I got a present from our security forces. They gave me the original telegram that was sent on the day our judgment was rendered. The judgment was rendered at 9:00, so I think it was sent at 10:00 to all interrogators: "Stop."

**If you read what the Fourth Geneva Convention or the Hague Regulations have to say about belligerent occupations, is it reasonable to conclude that all of Israel's settlements are in violation of international law?**

I really don't want to talk about it. It is such a hot topic in Israel nowadays. And as it is such a hot topic, I must impose on myself some restrictions. But what I can tell you is what I wrote in my [August 2004] judgment on the [West Bank] security fence. In this judgment I took account of a judgment that was rendered several weeks earlier by the International Court of Justice, which said that the fence is illegal because its aim is to protect the [Israeli] settlements and the settlements are illegal. And my reaction was that I don't express any view whether the settlements are legal or illegal because this was not the case before me. But even if the settlements are illegal the settlers are not outlawed, and as long as they are there they should be protected. You cannot go and just shoot because they are there illegally.

**There are those in Israel who have said that by curbing the excesses of the occupation, you have also managed to legitimize the occupation. Do you think there's any truth to that?**

Well, I know this criticism was raised by a very tiny minority of liberals, let's say. But I think it's quite clear that what the supreme court has done is to preserve the rule of law in this area. ... In some cases we failed, we're human. But the idea that it's better if it's worse—I don't accept that. 🌐

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