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## Book Reviews

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## BOOK REVIEWS

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In this issue, we are excited to bring you two reviews that are different from the book reviews we typically publish. The first is an in-depth review by Jeffrey B. Morris and Shari G. Newman of *The Judge in a Democracy*, a timely book by Aharon Barak, the recently retired President of the Israeli Supreme Court and a world-renowned jurist. The second is a review of a new database by Oxford University Press called “International Law in Domestic Courts.” This important new database will undoubtedly become an essential research tool. In the future, we hope to publish more in-depth reviews and more reviews of electronic resources. Enjoy!

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***Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession.*** By Frank Hoffmeister. Leiden, The Netherlands: Koninklijke Brill NV, 2006. Pp. ix, 289. ISBN 90-04-15223-7. €95.00; US\$124.00.

*Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* is a concise discussion of a multi-faceted deadlock that has been ongoing for over three decades. Frank Hoffmeister sheds new light on this international spectacle, which has involved a growing number of parties since the European Union’s rise. The Cyprus problem indeed has been written about for decades as the situation has developed and become more complex. The legal aspects alone have occupied the research and discussion of international lawyers, politicians, and academicians alike.

As is the case with every dispute, in the Cyprus issue there are at least two sides to consider. Hoffmeister sincerely attempts to address the position of all concerned parties; however, the UN position, or more specifically the Annan Plan(s),<sup>390</sup> seems to hold the favored position throughout the text.<sup>391</sup> As the subtitle suggests, the Annan Plan comes to the forefront of the

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<sup>390</sup> There have been five versions between 2002 and 2004 but collectively they are referred to as the Annan Plan.

<sup>391</sup> See, for example, [The Annan Plan for Cyprus](http://www.hri.org/docs/annan/) available online <http://www.hri.org/docs/annan/>

discussion and legal analysis more often than the position of other parties. Given Hoffmeister's credentials, this is not surprising. He was after all the EU expert seconded to the UN for the preparation of the latest version of the Annan plan and an official at the Cyprus desk at Directorate-General on Enlargement of the European Commission. Although this book is not official or semi-official, as the author clearly states, it is based on his experience dealing with the Cyprus problem. This is not stated to take away from the legal analysis. Indeed, Hoffmeister provides a notable assessment of the legal dilemma and brings the reader up to date with the current situation.

In fewer than three hundred pages, the author has sketched a rough anatomy of the Cyprus problem for the novice reader. The extensive footnotes are accompanied by appendices, containing a few of the referenced legal doctrines, followed by an impressive bibliography and a scant index. The chronological arrangement of topics and a further division of each chapter into facts and legal analysis offers a polished presentation and a pleasant read. In particular, the historical discussion of the relations between the parties involved is noteworthy and necessary for the legal analysis of each stage. The delicate brokering of the UN and the EU is integrated seamlessly into the discussion throughout the text. The author is successful in condensing the facts and rendering the legal application. Excluded from this text are "geostrategic interests of the actors involved, negotiation tactics [and] the political interaction of their steps." However, these are addressed selectively to give a reasonable account of the state of affairs.

This title would be a valuable addition to any international law collection and a fine beginning into developing an understanding of the legal aspects of the Cyprus problem.

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***EU Administrative Governance.*** Edited by Herwig C.H. Hofmann and Alexander H. Türk. Cheltenham, UK: Edward Elgar Publishing Limited, 2006. Pp. viii, 622. ISBN 1-84542-285-6. £95.00; US\$160.00.

This book is a detailed illustration of European Union's (EU) complex, multi-level administrative governance system. It is a compilation of multiple chapters written as individual essays by various European and American legal scholars, legal practitioners, and political scientists. The key

to this collection of essays is the highlighted cooperation among administrators in Europe that has become the backbone of the EU's unique system of government and governance. The book is divided into three main areas: Part I (Policy Process) contains three chapters; Part II (Sectoral Areas) contains eight chapters; and Part III (Cross-Sectional Analysis) contains five chapters as well as a conclusion chapter. Each chapter is well cited, illustrated, and followed by a useful bibliography.

Chapter 1 focuses on the several administrative and institutional ambiguities presented by the EU. Most notably, the focus is on the EU's mix of national, functional, and supranational governance dynamics. Particular emphasis has been put on how the European Commission controls and polices expert groups in order to influence and manage the policy-making agenda. Using small and large expert groups to set the Commission agenda has activated the dynamics of instrumental rationality and path dependency. These expert groups are used as arenas for deliberation, brainstorming, and intergovernmental conflict solving. This is where complex technical problems are solved, according to the authors of this chapter. As a final note, the chapter challenges the current intergovernmental divide in European integration scholarship by studying the integration of domestic and EU institutions in the agenda setting phases of the EU decision-making process. This is a dense chapter, which is well cited and supported by the latest literature in the field of administrative law. The analysis employed here is strictly from a social science perspective.

Chapter 2 reflects the fact, which is well documented by the authors, that administrators play a crucial role within the EU decision-making process even though the actual number of staff working within the EC institutions is comparatively low. The main conclusion drawn by the study presented in this chapter shows that EC preparatory bodies do not just carry out certain preparatory work; they also help broker compromises. This chapter is a study of both roles and practices of preparatory bodies of the EC as well as the roles of administrators. It is a well thought out, thorough study that helps explain the complex intermingling of various administrative facets of the EU. Throughout their analysis, the authors focus on improvements for current regulatory mechanisms.

Chapter 3 focuses on the administrative policy implementation. The current and future constitutional structures, under the EU/EC treaty and under the treaty establishing a constitution for Europe, are no more than a framework. This chapter explains both the legality of the delegation of administrative powers and the constitutional principles of administrative law in the form of substantial and procedural fundamental rights. The main conclusion of the chapter is that broad constitutional structures do not change the fact that the details of structures of EU administrative governance for

implementation are developed by secondary legislation and institutional practice in every policy area. With respect to the protection of individual rights, this chapter does not analyze the types of legal acts that can be the result of administrative action in the EU. Instead, it takes more of an inside point of view by systemizing and giving an overview of forms of co-operation between administrations from different levels.

Part II of the book entitled “Sectoral Areas” contains the next 8 chapters. This portion of the book analyzes various administrative law areas. First, the authors examine the comitology in EU’s environmental policy and European governance of food safety. Next, the authors analyze the modernization of EC antitrust enforcement, the need for a single EU securities regulator, and the relationship of administrative governance to state aid policy. The last three chapters analyze asylum and immigration policy, EU police and judicial co-operation, and the common foreign and security policy as they individually relate to administrative governance. Each chapter makes excellent use of supporting documentation and provides a useful, if not familiar, critique of the procedural mechanism from its theoretical basis to its implementation stages. This section of the book is strong because it makes excellent use of data as well as available legislation to ensure that readers arrive at the same conclusion as the author. Nevertheless, each chapter suffers from the “individual essay” syndrome. Instead of blending together, each chapter may be read as an individual essay with little or no connection to the chapter following it.

Part III of the book entitled “Cross-section” analysis contains the final 4 chapters. The authors first review and analyze the EU committee governance and they conclude that a considerable amount of time and energy is spent on these assignments by representatives of the individual states. The study successfully shows that smaller EU member states spend more time on these committees than their larger counterparts. The next essay deals with the thorny issue of comitology and European Courts. The author of this chapter exquisitely demonstrates the fact that on occasion courts have been inconsistent and unpredictable when applying existing general administrative law principles. The author seems optimistic about the progress of comitology in Europe although the early results have left the final results quite unpredictable.

The last two chapters examine various models and scenarios faced by the EU in its quest for a form of unified administrative governance. The theoretical approach by the authors is well documented and thorough but it lacks much practical appeal outside the realm of law practice. The reader is not only made aware of the current problems of democratic legitimacy in a supranational government but also of potential new problems that may arise.

The chapter is well thought out and timely but largely a theoretical analysis in light of the missing constitutional piece currently plaguing the EU.

Overall, this work is a critical analysis of the current body of EC administrative governance up to February 2006. The book is well researched and exquisitely cited so to provide its readers with a quick reference to the most pertinent case law holdings and legislation in this growing area of law. This work, however, is a compilation of individual essays rather than a cohesive, free flowing text. The book contains numerous references and notes, tables of various study results, as well as a table of legislation necessary in any EU law text. The book is not conventionally organized, and it lacks the easy follow through reading of a classic textbook. Nevertheless its exquisite analysis of a difficult regulatory arena warrants a recommendation for law schools that offer comparative law courses or courses in European Union law.

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***Fresh Water and International Economic Law***. Edited by Edith Brown Weiss, Laurence Boisson de Chazournes, and Nathalie Bernasconi-Osterwalder. Oxford, New York: Oxford University Press, 2005. Pp. xxv, 480. ISBN 0-19-927467-3. £74.95; US\$145.00

In one way or another, water plays a role in the provision of all basic human needs and luxuries: ecology, health, agriculture, sanitation, transportation, recreation, culture, energy, manufactured products, etc. No other natural resource is more universally essential or more diverse in its beneficial uses to humans than fresh water.

As an introductory text in 15 chapters, *Fresh Water and International Economic Law* “focuses on the implications of the use of water as an economic good, the implications of commoditization of fresh water, and the bearing of international economic law on water issues.” The predominant theme throughout the book is that society’s interest in promoting the equitable and efficient use of this essential resource is reflected both in the symbolic human rights view of fresh water and in its economic value.

This timely volume acknowledges all of the complex and conflict-ridden issues revolving around water uses in the context of currently existing trade instruments, regulatory mechanisms, and contemporary legal thought. Is there a human right to water? What does that right encompass? Can we balance competing interests and encourage efficiency? How will scarce water

resources be allocated? How will economic models look and operate? How will conflicts be resolved?

The movement in water management, which is not new but on the rise, from supply augmentation (dam projects and storage reservoirs) to reallocation (water transfers) argues that markets rather than administrators should determine the comparative value of alternative water uses. However, international efforts to manage, protect, and distribute water must consider the multiple uses of water and the complex interactions among users. While international trade and privatization seem like useful mechanisms to equalize access and increase efficiency, significant challenges are also present.

The authors of this book provide a practical analysis of international trade agreements and other documents that are or may be applied to water resources and the roles of international organizations in these issues. A number of the chapters analyze historical and/or new legal theories relevant to water that intersect with trade agreements and the mechanisms by which they are implemented. Often, the authors lay out background on general economic theories, legal theories of property rights, and statistics relating to water resources. Throughout, the geography of specific examples is diverse.

The five broad topics of the book cover: (I) issues arising out of transfers of fresh water; (II) water services and the right to water; (III) groundwater use and agricultural subsidies; (IV) water and investment; and (V) resolving conflicts over water. In Part I, the authors analyze how water disputes arise, compare US constitutional law to international trade law, and discuss how trade laws apply to the transportation of water and when water becomes a “product” or “good” subject to trade laws.

The contributions in part II explain how the right to water is implicit in legal human rights instruments, discuss the extent to which water-related services (e.g., sanitation) may be covered by the General Agreement on Trade in Services (GATS), and explore how GATS rules may detrimentally impact a government’s ability to regulate privatized water services.

Part III reveals the effects of agricultural subsidies, recognizes the divergent meanings of “water use efficiency” and the diverse objectives regarding water management, and explores the question: Does international trade law offer a means to reduce or eliminate detrimental subsidies? In Part IV, the authors discuss such topics as investment rules and foreign investment protection, how these rules affect the ability of governments to manage and protect water resources, specific cases decided under NAFTA, how investment treaties can help settle water disputes, and participatory standards for local communities. Finally, Part V examines inter-State mechanisms for dispute resolution, procedures available to non-State actors, and the roles of transparency, effective public participation and *amicus curiae* in resolving water disputes.

Fresh Water and International Economic Law is one of the latest of 11 titles published since 2001 in the Oxford University International Economic Law series. This compilation was inspired in part by two exploratory seminars in 2002 and 2003 organized by the Georgetown University Law Center and likely was encouraged by the United Nations' official recognition of the right to water in 2002.

Resources in the volume include a two-page list of acronyms and abbreviations; 15 tables, figures and maps; and eight Appendixes. The Appendixes include excerpts from relevant international documents, a bibliography, and a three-page list of water-related web sites. Although some chapters admit a utopian vision and a more truly global view of resource use and human survival than currently seems possible, the text generally offers balanced and thoughtful suggestions for resolution of the issues presented. As a timely introduction to international trade law and to current legal thought on fresh water issues specifically, *Fresh Water and International Economic Law* is a complement to other legal materials on international, economic, environmental, human rights, and natural resources topics.

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***International Law in Domestic Courts (ILDC)***

Oxford University Press (2006-)

<http://ildc.oxfordlawreports.com>

<http://www.oxfordonline.com/freetrials>

£1300-1500/\$2000-2490 for academic institutions

For more information, please contact Julie McGeough at OUP, (212) 726-6419; [julie.mcgeough@oup.com](mailto:julie.mcgeough@oup.com)

This new online resource from Oxford University Press (OUP) is a welcome addition to the realm of international legal research materials. International Law in Domestic Courts (ILDC) is a database containing cases from national courts that deal with international law topics from over 60 jurisdictions. The special features include English translations of cases and scholarly commentary by experts highlighting the most important points of international law. The cases are supposed to be the ones that are “setting precedents, reaffirming standards, or are otherwise addressing some critical

issue in international law.”<sup>392</sup> More detailed information about how cases are selected is available on the website.<sup>393</sup>

According to the website, “[t]he cases are selected by local reporters in conjunction with the OUP editorial board and feature expert commentary, full texts of judgments in their original language and translations of key passages of non-English judgments into English.” The reporters come from a variety of jurisdictions and many work in major law schools. Depending on the country, there may be one or more than ten reporters. The reporters provide the bulk of the content: they suggest cases for inclusion, draft the reports, revise reports after the editors have reviewed them, and supply the text of the judgments (often indicating which sections should be translated). They also keep the content fresh by notifying OUP of changes or updates to the cases.

The Editorial Board is comprised of people who were chosen based on their expertise in the application of international law in domestic law. They also represent various regions of the world: Europe, Africa, Latin America, Israel and the Middle East, North America, and Asia. The editorial board works under the direction of André Nollkaemper and Erika de Wet, professors at the University of Amsterdam Center for International Law.<sup>394</sup> This editorial board is unique because it was involved during the conceptual stages of the project and they continue to provide their expertise by reviewing and editing the case notes and commentaries.

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<sup>392</sup> 47 *Law Librarian Newsletter* 1 (Winter 2006/2007).

<sup>393</sup>

[http://ildc.oxfordlawreports.com/uid=105396/subscriber/about\\_ildc?topic=about\\_ildc\\_main](http://ildc.oxfordlawreports.com/uid=105396/subscriber/about_ildc?topic=about_ildc_main).

<sup>394</sup> <http://www.jur.uva.nl/aciluk/>.

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## Welcome to International Law in Domestic Courts

ILDC brings you a regularly updated repository of domestic cases in international law from over 60 jurisdictions. The cases are selected by local reporters in conjunction with our editorial board and feature expert commentary, full texts of judgments in their original language and translations of key passages of non-English judgments into English.

[Search the database](#)  
[Browse the database](#)

### Newly reported cases

**The Government of the Republic of Slovenia** Slovenia  
 5th June 1997  
**Keywords:** Aliens, treatment, Corporations, Good faith, EC (European Community), EU (European Union), General principles of international law, International law and domestic law, conflicts between, International law and domestic law, direct effect, International law and domestic law, incorporation, Nationality of corporations, Property, Responsibility of states, Self-determination, Sovereignty, Treaties, application, Treaties, ratification, Treaties, reservations and declarations, Treaties, self-executing.  
 Whether a State organ may ratify an international agreement which would oblige Slovenia to change its Constitution.

**Figure 1: ILDC Homepage**

Basically, ILDC is a straight-forward database to use. You can search or browse the database. Right now, browsing works well since there is not a large number of cases. As you can see from Figure 2, there are 17 categories and the total number of cases for each category is indicated by the number on the right. Not surprisingly, there are more cases in the areas of human rights and criminal law than in economic or environmental law. Browsing by jurisdiction and alphabetically by case name is also available.

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INTERNATIONAL LAW IN DOMESTIC COURTS

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Quick search  Search

You are in [Home](#) > Browse by key category

## Browse by key category

- [Immunities](#) (42)
- [Individuals and human rights](#) (88)
- [International criminal law](#) (23)
- [International economic law](#) (2)
- [International environmental law](#) (3)
- [International organizations](#) (8)
- [International responsibility](#) (6)
- [Jurisdiction](#) (33)
- [Law of the sea](#) (3)
- [Law of treaties](#) (20)
- [Organs of the State](#) (3)
- [Relationship between international and domestic law](#) (66)
- [Sources of international law](#) (11)
- [Statehood](#) (7)
- [Subjects of international law](#) (2)
- [Territory](#) (2)
- [Use of force and the law of armed conflict](#) (28)

**Figure 2: Key Category Browse Page**

Two search mechanisms are provided: a quick search and an advanced search (see Figure 3). The “Help” pages provide good instructions on how to use both search functions, along with tips on how to combine them. The advanced search has several search options. The “key category” field contains the same topical areas as the browse feature. There is an extensive keyword search as well as fields for jurisdiction, parties, and search terms. The free text search field and the quick search allow for stemming, use of Boolean operators, and phrase searching. Searches can be limited by date and to either the headnotes or judgments only.

**Advanced search**

Key category

Keyword

Select one Keyword, or, if you would like to select multiple Keywords click the box to see a full list

Jurisdiction

Parties

From

To

ILDC case number

Type in the case number, e.g. for ILDC 8 (BW 2009), just type 8

Search term

Search All

Or

Headnotes

Judgments

**Figure 3: Advanced Search Page**

Each document (report) in the database has the following components, including a good deal of value-added content:

- information about the case (jurisdiction, citations, date of decision, court, judges, procedural stage, subsequent case development)
- key categories (searchable via the advanced search)
- keywords (searchable via the advanced search)
- core issues of the case
- facts
- holding
- commentary by the reporter (also called commentator, the name is listed on the navigation side of the report)
- judgment, both in the original language and an English translation

The navigation bar on the left side of the screen allows you to jump to various sections of the document and provides several print options (Figure 4). A truly valuable feature is the ability to access the original judgment as well as the translation (see Figure 5).

The screenshot shows the website interface for 'INTERNATIONAL LAW IN DOMESTIC COURTS'. At the top, there is a navigation bar with links: Home, Advanced search, Browse, Help, Site map, Contact us. Below this is a secondary navigation bar with links: Find out more, Sign up for case alerts, Credits, Commentators, Subscriber services, Logout. The main content area displays the case title 'Turkish citizen G' and provides detailed information including Jurisdiction (Germany), ILDC Citation (ILDC 65 (DE 2004)), Original Citation (Görgülü case (Individual constitutional complaint), BVerfG, 2 BvR 1481/04 of 14 October 2004, 111 Entscheidungen des Bundesverfassungsgerichts (BVerfGE), 307—332, [2004] Neue Juristische Wochenschrift (NJW) 3407—3412), Date of decision (14th October 2004), Court (Federal Constitutional Court (Bundesverfassungsgericht)—Second Senate), Judges (Hassemer, Jentsch, Bross, Osterloh, Di Fabio, Mellinshoff, Lübke-Wolff, Gerhard), Procedural Stage (Constitutional complaint against orders of the Naumburg Higher Regional Court (Oberlandesgericht) of 30 June 2004 (14 WF 64/04) and 30 March 2004 (14 WF 64/04), [2004] Europäische Grundrechte-Zeitschrift 749—751, following decision of the European Court of Human Rights, Case of Görgülü v Germany, Application no. 74969/01 of 26 February 2004), and Subsequent case developments (Final decision on the merits; not subject to appeal. Decision confirmed by the Third Chamber of the First Senate of the FCC in a temporary injunction of 28 December 2004, 1 BvR 2790/04. Constitutional complaints by G of the related orders of the Higher Regional Court of Naumburg were decided by: Order of the First Chamber of the First Senate of 5 April 2005, 1 BvR 1664/04; Order of the First Chamber of the First Senate of 10 June 2005, 1 BvR 2790/04 (English texts available at <http://www.bverfg.de/entscheidungen>)).

On the left side, there is a 'Quick search' box and a 'Print Preview' section with buttons for 'Full report', 'Headnote and translation', and 'Headnote'. Below the 'Print Preview' section is a 'Commentator' section.

Figure 4: Sample from a Section of a Report

The screenshot shows the 'Judgment' section of the report. It includes a 'Judgment: English Translation' section with a link to 'View the judgment in the original language'. The text of the judgment is as follows:

Order of the Second Senate of 14 October 2004  
— 2 BvR 1481/04 —  
in the proceedings on the constitutional complaint of the Turkish citizen G., ...  
against the order of the Naumburg Higher Regional Court

a) (Oberlandesgericht) of 30 June 2004 — 14 WF 64/04 —,  
b) the order of the Naumburg Higher Regional Court of 30 March 2004 — 14 WF 64/04 —

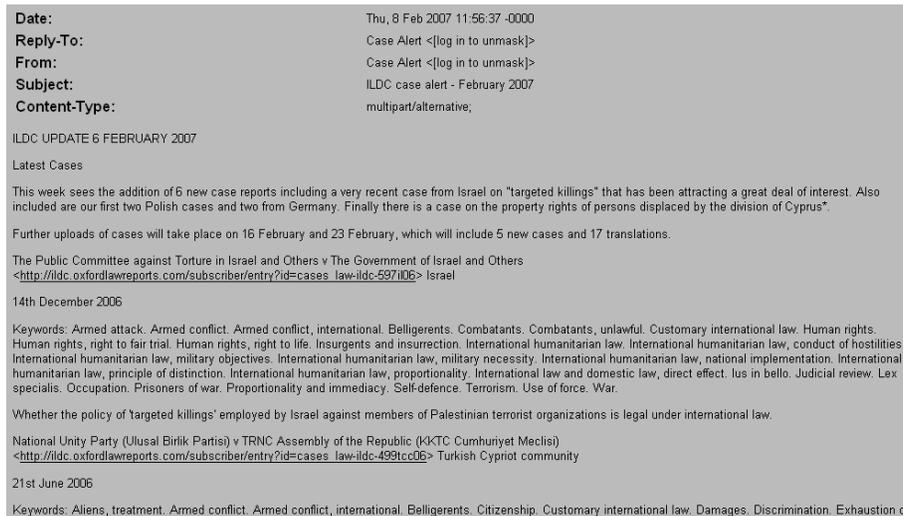
and the complainant's application for a temporary injunction  
...

**RULING:**  
The order of the Naumburg Higher Regional Court of 30 June 2004 — 14 WF 64/04 — violates the complainant's fundamental right under Article 6 of the Basic Law (Grundgesetz) in conjunction with the principle of the rule of law and is reversed.  
The matter is referred back for a new decision to another civil senate of the Naumburg Higher Regional Court.  
Apart from this, the constitutional complaint is rejected as unfounded.  
This also disposes of the application for a temporary injunction.  
The Land (state) Saxony-Anhalt is ordered to reimburse two-thirds of the complainant's necessary expenses.

**GROUNDS:**  
A.  
1 In his constitutional complaint, the complainant challenges inter alia what he regards as the unsatisfactory enforcement of the judgment of the Higher Regional Court of Naumburg (OvG) of 30 June 2004 (14 WF 64/04) and the order of the Higher Regional Court of Naumburg of 30 March 2004 (14 WF 64/04).

Figure 5: Original Judgment

Other features include a list of newly added, updated, and upcoming case reports, and a new case alerts email service (see Figure 6).



**Figure 6: Sample of Case Alert Email**

The database does have some limitations. On the content side, the biggest limitation is the number of cases, approximately 200 cases at the time of the writing of this review. It is important to note that the archive of cases is not extensive and for several jurisdictions the collection only goes back to 2000. However, new content is constantly being added.

On the functionality side, there is no way to save searches or mark what you find to create a cite list. It would be handy to be able to mark cases and email them or create a list to email or print. An email feature that allows you to have the data in text format with live links would also be useful. Currently, the only output feature is print (in HTML), so you cannot download or email easily. Also, you can only print the entire report or only the headnotes. Other limitations include the inability to search by original case citation (although you can search via the free text field) and there is no way to sort or limit an existing search.

ILDC is still a work in progress with many future developments planned. OUP plans to add better ways to refine searches and sort results; include the ability to browse by year; add additional print options (such as printing documents as PDFs); and make a complete list of all of the cases accepted for inclusion available on the site. In addition to new functionality, there is a plan to add a collection of jurisprudence from international courts and tribunals. The first of these, on international criminal law (edited by William Schabas) will be ready in November, 2007. Another module will

focus on human rights cases from the UN treaty bodies as well as the cases from other human rights systems. While these collections will require a separate subscription, users will be able to search across collections using one interface.

The practice of States, which includes the decisions issued by domestic courts, is important when dealing with the application and interpretation of international law. In the past, locating this information was challenging at best. Researchers had to comb through State yearbooks on international law, *International Law Reports*,<sup>395</sup> and other tools that lack some of ILDC's strengths, namely timeliness and being able to search electronically. Therefore, I highly recommend this database for those who are interested in the relationship between international and domestic law as well as those interested in dispute settlement. As this database develops, it will become an important tool for scholars, practitioners, judges, and students.

Marci Hoffman

Associate Director and International & Foreign Law Librarian  
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***Can Might Make Rights? Building the rule of law after military interventions.*** By Jane Stromseth, David Wippman, and Rose Brooks. Cambridge, New York: Cambridge University Press, 2006. Pp. x, 414. ISBN 978-0-521-67801-8. £17.99; US\$29.99

According to the authors of *Can Might Make Rights? Building the rule of law after military interventions*, "building the rule of law is a constant balancing act." There is no one path or process that will always work to establish the rule of law in a post-intervention society. Interveners must be aware of the possible pitfalls as they approach the establishment of the rule of law. They must have a sense of the cultural framework of the country and be mindful of this as they consider the legal institutions that should be developed. Historically, there are numerous examples of failed attempts to establish the rule of law because the interveners have not considered the whole process and have focused on specific aspects, such as rebuilding the police force, establishing the legislature, or writing a constitution. While these are certainly important goals, creating the rule of law is much more complex than those individual steps.

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<sup>395</sup> *International Law Reports* (1950-) and *Annual Digest and Reports of Public International Law Cases* (1919-1949).

With this in mind, Jane Stromseth, David Wippman, and Rosa Brooks have written *Can Might Make Rights: Building the Rule of Law After Military Interventions*. Their goal for the book is “to offer enough theoretical and historical background to enable readers to contextualize and understand the basic dilemmas inherent in interventions designed to build the rule of law while offering concrete suggestions for getting it right in the future.” The book was originally conceived with a focus on humanitarian interventions and the development of the rule of law following that type of intervention. However, in the wake of September 11<sup>th</sup>, it evolved to include interventions motivated by national security concerns. The authors realized that although the basis for intervention was different, the problems that arose in post-conflict attempts to establish the rule of law were similar.

In the introductory chapter, the authors discuss the rule of law using the metaphor of building a house. This is a helpful technique because it clearly sets forth the vital steps of establishing the rule of law, yet it places them in a context that may be more familiar. Important aspects include understanding how previous houses have been built, getting the proper blueprint, gathering the necessary resources, and showing the occupants that the house is worth waiting for. Applying these concepts to the creation of the rule of law, what is needed are “a basic theoretical and historical background, a blueprint, building blocks, money, appropriately skilled people, and a cultural commitment to the underlying project.” The chapters of the book follow this structure and discuss these steps in sequence. Examples from recent post-intervention attempts to establish the rule of law in countries such as Somalia, Bosnia, Kosovo, East Timor, Sierra Leone, Liberia, Afghanistan, and Iraq are included throughout the book. These are helpful because they put the theoretical concepts into a more understandable context.

Chapters two and three examine the historical and theoretical framework. Understanding this background and learning from it are key elements for current attempts to build the rule of law. Chapter 2 begins with a discussion of the general international legal bases for intervention. It gives examples of interventions that were considered legitimate, such as Afghanistan and Somalia, and those that were more controversial, such as Kosovo and Iraq. This discussion is relevant because the perceived legitimacy and/or legality of the intervention can have a strong impact on the effort to build the rule of law. Chapter 3 presents a detailed discussion of what exactly the rule of law is. As the authors point out there is no single agree-upon definition for the rule of law. An analysis of the different theories relating to how to conceptualize the rule of law is presented, as is a historical look at rule of law programs and how they have been arranged. Following this background discussion, the authors present their definition of the rule of law, which they describe as “descriptive and pragmatic” and which

serves as an introduction to their approach to creating the rule of law that they call a “synergistic approach.” The synergistic approach has three key elements; it is end-based, adaptive, and systemic. Each of these elements is explained within the context of building the rule of law.

In Chapter 4, the authors discuss the importance of “the blueprint for the political reconstruction of the affected country.” Blueprints are intended to set out the steps by which the rule of law can be established. Out of necessity, they will be developed on a case-by-case basis because each country has a different cultural background and each intervention has a specific underlying cause. The chapter uses a number of different countries as examples to illustrate the blueprint design process and to highlight some of the successes and failures that can occur.

The major building blocks for the creation of the rule of law are outlined in chapters five, six, and seven. These chapters address the issues with the application of the “synergistic approach” developed in Chapter 3, which shows the ways that this approach can improve the progress toward the rule of law. The focus of chapter 5 is on reestablishing security, which in the authors’ opinion is the most important step toward building the rule of law. Chapter 6 provides a look at how to build or rebuild the justice system, which includes not only the courts, but also the police force and prisons. Respect for human rights and determining how to hold people accountable for past atrocities is the topic in Chapter 7. These chapters are full of clear, well thought out discussions and provide examples of how they have been handled in recent post-conflict situations.

The last major factor to be considered is the cultural commitment to the rule of law. Attempts to establish the rule of law will have a hard time succeeding in the absence of the acceptance by the people who are going to subject to it. In Chapter 8, the authors discuss the necessity of creating a rule of law culture, where the vast majority of the people understand the value of the legal institutions and support them. They describe both the important issues and possible pitfalls present during the development of a rule of law culture. Finally, Chapter 9 applies the concepts of the synergistic approach to the area of rule of law assistance and explores how effective planning and coordinated efforts among the different international actors can produce a more successful rule of law structure.

Ms. Stromseth, Mr. Wippman, and Ms. Brooks specifically state that *Can Might Make Rights* is not a how-to manual. Their purpose is to set forth a practical and pragmatic framework that can be referenced as interveners and others begin the process of developing the rule of law in post-conflict

situations. In this regard, the book succeeds, as it sets out their ‘synergistic approach’ for implementing the rule of law in a manner that is understandable and useful.

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***The Judge in a Democracy.*** By Aharon Barak. Princeton, New Jersey: Princeton University Press, 2006. Pp. 360. ISBN 978-0-691-12017-1. US\$29.95.

Princeton University Press has just published another book written by the prolific President of the Israeli Supreme Court, Aharon Barak.<sup>396</sup> With the exception of three chapters singled out in this review, this work of the internationally famous jurist has little that will be novel to anyone who has given considerable thought to the job of judging. However, for those who may be interested in the underpinnings of the philosophy of an activist, audacious judge (the “John Marshall of Israel”), or those who may be interested in getting a sense of the work of an impressive judicial system, this book is well worth reading.<sup>397</sup>

To better comprehend the significance of Barak’s book and to understand what has shaped his judicial philosophy, brief sections on Israel’s history, governance, and the work of its Supreme Court precede its consideration.

[A Capsule Background on the History of Israel, Its Governance, and the Work of the Israeli Supreme Court](#)

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<sup>396</sup> THE JUDGE IN A DEMOCRACY is a substantially expanded version of an article that originally appeared in the *Harvard Law Review*. See Aharon Barak, *Foreword: The Role of a Supreme Court in a Democracy*, 116 HARV.L.REV. 16 (2002). See also Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAM. L.REV. 125 (2003).

<sup>397</sup> See, e.g., David B. Sentelle, “Judicial Discretion: Is one More of a Good Thing too Much?,” 88 MICH.L.Rev. 1828 (1990) (reviewing AHARON BARAK, JUDICIAL DISCRETION (1989)).

Surely, the judiciary of a small nation, besieged for its more than fifty year history, lacking a constitution,<sup>398</sup> and yet remaining throughout a republic with an independent judiciary almost as protective of human rights as any in the world is worth attention. Moreover, there are those who believe that the judicialization of politics has “probably proceeded further in Israel than in any other democratic country.”<sup>399</sup>

Israel, gained its independence in 1948. Intended as one of two states to be created from the mandated Palestine territory, Israel was attacked by its neighbors almost immediately after it declared its independence and has been in a state of emergency ever since. From the birth of the state until 1977, the Labor Party (Mapai) has dominated Israeli governance. Since that time Israel has been governed by short-term Parliamentary coalitions unable to give strong leadership in dealing with major problems. From its birth, Israel has had to come to grips with major problems that would trouble any nation. Additionally, Israel is faced with issues associated with being a Jewish state, including assimilation of Jewish immigrants, relations between synagogue and state, and terrorism.<sup>400</sup> The political culture of the Jewish state has been greatly affected by four major wars; waves of immigration from Europe, Muslim states, and the former Soviet Union; and the debate over the future of the territories seized in the Six Day War of 1967, a debate which grew in intensity after the 1973 Yom Kippur War. If in the early years of the State there were deep divisions between the very religious and the secular Ashkenazim from Northern Europe, almost sixty years later the polity is not only divided between those two groups, but also the Sephardim, the Russian immigrants, and the Arabs.<sup>401</sup>

Public cynicism born of rampant partisanship, self-interested politics, and ineffectual governance eased the way for the expansion of judicial power. Israel’s judges, particularly its Supreme Court, proved ready to decide

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<sup>398</sup> On the controversial question as to whether Israel now has a written constitution, see *infra*, pp. 17ff.

<sup>399</sup> Martin Edelman, Israel in THE GLOBAL EXPANSION OF JUDICIAL POWER 403 (C.Neal Tate & Torbjorn Vallinder eds., 1995) 403; Hillel Neuer, *Aharon Barak’s Revolution*, AZURE, Winter 1998, at 13, 18 available at <http://www.azure.org.il> (then follow “Neuer” hyperlink); Ruth Gavison, *The Israeli Constitutional Process: Legislative Ambivalence and Judicial Resolute Drive* 18 (Ctr. for the Study of Rationality, Discussion Paper # 380, 2005).

<sup>400</sup> Alan Dowty, *Emergency Powers in Israel: The Devaluation of Crisis in COPING WITH CRISIS: HOW GOVERNMENTS DEAL WITH EMERGENCIES* (Shao-chuan Leng, 1990)1, 2; Aharon Barak, *Freedom of Speech in Israel: The Impact of the American Constitution*, 8 TEL AVIV U. STUD.L. 241, 248 (1985).

<sup>401</sup> Edelman, *supra* note 4, at 403; Gavison, *supra* note 4, at 21; Emily Bazelon, *Let There Be Law*, LEGAL. AFF., May-June 2002, at 25, 29.

difficult policy questions regardless of political fallout. As a result, many questions of policy were transformed into legal questions by attorneys and resolved by the courts. The political branches often felt relieved, and Israel's courts became more controversial.<sup>402</sup>

The writing of a constitution for Israel was delayed by the war that immediately followed the creation of the State. This result did not displease Israel's first Prime Minister, David Ben-Gurion, who saw advantages for the governing Mapai Party from a Knesset unconfined by a constitution and who also realized that his coalition government would be jeopardized by a battle between Orthodox and secular forces over the role of Jewish law in the new state. Instead of writing a constitution, a process was agreed upon where the Knesset could enact "Basic Laws," building a constitution, chapter by chapter, that ultimately could be unified. Most of the Basic Laws would contain provisions to insure that they would not be altered or superseded by emergency resolutions, but otherwise they were not formally entrenched.<sup>403</sup> From 1958 to 2001 fourteen Basic Laws were adopted by the Knesset dealing with such matters as the Knesset, the President, the Armed Forces, and Rights of Human Dignity and Liberty.

The Supreme Court of Israel is not only Israel's highest appellate court, but as a court of first instance (the High Court of Justice) it may hear anyone with a grievance against the government. The High Court of Justice has the power to issue writs of habeas corpus as well as other prerogative writs. In this way, actions challenging government policy may be brought directly to the Court.<sup>404</sup>

The fourteen Justices of the Supreme Court<sup>405</sup> and the judges of lower courts are chosen by a nine-person committee chaired by the Minister of Justice. One other member of the Cabinet, three members of the Supreme Court (including its President), two members of the Knesset and two members

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<sup>402</sup> Edelman, *supra* note 4, at 403, 409; Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. L.U.L.J. 605, 616.

<sup>403</sup> Martin Edelman, *Judicial Review and Israel's Struggles for a Written Constitution*, in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 157, 158 (Donald W. Jackson & C. Neal Tate eds., 1992); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 Am.L.Comp.L. 585, 588 (1996); Martin Edelman, *The Status of the Israeli Constitution at the present Time*, SHOFAR, June 22, 2003, at 7-8, available at <http://www.highbeam.com>; Dowty, *supra* note 5, at 24.

<sup>404</sup> Haim S. Cohn, *The First Fifty Years of the Supreme Court of Israel*, 23 J.SUP.CT.HIST.SOC'Y 3 (1999); Neuer, *supra* note 4, at 43n.16.

<sup>405</sup> The Court sits in panels of three. The Supreme Court originally had six members, but is has not been increased to fourteen.

of the Israeli bar also sit on the committee.<sup>406</sup> It has been suggested that during his presidency, Aharon Barak has dominated the process of selection. However, appointments have largely been based on merit. Judges, attorneys or academics can be members of the Israeli Supreme Court. The Justices have life tenure but also a fixed retirement age of seventy.<sup>407</sup>

The status and jurisdiction of the judicial branch are not entrenched, although the Court is unaffected by orders made under emergency regulations.<sup>408</sup> The Minister of Justice is responsible for managing the administration of the courts, and with the consent of the president of the Court chooses the director of the courts, who is accountable to the Minister.<sup>409</sup> A permanent parliamentary committee determines judicial salaries and pensions.<sup>410</sup>

Thus, to protect the rule of law, the Israeli political elite insulated the judiciary from the political environment. The courts have throughout the history of Israel retained great public support and legitimacy as independent, objective, and impartial. They have been seen as a fundamental barrier against partisan decisions and as the guardians of fundamental values embedded in the rule of law. Nevertheless, public criticism of the courts has increased since the early 1990s.<sup>411</sup>

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<sup>406</sup> The actual appointment is made by Israel's largely ceremonial President.

<sup>407</sup> Ina Friedman, *Court of Controversy*, JERUSALEM RPT, Jan. 23, 2006, at 12, 16.

<sup>408</sup> Shimon Shetreet, *The Critical Challenge of Judicial Independence in Israel*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 233, 245-46 (Peter H. Russell & David M. O'Brien eds., 2001)

<sup>409</sup> *Id.*, at 247.

<sup>410</sup> Cohn, *supra* note 9, at 5ff; Martin Edelman, *The Changing Role of the Israeli Supreme Court*, in COMPARATIVE JUDICIAL SYSTEMS 93, 99 (John R. Schmidhauser ed., 1987).

<sup>411</sup> Edelman, *supra* note 4, at 406, 412; Shetreet, *supra* note 13, at 239; Edelman *supra* note 8, at 161.

Paradoxically, the Justices have often been used to head or be part of commissions of inquiry into major public controversies on matters of the highest national importance. Justice Kahan led the inquiry into the Phalangist massacre of Palestinian refugees in Beirut. Judge Barak himself was a member of that commission. Supreme Court President Shimon Agranat headed a commission investigating responsibility for unpreparedness for the Yom Kippur War, which led to the resignations of Prime Minister Golda Meier and Defense Minister Moshe Dayan. Edelman, *supra* note 15, at 97; Shetreet, *supra* note 13, at 238.

The Israel Supreme Court, 1948-1978

At the time of independence, Israel inherited the British legal system for the Palestine mandate; a system devoid of express legal guarantees of political and civil liberties and rife with emergency regulations permitting the suspension of rights.<sup>412</sup> Yet, Israel also inherited from Great Britain the principle of government under law. In its early years, the Israeli Supreme Court was concerned with establishing its authority. Thus, the Court tended to avoid direct confrontations with the political branches by deferring to the Knesset, government, and Israeli defense forces. Even then the government blatantly defied court orders and the Knesset often overruled the Court. Nevertheless, the Court gradually established standards for the rule of law.

The Israeli Supreme Court was able to intervene in sensitive political matters by employing the powers of statutory interpretation and administrative review. Laws and administrative practices were interpreted through a prism of human rights. The Court started with the premise that, when legislating in any given area, the legislature had not harbored any intention to deviate from basic individual rights, unless it had done so explicitly and specifically. Legislation was also read in light of super-statutory principles, i.e., the Proclamation of Independence, principles of democratic government and the rules of natural justice. Violations were permissible only if explicitly authorized by law.

Where executive actions were concerned, the Court presumed that no government official would act against an individual unless the official had been clearly empowered to do so. Legislation delegating power to ministries was not interpreted as delegating the power to enact restrictions on individual liberty. Despite the absence of explicit statutory authorization, the Court was willing and able to discern, infer or interpret protection of individual rights within the law, and able to develop a conception of law based on a theory of rights.<sup>413</sup>

It would take roughly a generation for the Israeli Supreme Court to conclude that universally recognized basic human rights were part and parcel of the Israeli legal system. The Court expanded its conception of the rule of law, and asserted the right to interpret legislation in the light of principles of

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<sup>412</sup> PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE AGRANAT AND THE ZIONIST CENTURY 92 (1997).

<sup>413</sup> Menachem Hofnung, *supra* note 8, at 580, 590, 597; Gavison, *supra* note 4, at 12; Edelman, *supra* note 4, at 410; Never, *supra* note , at 13; LEHAV, *supra* note 17, at 96ff.; Amos Shapira, *The Genesis and Impact of Rights Protection under Israel's Basic Law*, 6 *TOURO INT'L L.REV.* 38-39; Martin Edelman, *Human Rights in the Israeli Court Systems*, Paper delivered at the 1980 Ann. Mtg ., AM.POL.SCI.ASS'N at p. 5..

natural justice. By applying the doctrine of reasonableness, the Court evolved from an organ whose function was to ensure that administrative bodies act within their own jurisdiction into a court that applied substantive review of the contents of administrative actions and policies.<sup>414</sup> By 1974, it was clear that the Court's concern for the rule of law was being extended to protect human rights. In this way, the Israeli Supreme Court came to play an important role in establishing Israel's commitment to a liberal political culture of universal, equal civil rights and liberties.<sup>415</sup>

### Aharon Barak

Aharon Barak was born in Kouno, Lithuania in 1936. Most of his family was murdered in the Holocaust, but Barak and his parents survived the Nazi occupation. After his father was released from Soviet prison,<sup>416</sup> the family fled on coal trains and arrived in Israel in 1947. Barak earned his first degree in law from the Hebrew University of Jerusalem at the age of twenty-two and his doctorate at twenty-seven. A tenured professor at thirty-two, Barak was appointed Dean of the law faculty of the Hebrew University in 1975. An important scholar, Barak is the author of ten books including five volumes covering the interpretation of legal documents from constitutions and statutes to contracts and wills.<sup>417</sup>

In 1975, Barak was also appointed Israel's Attorney General. In that office he prosecuted senior political figures including Leah Rabin, the wife of Yitzhak Rabin, and served as a member of the Israeli negotiating team at Camp David in 1978, where he acted as legal advisor, drafter and go-between. The same year he was named to the Supreme Court. He became its Deputy President in 1993 and President in 1995.<sup>418</sup>

As President of the Supreme Court, Barak has been a dominant force. He is not only the intellectual leader of the court, he also exercises leadership through the appointment and assignment process.<sup>419</sup> For Barak, the role of the judge is to protect freely the rule of law in a democratic society by ensuring

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<sup>414</sup> Hofnung, *supra* note 8, at 601. See also Edelman, *supra* note 4, at 410.

<sup>415</sup> Shapira, *supra* note 18, at 38-9; Edelman, *supra* note 4, at 410.

<sup>416</sup> His father had been accused of being a Zionist.

<sup>417</sup> Barak, *PURPOSIVE INTERPRETATION OF THE LAW* (2005). See also Barak, *JUDICIAL DISCRETION* (1989).

<sup>418</sup> Hillel Neuer *Aharon Barak's Revolution*, *AZURE*, (1998) No. 3 at 14-15; Emily Bazelon, *Let there be Law*, *LEGAL AFF*, May-June 2002, at 26-27; Aharon Barak, *The Role of the Judge in a Democracy*, *JUSTICE IN THE WORLD MAGAZINE* NO. 3, available at <http://justiceintheworld.org/n14/cover.shtml>.

<sup>419</sup> Emily Bazelon, *supra* note at 6; Jonathan Rosenblum, "A Court of One", *Jerusalem Post*, Oct. 15, 1999.

the accessibility of courts, demanding that legislation be clear and by keeping the actions of the government under judicial scrutiny.<sup>420</sup> As a judge, Barak has consistently and successfully challenged traditional doctrines limiting the court's power. He has developed a judicial philosophy which assumes that anyone seeking a judicial decision on an issue that involves a substantive violation of the law or a decision in a matter which the Court considers to be in the "public interest," deserves standing and, ordinarily, a decision on the merits. Thus, he has successfully encouraged the court's intervention in an ever-growing range of cases.<sup>421</sup>

### THE JUDGE IN A DEMOCRACY

*The Judge in a Democracy* is a book by a judge about judging, and more particularly about judging in a democracy during an era in which human rights are "the core of substantive democracy." Democracies are facing the emerging threat of terrorism and the importance of the judiciary relative to the other branches has increased.<sup>422</sup>

Barak rejects the convention that the judge merely states the law and does not create it as a "fiction, even a childish approach." In the "hard cases," judges exercise judicial discretion among a number of legitimate options.<sup>423</sup> Barak is concerned with formulating a systematic and principled approach to the exercise of discretion by judges. He devotes the first part of his book to discussing the two central elements of the judicial role that go beyond actually deciding a dispute. The first element is bridging the gap between law and society as a partner in creating the law with the legislature. Barak sees the responsibility of the law to be responsive to change in society. The other element is protecting the constitution and substantive democracy as expressed in the concept of separation of powers, the rule of law, fundamental principles, the independence of the judiciary, and human rights.<sup>424</sup>

The second part of Barak's book contains two of the chapters that Americans may find the most thought provoking, i.e., those on non-justiciability and standing. In this section Barak also explores the means by which a court can fulfill its role. He touches upon public confidence, common law decision-making, and constitutional and statutory interpretation. Barak also introduces his philosophy of "purposive interpretation," a method to realize the purpose the legal text serves. Purposive interpretation is the

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<sup>420</sup> Neuer, *supra* note 4, at 18.

<sup>421</sup> Neuer, *supra* note 4, at 14.

<sup>422</sup> AHARON BARAK, *THE JUDGE IN A DEMOCRACY* xi-xiv. (2006).

<sup>423</sup> *Id.* at xiv, 119

<sup>424</sup> *Id.* at xviii

relationship between the objective purpose (hypothetical intent that a reasonable author would want to realize) and the subjective purpose (real intent of the author).<sup>425</sup> Barak next looks to balancing and weighing as a judicial tool and finally at the significance of comparative law.<sup>426</sup> He holds comparative law to be of great assistance in judging and expanding a judge's horizons and interpretive fields of vision. Comparative law helps understanding of judicial interpretation's place and the role of the judge as an interpreter by illuminating those instances where democracy infringes on fundamental values, and it also presents alternatives in considering solutions.<sup>427</sup>

In the third section of the book, Barak discusses the relationship in a democracy between the court and the political branches. Tension between the courts and the political branches is natural and desirable according to Barak. If the court's rulings were always satisfactory to the other branches, it would raise the suspicion that the court was not properly filling its role in a democracy.<sup>428</sup> Barak distinguishes between: (1) societies that regard the state with great suspicion, such as the United States, (2) societies where the state represented by the legislature and the executive is a realization of national aspiration, and (3) societies where the state is viewed as both a source of good and evil, within which the law is made up of positive and negative rights of government. This last group includes Canada and Israel.

In this section Barak also includes discussions of judicial review of legislation and of non-legislative decisions of the legislature, as well as reasonableness and proportionality as judicial tools. Barak discusses the need for constant dialogue between the judiciary and the legislature, which occurs when each branch carries out its institutional role. He supports the Canadian and Israeli legal systems, which permit the legislature to overrule a Supreme Court decision voiding a statute and allow the legislature to pass a new statute when the courts interpret a statute in a manner that is unacceptable to the legislature.<sup>429</sup>

In the fourth part of the book, Barak evaluates the role of the judge in a democracy, evaluates judicial activism and judicial self-restraint, and looks specifically at judging in an age of terrorism. For Barak, the role of the activist and the self-restrained judge relates to how well the judge realizes his/her role of bridging the gap between law and society's changing reality of

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<sup>425</sup> *Id.* at 125. In *PURPOSIVE INTERPRETATION IN LAW* (2005), Barak has applied purposive interpretation to the interpretation of all legal texts from contracts and wills to constitutions.

<sup>426</sup> *Id.* at 201. In the chapter on judgments, Barak considers the judgment's level

<sup>427</sup> *Id.* at 194-97.

<sup>428</sup> *Id.* at 216.

<sup>429</sup> *Id.* at 237.

protecting the constitution and its values. Barak refuses to classify himself as judicially restrained or judicially active, stating that he favors graduated change in law, i.e., change in accordance with the “general framework of the system, normative coherence, organic growth, natural development, continuity and consistency.”<sup>430</sup> A judge, he concludes, “can best bridge the gap between law and society by exercising partial activism and partial restraint.”<sup>431</sup>

The last part of the last section of the book concludes with a chapter on the role of the judge in theory, in reality as well as in the future. Barak states that in creating new law, the judge should first bridge the gap between social reality and the law,<sup>432</sup> and second, protect the constitution and its values. Barak believes that a judge should try to develop a judicial philosophy rather than act intuitively.<sup>433</sup> For Barak, that philosophy is purposive interpretation. In the future, change, both technological and social, will occur even more rapidly than before and legislatures will not always be able to keep pace with these changes. Thus, society will need more than ever its courts to bridge the gaps between law and life.<sup>434</sup> Democracy, Barak says, needs strong courts especially when it has a strong legislature and executive.<sup>435</sup> Barak concludes by denying that he has a political platform. He emphasizes the “chains” that bind him as a judge and as the President of the Supreme Court, and writes of judging as a mission. It is not a job; It is a way of life.

#### Barak on Justiciability, Standing and the Judicial Role and Terrorism

While *The Judge in a Democracy* predominantly outlines the role of a judge within a structure familiar to most Americans, three chapters, i.e., those on justiciability, standing and the judicial role, and the problem of terrorism will be found particularly provocative, for their approach is quite different from the practice in the United States.

For Barak, the separation of powers is the backbone of the constitution.<sup>436</sup> The three branches of government are of equal status, each having its own unique character. However, Barak has little patience for the “political question” doctrine. He begins with the view that the “law is everywhere.”<sup>437</sup> Whereas Barak may examine a decision on its merits or may

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<sup>430</sup> *Id.* at 281.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* at 306-07.

<sup>433</sup> *Id.* at 308.

<sup>434</sup> *Id.* at 310-11.

<sup>435</sup> *Id.* at 312.

<sup>436</sup> *Id.* at 35.

<sup>437</sup> *Id.* at 179.

ultimately abstain from making a decision for lack of a cause of action,<sup>438</sup> he does not believe that a court should abdicate its role in a democracy merely because it is uncomfortable or fears tension with other branches of the state. For Barak, refusal of the Court to judge an issue is “political thinking which is inappropriate for a court.”<sup>439</sup> Each branch is authorized and obligated to interpret the scope of its own authority. However, when a dispute arises as to the legality of that interpretation, the formal decision is in the hands of the judiciary.<sup>440</sup> Barak does not, however, add much to the traditional arguments that political non-accountability, professional training, and independence make the judiciary the most qualified to decide such disputes. “More than any branch, judges can be trusted to adjudicate objectively and appropriately.”<sup>441</sup>

Where the separation of powers is concerned, the role of the judge in a legal system whose values are democratic is “to preserve and protect the separation of powers.”<sup>442</sup> In contrast to the federal courts in the United States, Barak believes the judiciary should act when coordinate branches acts unlawfully. In the United States, the federal courts will not void a pardon given for improper motives, overturn defects in Senate impeachment procedures, or reverse the President’s action where he would not dismiss a Secretary of State facing criminal proceedings. In contrast, for Barak, the situations in which the courts refrain from exercising their jurisdiction would be rare and exceptional.<sup>443</sup>

Barak discusses both normative justiciability, i.e., whether there are legal criteria to resolve a dispute, and institutional justiciability, which focuses on whether it is desirable to decide a dispute that is normatively justiciable.<sup>444</sup> Institutional justiciability for Barak seems to have no independent existence.<sup>445</sup> Barak rejects the view that some cases contain a lack of judicially discoverable and manageable standards for their resolution.<sup>446</sup> Every legal problem, he says, “is encompassed in the world of

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<sup>438</sup> *Id.* at 177.

<sup>439</sup> Neuer, *supra* note 4, at 19ff.

<sup>440</sup> BARAK, *supra* note 27, at 42.

<sup>441</sup> *Id.* at 44.

<sup>442</sup> *Id.* at 45.

<sup>443</sup> *Id.* at 49-50.

<sup>444</sup> *Id.* at 178ff. See also *Id.* at 183.

<sup>445</sup> H.C. 910/86 Ressler v. Minister of Defense, 42 P.D. 441, available at

www.court.gov.il

<sup>446</sup> See Baker v. Carr, 369 U.S. 186, 217 (1962).

law.”<sup>447</sup> Barak has even argued in dicta that issues regarding war and peace may be justiciable.<sup>448</sup>

For Barak that does not mean that legal solutions are always the best solutions. The mere fact that an issue is political, i.e., it has political ramifications and predominantly political elements, “does not mean that it cannot be resolved by a court.”<sup>449</sup> That a certain matter is entrusted exclusively to one branch is not a permit for that branch to act unlawfully within the framework of that authority, nor does it mean that the question of the legality of that act is also entrusted to that branch of state. Political authorities are free to act within but not without the law.<sup>450</sup> The solution for Barak, therefore, may often be that the Court decides the case on the merits, but holds that the government has acted within a zone of reasonableness. He has, for example, taken the position that the issue of whether the government could release a terrorist within the framework of a political “package deal” was justiciable, but that the legal criteria to resolve the matter fell within the discretion of the executive.<sup>451</sup>

**Barak disagrees with the view that there are disputes that are impossible to resolve judicially without expressing respect for coordinate branches of the state. He says that “[I]t is inconceivable that preferring the judicial interpretation to the interpretation of the other branch expresses disrespect for that branch. There is no disrespect to the other branches when each branch fulfills its constitutional role and does what the law has ordered it to do.”<sup>452</sup> Barak also disputes the view that recognition of institutional non-justiciability is implicit in the concept of democracy itself.<sup>453</sup>**

Finally, Barak is unwilling to be swayed by the fact that institutional non-justiciability is justified, because it protects the court itself from a “politicization of the judiciary” that could undermine the confidence of the public in the courts. The role of the court”, he says, “is to adjudicate disputes even if the public or some portion of it does not like the outcome.”<sup>454</sup> No one

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<sup>447</sup> Barak, *supra* note 27, at 179.

<sup>448</sup> H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441 available at [www.court.gov.il](http://www.court.gov.il).

<sup>449</sup> *Id.* at 179.

<sup>450</sup> *Id.*

<sup>451</sup> H.C.6315/97, Federman v. Prime Minister (unreported). See Barak, *supra* note 27, at 180 n.12.

<sup>452</sup> H.C. 73/85 “Kach” Faction v. Chairman of Knesset, 39 (3) P.D. 141, 163. See Barak, *supra* note 27, at 184-85.

<sup>453</sup> See Barak, *supra* note 27, at 185.

<sup>454</sup> *Id.* at 188.

can fault the Israeli Supreme Court of the last twenty-five years for timidity. The Court has been repeatedly willing to examine the internal decisions of the Knesset.<sup>455</sup> It went to the merits and ruled that expropriating land in an area under Israeli military occupation for the purpose of establishing a settlement was unlawful.<sup>456</sup> It has ruled on the validity of a pardon granted by the President of the State to the Israeli General Security Service and to a number of its agents for illegal acts they had committed.<sup>457</sup> It has held that methods of interrogation employed against terrorists, such as sleep deprivation, head covering, and painful sitting positions, were illegal even if used to prevent the “explosion of a ticking bomb.”<sup>458</sup> Thus, it may not be surprising that Barak praises the U.S. Supreme Court’s decision to go to the merits in Bush v. Gore.<sup>459</sup>

The political question doctrine in American law is “confusing and unsatisfactory,” and an area which has not profited by judicial consistency.<sup>460</sup> It is now limited to the Republican Form of Government Clause of Article Four, with cases involving activities of political parties, foreign affairs issues, Congress’s ability to regulate its internal processes, the process for ratifying constitutional amendments, the impeachment process, and instances where a federal court cannot shape equitable relief and American judges with cases in some of these areas might profit by consideration of Barak’s approach, even though Israeli judges are advantaged by the fact that they need not be constrained about exercising undemocratic authority, because in the absence of a comprehensive, written constitution, their decisions can in some areas be overridden by a legislative majority.<sup>461</sup>

#### STANDING

On and off the bench, Barak has been a strong advocate of very liberal approaches to standing. Barak’s audaciousness takes him far beyond American judges, who are somewhat limited by Article III of the U.S. Constitution. Barak regards his role as a judge not merely as a dispute-settler, but also as one responsible for “bridging the gap between law and society and

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<sup>455</sup> Edelman, *supra* note 4, at 411.

<sup>456</sup> H.C. 390/79, Dawikat v. Gov’t of Israel, 34 (1) P.D. 1.

<sup>457</sup> H.C. 428/86 Barzilai v. Gov’t of Israel, 40 (3) P.D. 505 available at [www.court.gov.il](http://www.court.gov.il).

<sup>458</sup> H.C. 5100/94 Pub. Comm. Against Torture in Isr. V. Gov’t. Of Israel, 53 (4) P.D. 817, [1998-99 Isr.L.R. 567]. See also Barak, *supra* note 27, at 189.

<sup>459</sup> 531 U.S. 79 (2000) see also Barak, *supra* note 30 at 188.

<sup>460</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 130, 143-45 2<sup>nd</sup> Ed. 2002).

<sup>461</sup> Edelman, *supra* note 4, at 411.

protecting ... democracy.” Such a judge will tend to expand the rules of standing and release judges from the requirement of an injury in fact. For Barak and his Court, virtually everyone has standing to challenge the legality of a civil servant’s behavior. Barak’s court has adopted the view that when a claim alleges a major violation of the rule of law in its broad sense, every person in Israel has legal standing to sue.<sup>462</sup>

Barak sees the connection between the rules of standing and the principle of the rule of law. Closing the doors of the court to a petitioner with no injury in fact, who is complaining about an unlawful action of a public body, means giving that public body a free hand to act without fear of judicial review.<sup>463</sup> Barak seconds the observations of Lord Diplock that, “it would in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited taxpayer, were prevented by outdated rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”<sup>464</sup> In the end, Barak takes “issue with a standing doctrine under which someone who claims that a public body unlawfully took his private money can resort to the courts, but someone who claims that a public body unlawfully took public money cannot.”<sup>465</sup>

In its role as the High Court of Justice, the Israel Supreme Court reviewed public petitions raising such issues as: (1) whether the Attorney General exercised his discretion properly in deciding not to indict someone,<sup>466</sup> (2) whether the government held political negotiations over a peace agreement at a time when it did not have the confidence of Parliament,<sup>467</sup> and (3) whether a parole board acted lawfully when it reduced a sentence imposed by a civil court.<sup>468</sup>

If Article III of the American Constitution makes such an approach to standing at times difficult and sometimes impossible, one still may regret some of the lost opportunities to bring public authorities to account. However, where the concern is not Article III but rather concern about flooded dockets, it should be noted that the Israel Supreme Court has been successful in balancing the importance of recognizing public petitions as

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<sup>462</sup> Barak, *supra* note 27, at 192-93.

<sup>463</sup> *Id.* at 194.

<sup>464</sup> R.v. Inland Revenue Commissioner, ex parte National Federation of Self-Employed and Small Business Ltd., [1982] A.C. 617, 644. See also Barak, *supra* note 27, at pp. 194-95.

<sup>465</sup> *Id.* at 196.

<sup>466</sup> H.C. 935/89 Ganor v. Attorney General, 44 (2) P.D. 485, in PUBLIC LAW IN ISRAEL 334ff (Itzhak Zamir & Allen Zysblat, eds., 1996).

<sup>467</sup> H.C. 5167/00, Weiss v. Prime Minister, 55 (2) P.D. 455.

<sup>468</sup> H.C. 1920/00 Gaton v. Parole Board, 54 (2) P.D. 31-3.

safeguards for the rule of law and the fear of overburdening the court with petitions.<sup>469</sup>

### The Israeli Judiciary and Terrorism

American civil libertarians should envy the performance of the Israeli Supreme Court as a protector of human rights in the occupied territories. Terrorism creates tensions affecting the balance between majority rule and the protection of individual rights. Barak's position is that it is the judge's role to protect democracy from terrorism as well as from the means the state wants to use to fight terrorism.<sup>470</sup>

In stark contrast to the performance of most of the American judges, trial and appellate, who have handled terrorism cases, Barak takes the position that the protection of every individual's human rights is much more important during times of terrorism than in times of peace. Barak simply does not accept the view, quaintly expressed in translation, that "when the cannons speak, the Muses are silent."<sup>471</sup> He insists that it is unacceptable for the law to be silent during battle. The struggle against terrorism should not be conducted outside the law, but, rather, within the law. Barak does not agree with Chief Justice William Rehnquist that such questions should be deferred until the fight against terror is over. If so, he says, the protection of human rights would be bankrupt.<sup>472</sup> Barak states, "I must take human rights seriously during times of peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock."<sup>473</sup> It is in times of terrorism when public opinion is most likely to favor actions that seem to promote security that judicial independence is most necessary.<sup>474</sup> Barak reminds us "the test of the rule of law arises not merely in the few cases brought before the court, but also in the many potential cases that are not brought before it."<sup>475</sup>

Palestinians who live in the occupied areas have access to the Israel's High Court. If earlier in his judicial career Barak signed his share of orders approving exiles, demolition of houses, detention, torture, and land seizures, in later years he has led the trend towards increased judicial review of the State's advancement of security considerations.<sup>476</sup> In 1988, in the Schnitzler

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<sup>469</sup> Shetreet, *supra* note 13, at 233, 237.

<sup>470</sup> Barak, *supra* note 27, at 285.

<sup>79</sup> *Id.* at 287.

<sup>472</sup> *Id.* at 299.

<sup>473</sup> *Id.* at 285.

<sup>474</sup> *Id.* at 286.

<sup>475</sup> *Id.* at 304.

<sup>476</sup> Bazelon, *supra* note 6, at 30-31.

case, Barak wrote for the three-justice panel that overturned a decision by the military censor banning publication in a Tel Aviv newspaper of selections from an article about the Mossad.<sup>477</sup> In 1998 Barak convened a special nine-justice panel to hear six new petitions involving allegations of torture. Thereby, he signaled discomfort with the government's reliance on the defense of necessity. In September 1999, he wrote for a unanimous court that held the methods of interrogation Shin Bet (one of Israel's secret services) employed against Palestinians detained without charges violated the right to human dignity and freedom. The Court announced that it would no longer defer to the government when individual rights were concerned, even if that meant putting Israelis at risk, unless the Knesset could legalize torture as comported with the Basic Law.<sup>478</sup> The Court has also ordered the government to change the route of the barrier separating Israel from Palestinian territory and has prohibited the army's practice of using Palestinians as "human shields."<sup>479</sup>

Barak promotes a single system of balancing, rather than one for regular times and another when there is the threat of terrorism.<sup>480</sup> To carefully balance national security and human rights, he prescribes that: (1) the courts should be open to anyone with a complaint about a public authority; (2) the courts should be available in "real time," i.e., when the situation is presented; and 3) the courts should not reflexively rely on national security rationales. Security considerations, he says, "are not magic words, nor can they be 'pretextual'."<sup>481</sup> Instead, there should be specific consideration with the specific solution least damaging to human rights. Thus, in Israel judicial adjudication may come while the events being reviewed are taking place, even at the beginning of an interrogation. Further, the High Court will hear cases even if terrorist activities occur outside Israel or the terrorists are being detained outside Israel.<sup>482</sup>

Barak argues that any balance that is struck between security and freedom will impose certain limitations on both. Such a balance will not be achieved when human rights are fully protected, nor when national security is afforded full protection.<sup>483</sup> Barak concludes, "[j]udicial review of the legality

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<sup>477</sup> H.C. 680/88 Schnitzler v. Chief Military Censor, 42(4) P.D. 1. See also Shetreet, *supra* note 13, at 238.

<sup>478</sup> Bazelon *supra* note 6, at 26, 32.

<sup>479</sup> Ina Friedman, *Court of Controversy*, JERUSALEM RPT., Jan. 23, 2006, at 12, 13.

<sup>480</sup> BARAK, *supra* note 27, at 297.

<sup>481</sup> *Id.* at 301.

<sup>482</sup> *Id.* at 293, 300.

<sup>483</sup> *Id.* at 296-97.

of the battle on terrorism may make the battle harder in the short term, but it also fortifies and strengthens the people in the long term.”<sup>484</sup>

### The Constitutionalization of Israeli Law by the Barak Court

It may be helpful to set Barak’s book against the jurisprudence of the Israeli Supreme Court during Barak’s tenure as President of the Court. During this time, with much criticism, Barak has declared a “constitutional revolution.”<sup>485</sup> This constitutional revolution fit smoothly with Barak’s judicial philosophy. According to Barak, “if up until now judges were given “conventional weapons” to deal with legislation by way of interpretation and the creation of Israeli common law, not judges have been given “non-conventional” weapons.”<sup>486</sup>

The development of a constitution began with Chief Justice Moshe Landau’s decision in Bergman v. Minister of Finance almost a decade before Barak’s appointment.<sup>487</sup> In that case, the Supreme Court for the first time declared an act of the Knesset void for violating a Basic Law. The Court held that a campaign financing law had not been adopted by the special majority of the Knesset as required in the Basic Law: The Knesset. Furthermore, the law unfairly discriminated against new political parties, thus violating the equality of all before the law. Thus, the Court acted on the unarticulated premise that Section 4 of the Basic Law: The Knesset provided the catalyst for Israel accepting the principle that it ought to be governed within the parameters set out by a written constitution authoritatively interpreted by its highest court.<sup>488</sup>

In December 1975, the government introduced the Basic Law: Legislation and announced that all Basic Laws in existence and those later enacted were to be treated as superior to other Knesset legislation. However, the proposal was not adopted because of controversies over enactment of a Bill of Rights as well as disagreements over entrenchment and the supremacy of the Knesset.<sup>489</sup>

In 1979, a year after Barak was appointed to the Court, the tribunal began in the Elon Moreh case to apply more substantive criteria in reviewing administrative decisions. The case involved an order dismantling a West

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<sup>484</sup> *Id.* at 303.

<sup>485</sup> Neuer, *supra* note 4, at 17.

<sup>92</sup> *Id.*

<sup>487</sup> H.C. 98/69, Bergman v. Minister of Finance, P.D. (I) 23:693-705 (1969), in PUBLIC LAW IN ISRAEL, *supra* note 74, at 310.

<sup>488</sup> Edelman, *supra* note 15, at 101ff; Edelman, *supra* note 8, at 162ff; Gavison, *supra* note 4 at 12-13.

<sup>489</sup> Gavison, *supra* note 4, at 13. Edelman, *supra* note 8, at 165; 165; Edelman, *supra* note 15, at 104-05.

Bank settlement within thirty days and restoring land to its lawful owners, who were Arabs. The Court held that security considerations were subject to substantive review even when the authorities were operating within their power. The Court looked behind the national security argument and found it wanting.<sup>490</sup>

During the 1980s and early 1990s, when the political branches were in a stalemate, the Court took on an increasingly activist role. Among its decisions was one that ended censorship of the theater. Another acknowledged the right of newspaper reporters to refrain from disclosure of their sources. The Court also ordered the military to distribute gas masks to Palestinian residents in the occupied territory during the Gulf War and forced a judge of the High Rabbinical Court who had become the spiritual leader of a political party to retire from his judicial post.<sup>491</sup>

During this period, the Court did not hesitate to intrude into the operation of the other branches of government. It decided cases involving internal matters of the Knesset, such as the Speaker's interpretation of a Knesset bylaw.<sup>492</sup> The Court decided a case determining the power of the minister of justice to refuse to surrender a criminal fugitive declared extraditable by the courts.<sup>493</sup> The Court ruled that Prime Minister Yitzhak Rabin had to fire Interior Minister Aryeh Deri, who had been indicted for a crime, even though the Knesset had prescribed in a statute that a minister must resign when convicted of a crime.<sup>494</sup> It also held unreasonable the nomination of Yossef Ginossar, who had admitted to illegal actions and received a pardon before any charges were brought, to be Director General of the Housing Ministry.<sup>495</sup> By 1992, there were few areas of public life beyond the reach of court review.<sup>496</sup>

### The Barak Court from 1992 to Date

As of 1992, observers had no trouble agreeing that Israel did not have a constitution, and that the sovereignty of the Knesset was almost unlimited. The Supreme Court would only invalidate legislation when it conflicted with

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<sup>490</sup> H.C. 390/79 Dwikat v. Gov't of Israel, 34 (1) P.D. 1. See also Hofnung, *supra* note 8, at 590; Shetreet, *supra* note 13, at 237-238; Edelman, *supra* note 15, at 106.

<sup>491</sup> See Hofnung, *supra* note 8, at 593-94.

<sup>492</sup> H.C. 652/81 M.K. Sarid v. Chairman of the Knesset M. Savidor, 36 (2) P.D. 197.

<sup>493</sup> Shetreet, *supra* note 13, at 235.

<sup>494</sup> Friedman, *supra* note 12, at 15.

<sup>495</sup> Hofnung, *supra* note 8, at 600.

<sup>496</sup> Hofnung, *supra* note 8, at 590-91.

a specifically entrenched clause of a Basic Law or when the majority had not enacted a law specified by a clause in a Basic Law.<sup>497</sup>

In March 1992, with few members voting, the Knesset adopted two Basic Laws, one on Freedom of Occupation and the other on Human Dignity and Liberty.<sup>498</sup> Section 5 of the Basic Law: Freedom of Occupation stated that it might not be changed “except by a basic law enacted by the majority of the Knesset,” thus entrenching that whole Basic Law. That Basic Law also provided a standard for the Knesset to live up to when limiting the rights stated in the Basic Law, a standard implying judicial review. The Basic Law Freedom of Occupation provided in Section 5 that the Knesset could pass legislation that violated rights set out in the Basic Law, so long as such laws suited Israel’s values, pursued a proper purpose, and violated the right to an extent no greater than required.

While the Knesset did not clearly establish the superiority of the Basic Law: Human Dignity and Liberty over ordinary legislation nor specifically give the courts authority to determine the constitutionality of legislation that possibly conflicted with it, it provided in Section 8 that the Basic Law shall not be infringed except by a statute that befits the values of the State of Israel as a “Jewish and democratic state” and is directed towards a worthy purpose, and then only to an extent that it does not exceed what is necessary. Such a standard implied judicial review.<sup>499</sup>

Barak greeted the new order gleefully: “Every branch of the law and every legal norm will have to adapt itself to the Constitutional rule,” he said.<sup>500</sup> In 1994, the Court found that the Basic Law: Freedom of Occupation had been infringed by the practice of prohibiting wholesale importation of non-Kosher meat and struck down the law. The Knesset then overturned the decision by an override and an explicit law.<sup>501</sup>

The following year, the Court held in the Bank Mizrahi case that the Knesset had the authority to frame the Constitution and had done so in the 1992 Basic Laws. In the 139 page opinion, the Court with nine justices sitting

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<sup>497</sup> Edelman, *supra* note at 8.

<sup>498</sup> Although the Knesset is constituted of 120 members, the votes on the two Basic Laws were 23-0 and 32-21.

<sup>499</sup> Bazelon, *supra* note 6, at p. 26; Edelman, *supra* note 8, at 3; Dorner, Does Israel Have a Constitution?, 43 ST.L.U.L.J. 1325, 1327-28 (1999); Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law* 3 (Nos. 1-3, 1997);

<sup>500</sup> Barak, *supra* note 107, at 7.

<sup>501</sup> Gavison, *supra* note 4, at 14-15. The case was the Mitral case, HC 3827/93. It appears that Barak was involved in the details of the 1992 legislation and presented special comments on the 1994 amendments. Gavison, *supra* note 4, at 17.

held that it had the power to declare unconstitutional laws that do not comply with the standards of the Basic Law.<sup>502</sup> The Knesset acknowledged that power by amending the Basic Law to allow for modifications by ordinary laws if an absolute majority of the Knesset supported their passage. Thus, the power of the Israeli Supreme Court had been expanded dramatically to include the ability to strike down legislation, which in its opinion violated normative rights.<sup>503</sup>

While the Supreme Court has only wielded its power to strike down statutes twice since the Bank Mizrahi case, the existence of such an activist court serves as a check on the range of options considered by the Knesset.<sup>504</sup> More important may be the long series of basic rights that the Court has since recognized as having constitutional dimension, including rights such as freedom of expression, journalism, and demonstrations; the right to equality and non-discrimination; freedom to pursue one's own life plan; freedom from state intrusion into one's physical and mental privacy, and the right to an education. The Court has even recognized social and economic rights.<sup>505</sup>

#### Criticisms of the Barak Court

The Court has given some of the Basic Laws constitutional status and assumed the supreme authority to interpret them. With its great expansion of its role as a policy-maker, the Court has somewhat injured its legitimacy. Its security decisions have been unpopular, and as a result of other decisions, it has become identified with the secular-liberal segment of Israeli society.<sup>506</sup> Critics of the Court point out that "The decision to confer supremacy on the court was never made by any popular organ [but] [i]t has been made by judges, conferring power on the judges and placing that power beyond the reach of both legislation and constitutional amendment itself."<sup>507</sup> In May

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<sup>502</sup> Unified Mizrahi Bank Ltd. V. Migdal Collective Village, 49(4) P.D. 221, CA 6821/93. (Nov. 9, 1995). See also Edelman, *supra* note 8 at 10 ; Neuer, *supra* note 4, at 36ff.

<sup>503</sup> Neuer, *supra* note 4, at 13.

<sup>504</sup> Hofnung, *supra* note 8, at 597ff.

<sup>505</sup> See Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Neo-Liberal Economic Order*, 46 AM.J.COMP.L. 427, 444; Ariel L. Bendor, *The Israeli Constitutionalism: Between legal Formalism and Judicial Activism* 1 available at <http://ccc.uchicago.edu/docs/bendor.pdf> (last checked May 3, 2006)

<sup>506</sup> Hofnung, *supra* note 8, at 602.

<sup>507</sup> Gavison, *supra* note 4, at 28. See also Ari Shavit, *Ruth Gavison Loyal Opposition*, HAARETZ, December 12, 1999 available at <http://www.netanyahu.org/loyoparishav.html>.

2003, Knesset Speaker Reuven Rivlin charged that Israel had been the victim of a constitutional putsch.<sup>508</sup>

In many ways, Israeli criticism of the Barak Court has been reminiscent of the criticism of the Warren Court in the United States. The Court has been criticized for acting as “the supreme moral arbiter of society.”<sup>509</sup> It has been accused of “usurping the legislature’s role...making democratic politics...largely irrelevant.”<sup>510</sup> It has been further argued that “[r]ather than allowing the political process to handle problems through consensus building and compromises, the current system encourages the reduction of value-laden to technical questions, to be resolved by adjudication.”<sup>511</sup>

The Court has also been criticized for taking sides, for drawing upon “the majestic generalities” of the new Basic Laws, and for reflecting the values of an “enlightened community” just like them, which is comfortable with individual autonomy and human rights.<sup>512</sup> Ruth Gavison states that it is wrong for the court to make use of its power to “decide in favor of Westernism and against traditionalism; or in favor of modernity and individualism and against communitarianism.”<sup>513</sup> A more extreme critic has paired Barak with Ariel Sharon as having a hidden agenda “to emasculate Jews and erase Israel’s Jewish character.”<sup>514</sup>

The Court has lost support among Jewish nationalists, the Orthodoxy, and security maximalists.<sup>515</sup> The backlash against the Court has led to large demonstrations. It has also led to proposals to increase the number of justices as well as to an attempt to deprive the Supreme Court of much of its jurisdiction by creating a new “constitutional court.” Barak responded by calling the proposed constitutional court “a cockroach.”<sup>516</sup>

### Conclusions

Within months, Aharon Barak will retire from the Israel Supreme Court after a twenty-eight year tenure, thirteen as its President. At a time it is under attack, the Court will sustain the loss of a commanding presence and

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<sup>508</sup> Gavison, *supra* note 4, at 11.

<sup>509</sup> Shavit, *supra* note 115, at 6.

<sup>510</sup> Evelyn Gordon, *Aharon Barak's Agenda*, Jerusalem Post; Nov 17, 2005 at 16.

<sup>511</sup> Hofnung, *supra* note 8, at 2

<sup>512</sup> Never, *supra* note 4, at 3.

<sup>513</sup> Shavit, *supra* note, 115 at 6.

<sup>514</sup> Paul Eidelberg, *The Hidden Agenda of Ariel Sharon and Aharon Barak* 4, Nov. 2, 2005 <http://www.theraphi.com/ppe/thaoasaab.html>

<sup>515</sup> Edelman, *supra* note 8, at 12-13.

<sup>516</sup> Bazelon, *supra* note 6, at 26, 32.

towering intellect who has polished political skills. In addition, Barak's seat is only one of several that will need filling. The Minister of Justice has postponed convening the committee that appoints Justices, because she believes it is stacked against the appointment of Ruth Gavison, a towering intellect who objects to Barak's views on judicial review, justiciability, and much else.<sup>517</sup>

Heretofore, the Court has been protected from serious damage. Successive governments of Israel have accepted the constraints placed on them by the Court, apparently because of the net benefit they receive from decisions conferring legitimacy upon them.<sup>518</sup> The Court has used its wiles and rendered judgments that have avoided confrontation by postponing operative orders.<sup>519</sup> And, in spite of the growth of criticism, public opinion remains behind the Court, based upon a belief that security from arbitrary governmental coercion is based upon a strict adherence to the rule of law.<sup>520</sup> Even Ruth Gavison says, "Our Supreme Court is very impressive. All told, it has excellent people, it enjoys a very strong status at home and high professional prestige. We can all take pride in it."<sup>521</sup>

Into the mix at this time, however, are thrown the variety of efforts going forward to create a constitution for Israel; the effects of the recent election; the continued divisions between the Orthodox and non-Orthodox over the role of Jewish law; and the atrophying of the power of the Ashkenazi elite. The Ashkenazi still control the instruments of the law, but they are a beleaguered minority.<sup>522</sup>

Americans reading this book, a book of a remarkable judge's philosophy of the role of the judicial branch, should be aware of the central role the author has played in Israeli constitutionalism. Many Americans may be wary of Barak's expanded view of standing, abhor his disregard of the concept of non-justiciability, and fear the restrictions on the government even during times of terrorism. What Barak prescribes for the role of the judge in a democracy may not inevitably lead to a profound accumulation of judicial power. Instead, they are merely checks on the other branches of government, ensuring that the fundamental values and principles that democratic societies hold to such high regard are in fact promoted. While changes in an established political system have the potential to cause a sense of instability,

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<sup>517</sup> Friedman, *supra* note 12, at 12-13.

<sup>518</sup> Gavison, *supra* note 4, at 18, n. 56.

<sup>519</sup> Shetreet, *supra* note 13, at 241.

<sup>520</sup> Edelman, *supra* note 4, at 406.

<sup>521</sup> Shavit, *supra* note 115, at 5-6.

<sup>522</sup> Shavit, *supra* note 115, at 5-6; Friedman, *supra* note 12, at 16.

fear, and criticism, from Barak's point of view "this modern development is not to increase the power of the court in a democracy but rather to increase the protection of democracy and human rights."<sup>131</sup>

Jeffrey B. Morris and Shari G. Newman<sup>523</sup>

*A Jury of Whose Peers? The Cultural Politics of Juries in Australia.* Edited by Kate Auty and Sandy Toussaint. Crawley, Western Australia: University of Western Australia Press, 2004. Pp. ix, 174. ISBN 1-920694-17-X. US\$35.00

If the criminal courtroom were a stage (as indeed it so often has been in pop culture), who would be the stars? The jury, according to Kate Auty and Sandy Toussaint, editors of *A Jury of Whose Peers?*, a collection of seven essays written by contributors running the gamut from academic to the "average Joe." The collection, which is subtitled *The Cultural Politics of Juries in Australia*, puts the jury center stage in an attempt to examine the culture of the courtroom as it is both created by and imposed upon the jury as a discreet social body.

Auty and Toussaint, a magistrate and an anthropologist respectively, aim to place legal studies within the framework of "cultural studies." The goal is an interesting and an important one, but here, the editors have sacrificed depth for breadth. The entire book, including notes and index, is a slim 174 pages, only 122 of which are substantive text. In that short space, seven authors cover such diverse topics as the emotional and practical demands placed on jurors (chapter one) and barristers (chapter two), juror competence (chapter three), the inequality of Australian aborigines (chapters four and five) and battered woman syndrome (chapters six and seven).

The tones of the various chapters are also uneven, ranging from humorous to passionate to academic. Indeed, the editors did this intentionally, arguing that the shifting voices reflect the complexity and ambiguity of the discussion. As a result, one of the central functions of editing a collection - bringing together a multiplicity of perspectives around a core theme to create a diverse yet coherent reading experience - is ignored. Here, the only commonality between the essays is that they each mention juries, but even that connection is tenuous. For example, the last two essays on battered woman syndrome are chiefly critical of the way abused women

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<sup>131</sup> Barak, *supra* note 27, at 22-23.

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are handled by the judicial system as a whole and barely mention what if any role the jury plays in the dysfunction of that particular defense in the Australian legal system.

Yet there are a few if not gems than at least semi-precious stones in this collection. Indigenous writer and film-maker Richard Frankland's piece is a poignant personal exploration of the disconnection between the ideal of a representative jury and the reality of continuing prejudice. Because of the historical and continuing oppression of aboriginal communities in Australia, Frankland painfully concludes, "No jury will ever be my peers." Editor Kate Auty's piece takes up the historical half of this equation and is a thorough and well-documented introduction to the legal treatment of Australian aborigines over the past century. The discussions of battered woman syndrome are also useful, particularly Jocelyn Scutt's piece arguing that the misuse and misinterpretation of the syndrome as its own defense, instead of as evidence in determining the reasonableness element of ordinary self-defense harms, abused women more than it helps them.

*A Jury of Whose Peers?* is well-edited and well-documented with extensive citations for each chapter. It includes an excellent bibliography as well as tables of other referenced sources such as archives, crown files and government publications. It also includes a table of cases cited; however, the usefulness of this feature is diminished by a lack of page number references. Finally, it has a sparse index that, though not put together as carefully as one would hope (novelist Toni Morrison who appears in two footnotes has her own entry whereas criminal defendant Robyn Kina who was discussed extensively in chapter 6 is nestled mysteriously under "Communications, language issues") is adequate for the book's size.

Because of the spotty quality of some of the pieces in this collection, it is not a recommended for smaller libraries or those with limited budgets. However, for larger academic law libraries with significant international law collections the best of the pieces in this book are worth having.

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*A Theory of International Terrorism: Understanding Islamic Militancy.* By L. Ali Khan. Leiden, The Netherlands: Koninklijke Brill NV, 2006. Pp. xi, 371. ISBN 90-04-15207-5. €115.00; US\$150.00.

L. Ali Khan is a law professor at Washburn University in Kansas. In this book, Dr. Khan explains Islamic militancy using three case studies:

Israel/Palestine, Chechnya, and Kashmir. Along the way, he discusses the role of armed jihad from a standpoint of Islamic theology, “value imperialism,” and how the very concept of the Nation State may undermine satisfactory and peaceful solutions to the conflicts under study. Building on his earlier books, *The Extinction of Nation States* (1996) and *A Theory of Universal Democracy* (2003), he also proposes novel, long-term strategies to resolve other intercultural political conflicts worldwide.

Part I of the book, dedicated to the phenomenology of terrorism, describes a “terror triangle,” a schematic that shows how the Nation State, born of violence, uses violence for its preservation. In the case of Chechnya, the Chechens are an aggrieved indigenous population and Russia is the Nation State that suppresses them. The third component of the triangle comprises the various entities, States and non-State actors, that provide moral, financial, and military support to the aggrieved population.

Part II is dedicated to the ontology of terrorism. Dr. Khan challenges the assertion, most forcefully advanced by American neo-conservatives, that Islam is inherently violence-prone, and that individual Muslims have been programmed for violence by Islamic theology. He believes the militancy of the Palestinians, Chechens, and Kashmiris arises from a set of concrete grievances, and that militancy is in its turn continually fuelled by the State violence employed by Israel, Russia, and India. He also believes the militancy is stoked by value imperialism promulgated by the three suppressive States; *i.e.* they attempt to impose their mores on the aggrieved populations, and hence do not limit themselves to strict national security or “law and order” agendas.

Dr. Khan discusses Islam’s Basic Code (the *Qur’an* plus the *Sunnah*, the reflections and deeds of Prophet Muhammad) as it applies to resistance to injustice and oppression. He describes the different types of resistance allowed to observant Muslims, and thus tries to impart a moral basis to it. He contrasts an essentially defensive Islamic resistance, which includes armed resistance, with the predatory violence employed by the three State adversaries. Dr. Khan sees this State-sanctioned counter-violence as amoral in that it arises from base motives: economic interests, coveting territory, and natural resources, or merely *raison d’État*. Moreover, he believes armed jihad is justified under the *jus ad bellum* doctrine in the United Nations Charter, in so much as the document enshrines the right to self-determination of peoples. It is understandable that Dr. Khan, a devout Muslim, should make a distinction between violence he sees as divinely sanctioned and other types of violence. It is less clear why he adverts to the U.N. Charter, since that secular document is the product of an international legal order that has not been influenced by any of the five schools of Islamic jurisprudence he describes.

Dr. Khan sees the United States as the globe's principal suppressive power, citing the country's promiscuous use of its armed forces and its ongoing attempts to impose its cultural norms on recalcitrant populations worldwide. Some of his critiques of the United States are reminiscent of those emanating from the European academic Left in the 1960s and 1970s, e.g., the United States is a rapacious empire in search of global hegemony. According to that interpretation, when the United States wasn't incinerating the world's peoples with its napalm, it was exploiting them with its multinational corporations, poisoning them with its fast food, and brainwashing them with its movies and pop music. In Dr. Khan's retelling, American foreign policy no longer seems to be in thrall to domestic capital, but is now a tool of Christian evangelicals and their neo-conservative allies, who, when not waging war on Muslims or supporting those who are, seek to defame them – before converting them.

If Dr. Khan's analysis recalls one that is both secular and Western, this is perhaps because he has spent much of his life in a secular West; although of Pakistani origin, he received much of his post-graduate education in the United States. He resembles in this way the Iranian sociologist Ali Shariati, himself a product of the Sorbonne. Dr. Shariati worked diligently to find Islamic solutions to the twin problems of (capitalist) liberalism and (communist) materialism, but he leavened his writings with a dash of *tiers-mondisme* on the Frantz Fanon model. (Dr. Shariati's works helped inspire the overthrow of the Shah, though this did not prevent the Iranian mullahs from banning his books once they had assumed power.)

In Part III of the book, Dr. Khan proposes peaceful solutions to the three conflicts under study, beginning with negotiated solutions. Because he sees the militant groups fighting on behalf of the Palestinians, Chechens, and Kashmiris as rational actors, he believes negotiating with them would not be appeasement or a fool's errand, but instead an equally rational act on the part of the three implicated States. He adduces the Canadian federal government's success in negotiating an end to separatist violence committed by the Front de libération du Québec in the 1960s and 1970s. That small, armed militant group was brought into the political process, but Canada is a pacific country with long traditions of consensus-building and constitutional legality to draw upon. Ottawa's inducing the Front to forswear violence may not be readily transferable to other countries.

Indeed, peaceful solutions to postwar Europe's three protracted, violent separatist conflicts, in Ulster, the Basque country, and Corsica, have remained elusive. Although the Irish Republican Army has, after a decade of negotiations with successive British and Irish governments, renounced armed struggle, Euskadi Ta Askatasuna ("ETA") and the Fronte di liberazione naziunale di a Corsica have not, and negotiations with those groups on the

part of various Spanish and French governments have yielded little of permanence.

Moving to less politically mature countries, the results are also mixed. In El Salvador, the insurgent Farabundo Martí National Liberation Front was brought to the negotiating table and now participates in the electoral process. In Peru, President Fujimori unleashed the army on the Shining Path, deciding that the group's political program – a seeming desire to turn the country into an Andean version of Pol Pot's Cambodia – precluded a peaceful, negotiated outcome. Although these two armed movements were not separatist in character, they ventured to speak on behalf of aggrieved populations.

Perhaps in assessing the prospects for success when negotiating with a militant group, it is important to consider the group's political program and the psychological profile of its leadership. If for instance the Israelis believe Hamas to be closer in spirit to the Front de libération du Québec than to the Shining Path, then there is hope for a successful negotiated settlement.

Ultimately, Dr. Khan sees the Nation State *per se* as the principal impediment to peaceful solutions. Because Nation States guard their sovereignty so assiduously, they are loath to offer autonomy, let alone independence, to aggrieved populations. As a long-term option, Dr. Khan proposes that Free States supplant Nation States. The Free State has an administrative function, but no sovereignty, and he cites the status of the states of the United States, or the Member States of the European Union. This is a novel approach, but it is unclear how a Free State could function without some controlling legal authority. In the United States, all local laws and ordinances are subject to (federal) constitutional challenge; in the E.U., laws enacted at European level actually supersede national legislation.

If Israel/Palestine were to become such a polity, what legal regime could be implemented to satisfy all citizens? Gay rights legislation would almost assuredly be repugnant to devout Muslims. And would liberals, whether religious or secular, tolerate a law requiring unmarried women be accompanied by male relatives when in public? The notion of the Free State is made yet more complicated by Dr. Khan's contention elsewhere in the book that Muslims do not wish to live under any legal regime that posits a separation of secular and sacred authority. He may have suggested how to square this circle in his previous books, but it would have been helpful to readers of this one had he added one or two expository paragraphs.

Dr. Khan concedes that Free States seem utopian, and he is aware that they may never be realized. In his defense, one should recognize that the origins of the Nation State are largely traceable to a specific time and place, *viz.* Europe under absolutism. There is no reason to suppose that the current international order shall forever endure.

At times in the book, Dr. Khan lapses into polemics, though his analysis is otherwise dispassionate, as befits a legal scholar. And although Dr. Khan is not an elegant writer, he is an engaging one, and his text is mercifully free of academic jargon. However, this book – *qua* book – is disappointing because the reader is subjected to many syntactical defects, stylistic incongruities, typographical mistakes and misspellings. Martinus Nijhoff is among the world's top-tier legal publishers, and recently became an imprint of Brill, a publishing house founded in 1683 and the holder of a Dutch royal warrant. That Dr. Khan submitted his manuscript to Nijhoff editors in less than perfect condition is forgivable; that those editors approved this book for publication in its present state is not.

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***Liberal Reform in an Illiberal Regime: The Creation of Private Property in Russia, 1906-1915.*** By Stephen F. Williams. Stanford, CA: Hoover Institution Press, 2006. Pp. xii, 320. ISBN 0-8179-4722-1. US\$15 (paperback).

Stephen Williams' *Liberal Reform in an Illiberal Regime* is a welcoming addition to the historiography of land reform in the late imperial Russia. This book contributes to the ongoing discussion of whether the reform destroyed the commune as a traditional form of agricultural and political organization for Russian peasants or led to enhancing peasant productivity and fostering a bourgeois ethic among the peasantry. The author stands firmly with the champions of the reform. He recognizes the genuine role, effectiveness, and validity of a liberal reform initiated and implemented from above by a government that was neither liberal nor democratic, although he perfectly understands the systemic pitfalls and difficulties faced by the reformers.

Unlike the existing voluminous literature on this subject, which is focused mostly on the explanation of the reform, review of its preconditions, and evaluation of its consequences, this book is dedicated to another aspect of the land reform. Williams examines the impact that the reform had on the development of property rights in Russia and to what degree the changes in the property rights system influenced the general liberalization of Russian society. A biographical sketch of Prime Minister Stolypin and a review of discussions regarding Stolypin's policy in the Russian Duma and State

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<sup>524</sup> Mr. Rasmussen is a legal editor, and translator of Dutch and Spanish.

Council allow for a better understanding of the problems encountered during the course of the reform.

The structure of this book reflects the logic of a judge, which the author as a judge applies every day in his courtroom. Williams evaluates the facts, reviews the situation in Russian agriculture, analyzes the context of the reform, looks at the pre-existing property rights regime, examines how and why the reform was developed, evaluates the arguments of the reform's opponents and proponents, explores peasant conditions before the reform, studies alternative options to the reform, and only after that does he resolve the main question regarding the role of private land ownership in the conflict between the end state of liberal democracy and the interests of those who hold power in an illiberal state.

The book relies heavily on the available statistics of the period, analysis of legislation, and factual information provided by Western and Russian historical studies. Critical analysis of the source materials, which include mostly Russian government publications and papers issued by party factions in the Duma, adds credibility to the research. Special credit should be given to Williams for thoughtful selection of maps and charts, which enhance and visualize one's understanding of the reform, as well as for the proper selection of terms in the glossary. The statutory appendix, which includes excerpts from all major legal acts relevant to the reform translated into English, allows one to understand the language of law and compare one's own conclusions with the author's opinion. An impressive bibliography reaffirms the author's reputation as a noted scholar.

The book starts with the general analysis of property rights and the role they play in civil society and liberal democracy. The first chapter focuses on specifics of property relations in early 20<sup>th</sup> century Russia. Williams acknowledges that collectivized rights of peasant allotment land seriously conflicted with liberalism and offered less opportunity for individual initiative when compared with individual ownership. He presents the opinions of major political forces in the country on this issue by exposing their lack of preparation to support the peasant acquisition of real property rights and their approach toward the reform and personally toward Stolypin, whose appointment as Prime Minister coincided with the dissolution of the First State Duma, another legal and political barrier on the way to liberal democracy in the country.

The second chapter discusses the preexisting property rights regime and its dysfunction. Williams analyzes the essence of the "repartitional" commune, which was the prevailing form of land ownership, and reviews its specifics, such as open fields, number of plots held by peasants, distance traveled between the village and remote tracts, decision making processes within the commune, tax burden assignments, and communal sociology. He

concludes that up to the time of the Stolypin reform restrictive laws, high transaction costs, and policies of the communes' elders made ending repartition and consolidating tracts a very complicated issue, even though the redemption obligations were cancelled in 1905. The third chapter looks at peasant conditions just before the adoption of the reform. This study appears to be very useful for comparing the reform to other proposed solutions to the "agrarian problem." This chapter contains a wealth of numerical information, which sometimes complicates the truly exciting reading about the daily life of Russian peasant families, their personal expenditures, activities on the grain market, and relations with the Land Bank. However, these figures do provide an excellent documentary illustration to the text.

Chapter 4 shows how strong the opposition to the reform was. Williams describes the composition of the First State Duma and the conflict between the government and the elected representatives regarding the agrarian reform. Williams states that the government viewed the reform as part of an effort to build a rule of law state and an opportunity to avoid revolution. The positions of the forces that confronted the government (landowners, peasant representatives in the Duma, members of the dominating Constitutional Democratic Party) and alternative projects are analyzed in this chapter. This analysis allows the reader to understand better the depth of the conflict in which no social or political force could insist on its vision of the reform and comprehend legal maneuvering aimed at adopting reform legislation through the application of the Tsar's "executive privilege" to pass emergency laws during the Duma's recess. The property rights reform initiated by Stolypin was just one part, although a fundamental one, of the agrarian reform in the late 19<sup>th</sup> and early 20<sup>th</sup> century Russia. The collateral measures included, among others, the reduction of the term of conscription, phasing out of the poll tax, elimination of peasants' collective responsibility for land taxes and redemption dues, cancellation of debts on redemption payments, and elimination of many other disabilities restricting peasants' ability to divide property, undertake obligations, participate in civil service, and obtain higher education. The investigation of how the government proceeded with these and other measures makes this book unique because no other research paints such a comprehensive picture of government efforts to make the reform succeed.

Chapter 5 is a rather technical but necessary chapter. It describes the core reform policies and the choices given to individual peasants and communes. It also evaluates the immediate effects of the reform and examines the variations in the reform implementation by region and size of peasant landholdings. This part of the chapter is of special interest because it allows one to see how the reform's results varied in neighboring and relatively similar provinces, such as Kursk and Voronezh, or Tula and

Ryazan. Endless discussions about the purpose of the reform, its forceful implementation, and other reform design issues continued for the entire century since the reform was introduced. The reform critics did not change their arguments and accused Stolypin of destroying the commune as a possible source of organized political resistance to the regime and of weakening the peasants politically by setting them at odds with one another. In regard to the issue of application of force, Williams proves that the official abuses of power were not endorsed or encouraged by central authorities and had nothing to do with the reform specifically. After reviewing peasants' complaints, Williams concludes that the violations can be attributed to the Russian reality and could happen in the course of any government campaign. In response to accusations of intentional diminution of peasants' political strength, Williams demonstrates how improved incentives and title conversion easily secured immediate gains in productivity, which for the majority of the peasants was of bigger importance rather than participation in political discussions. Of interest is the statistical data on land consolidation and harvest growth that debunks implications that the authorities did not care about productivity or peasant preference. The mistakes, flaws, and incompleteness of the reform are studied as well, and add to the objectivity of the analysis in chapter 6. This careful detailing of the difficult balancing is one of the strengths of the book.

In the last chapter of the book, Williams describes property rights as the key factor in assessing legal arrangements and their effects on the ability of political actors to resolve social conflicts and improve institutional efficiency. He recognizes the following long-term implications of the reform: growth in agricultural productivity and peasant welfare, social transformation of Russian rural population, exploration of new lands in Siberia and Central Asia, strengthening property rights, and creation of prospects for a liberal democracy in Russia. The book ends with a concise examination of current efforts of Russian reformers to introduce markets and property rights into the post-communist agricultural system. Williams draws an analogy between the Stolypin era and today based on the facts that, as in the past, some individuals favoring liberal reforms are at least nominally close to the core of power in present-day Russia, and the same questions about the necessity to secure the pillars of liberal democracy, which were raised in 1906, remain acute today.

Overall, Williams has produced a well-written, easy-to-read book on a very complex subject. His work will be of interest to students of property

and land relations in pre-revolutionary Russia. The book would also be useful for graduate and advanced undergraduate students interested in Russian late imperial history.

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***State Practice Regarding State Immunities/La Pratique des Etats concernant les Immunités des Etats.*** Edited by Gerhard Hafner, Marcelo G. Kohen, and Susan Breau. Leiden, The Netherlands: Koninklijke Brill NV, 2006. Pp. viii, 1502. ISBN 90-04-15073-0. €295.00; US\$398.00.

In 2002, the Council of Europe (COE) launched a Pilot Project on State Practice Regarding State Immunities. The project aimed to clarify practice by European States and to collect materials exemplifying that practice. As part of the Pilot Project, the COE has made summaries of State practice documents, submitted by its member states, available in a database.<sup>525</sup> These State practice documents include national court decisions, national legislation, and other materials. They address areas such as waiver of immunity, employment contracts, personal injury and damage to State property, and the effect of arbitration agreements.

The COE engaged three organizations to prepare a joint study of State practice in this area: The Department of European, International, and Comparative Law of the University of Vienna; the Graduate Institute of International Studies, Geneva; and the British Institute of International and Comparative Law. Gerhard Hafner and his co-editors, Susan Breau and Marcelo Kohen, recruited additional scholars to write ten analytical chapters, which comprise Part I of the book.

In these chapters, the authors combine thorough dissection of State practice with comparisons to the provisions of three instruments: the UN Convention, the unsuccessful 1972 European Convention on State Immunity,<sup>526</sup> and, to a lesser extent, the 1991 International Law Commission (ILC) Draft Articles for a Convention on State Immunity. These chapter contributions are uniformly excellent. Each author manages to bring clarity to

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<sup>525</sup> [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/State\\_Immunities/default.asp#TopOfPage](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/default.asp#TopOfPage). The 28 contributions include a submission from Japan, an Observer State at the COE.

<sup>526</sup> CETS No. 74. Only eight states ratified this convention (ix).

an aspect of State immunities, from Kohen's helpful treatment of the definition of "State" to August Reinisch's well-organized explanation of immunity from enforcement measures.<sup>527</sup> Stephan Wittich marshals a large body of case law into a coherent statement of the commercial transaction exception. Kohen expertly unravels the two threads of diplomatic immunity and State immunity from a knotty mass of unclear case law and state practice.

Unlike some academicians, the authors state their conclusions without endless qualifications, giving the reader a clear sense of the prevailing rules. The authors do not restrict their discussion to the examples of State practice summarized in Part II of the book. Instead, they provide extensive discussion of, and references to, legal authorities from many jurisdictions.

Part II of the book includes the summaries of State practice documents available in the COE database. More importantly, it includes Susan Breau's masterful digest of practice by Council of Europe members, organized under the main headings of jurisdictional immunity, immunity from execution, and waiver. Subheadings, arranged according to the articles of the UN Convention on Jurisdictional Immunities of States and Their Property,<sup>528</sup> allow easy access to summaries of decisions on topics such as employment contracts, intellectual property, and commercial transactions.

For researchers seeking clarity on other aspects of State immunities, this book will be an invaluable resource. I recommend this book to State officials, national judges, scholars, and practitioners engaged in business relations with foreign States.

Finally, a note on language. The book's essays, including Susan Breau's extensive digest of State practice on immunities within the Council of Europe, appear both in English and French, on facing pages, identically numbered. In the English-language version of the essays, French quotations from judicial opinions have not been translated into English. On the French side, the occasional excerpt from English-language statutes and cases has been ably rendered in French. The "National Contributions" from Andorra, Belgium, France, Switzerland, and Turkey appear only in French; the remaining 23 contributions are in English.

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<sup>527</sup> Reinisch has published an expanded account of this problem as August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 *EUR. J. INT'L L.* 803 (2006).

<sup>528</sup> GA Res. 59/38, annex (Dec. 2, 2004).

***Practice and Policies of Modern Peace Support Operations Under International Law (International and Comparative Criminal Law Series).***  
Edited by Roberta Arnold and Geert-Jan Alexander Knoops. Ardsley, New York: Transnational Publishers, 2006. Pp. vii, 303. ISBN 1-57105-361-1. US\$125.00.

According to a recent United Nations press release, UN peacekeeping deployments reached record levels in 2006 with over 80 thousand military and police personnel serving in 18 peacekeeping operations throughout the world.<sup>1</sup> As the most immediate and effective method available to the UN for maintaining international peace and security, UN peacekeeping operations have undergone a dramatic transformation over the past twenty years. The Security Council, freed from the constraints of Cold War politics, has expanded the scope of its operations to contain regional and internal conflicts throughout the world. In his book, *Council Unbound: the Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War*<sup>2</sup>, Michael J. Matheson identifies three distinct “generations” of UN peacekeeping that illustrate this evolution and accretion of responsibilities. The first generation, most prevalent during the Cold War era, was the classic formulation of a light military force inserted into a conflict with the consent of the combatants and tasked with a limited mission of providing a buffer between belligerents, thus allowing for a cessation of hostilities. UN operations in the Sinai and the Golan Heights are typical of this type of operation. Second generation peacekeeping operations, on the other hand, were constituted in reaction to complex emergencies and were typically in response to an internal conflict requiring a response utilizing not only traditional military functions, but also requiring reconstruction of key economic and political institutions, and humanitarian assistance to non-combatants. Peacekeeping missions in Bosnia, Croatia and Haiti are representative of this more robust formulation. Finally, UN peacekeeping has entered a third stage where, unlike earlier operations, military personnel are inserted into “failed state” situations and assume all governing functions in the territory until such activities can be returned to a reconstituted domestic government. The UN Transitional Authority in Cambodia in 1991 represents the first major foray of the UN into this type of mission. Thus, peace support

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<sup>1</sup><http://www.un.org/News/Press/docs/2006/pko152.doc.htm>

<sup>2</sup>Matheson, Michael. *Council Unbound: the Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold*, United States Institute of Peace Press (2006).

operations have evolved from simple peace enforcement and management tasks to that of complex international crisis response and management operations typically involving institution building, law enforcement, and humanitarian crisis management.

Given this dramatic transformation of peace support missions, a timely new collection of essays, *Practice and Policies of Modern Peace Support Operations Under International Law*, attempts to define and delineate the emerging parameters of this new paradigm. This volume, the latest in Transnational's International and Comparative Criminal Law Series, offers a detailed and multi-faceted perspective on the practice and policies of modern peace support operations. As the editors state in their introduction, the main focus of the book is on evaluating modern peace support operations "in action," and distilling the lessons learned from earlier experiences for the benefit of future operations. Thus, Part 1 of the collection takes a historical look at peace support operations generally, outlines their use in establishing and promoting rule of law, and presents the challenges they face in creating effective and legitimate post-conflict civil institutions and judicial mechanisms to punish war criminals and establish order. The section concludes with Gerhard Scherhauser's essay detailing the experiences of Austria's deployment with the Kosovo Force (KFOR), which neatly illustrates the wide range of legal issues faced by a deploying force and the complex interplay between political and military goals and their ultimate implementation on the ground during a mission.

Part 2 of the collection looks at the relationship of international law norms to modern peace support operations. Co-author Roberta Arnold evaluates the applicability of the Geneva Conventions and the law of occupation to such operations and concludes that peacekeepers are indirectly bound by humanitarian law through their membership in their individual national armies. Josephine Lett next examines the issues surrounding the extraterritorial reach of the European Convention of Human Rights to international peacekeeping operations. Do individuals of non-member states enjoy the protections of the Convention when their territory is occupied by forces of member states? Lett comes to the conclusion that the instrument may very well travel with the troops and in certain circumstances can be invoked by individuals in the deployment area. Part II concludes with chapters on the necessity of effective status of force agreements for the protection of peacekeeping forces and the efficacy of the use of non-lethal weapons. Both essays serve to illuminate and underscore the hard-learned lessons of past deployments and their applicability to improving future operations.

Part 3 concludes the volume by looking at the interrelationship of peace support operations and international criminal law. Co-editor Geert-Jan

Alexander Knoops examines the complex issues surrounding the liability of peacekeeping forces to military criminal sanctions and makes recommendations for reconciling conflicting domestic and international norms. Stefano Failla discusses the issue of border control during a peace support operation using the Kosovo deployment of 1999-2005 as a case in point. The necessity of re-establishing cross-border commercial activity and the orderly migration and repatriation of displaced persons is crucial to the success of such operations and cannot be neglected. Pascal M. Dupont discusses the issue of criminal detention, again using the Kosovo crisis as an example. He highlights the need for monitoring mechanisms for such detentions by the international community during such an operation. Finally, this section concludes with a glimpse of the dark side of past peacekeeping deployments and the potential for criminal activity. Specifically, authors Valerie Wahl and Sandra Katrin Miller look at the trafficking of human beings for the purposes of sexual exploitation that occurred during deployments in Bosnia and Herzegovina and Congo. They outline the legal options available for curtailing such illicit trafficking and the need for establishing effective disciplinary mechanisms and standards for prosecuting peacekeepers and support personnel suspected of participating in such activities.

On the whole, *Practice and Policies of Modern Peace Support Operations* provides a comprehensive overview of the complex responsibilities and challenges inherent in modern day peace support operations, and as such it is a welcome contribution to the literature. It is unique in that the contributors go beyond the theoretical underpinnings of the subject by evaluating past operations and using them as predictors for future refinements. The collection's detailed treatment of the topic allows it to serve both as an introductory primer to the topic as well as a detailed guidebook to the many important issues to be considered when evaluating and planning such operations. Readers will also appreciate the detailed index and table of cases that allow one to locate needed subject matter quickly. *Practice and Policies of Modern Peace Support Operations* is a valuable addition to any comprehensive collection of literature on international peacekeeping and is also highly recommended to anyone interested in the ability of the international community to alleviate human rights violations through humanitarian intervention.

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