



Biblical Judgments

*An interview with
Justice Daphne
Barak-Erez of the
Supreme Court
of Israel*

What can Sodom and Gomorrah tell us about the tyranny of the majority? What can we learn about due process from King Solomon’s attempts to “split the baby”? And why does it matter that the only practicing judge in the Bible was a woman?

Mining old texts for new insights, **JUSTICE DAPHNE BARAK-EREZ**, a justice of the Supreme Court of Israel, asks these and other questions in

Biblical Judgments: New Legal Readings in the Hebrew Bible (University of Michigan Press, 2024). Barak-Erez, formerly a dean and professor of law at the Faculty of Law of Tel Aviv University, employs the keen, close-reading eye of an academic as she revisits the biblical stories she learned as a child, now with the added perspective of having served as a judge for more than a decade. The book is organized into chapters by subject matter — on law and government,

judges and judging, human rights and social justice, criminal law, private law, and family and inheritance law — examining illustrative stories from the Bible in each category.

In the spring of 2024, Barak-Erez joined **DAVID F. LEVI**, James B. Duke and Benjamin N. Duke Dean Emeritus of Law, at Duke Law for a conversation about her book, the structure of the Israeli Supreme Court, and what lessons we can continue to learn from one of the world’s oldest texts. An abbreviated version of their conversation follows.

LEVI: We're going to talk mostly about your new book, *Biblical Judgments*. But first, let's talk about you, your background, and your Court. Let's start with what drew you to the law?

BARAK-EREZ: No one, concrete thing took me there. I was the first in my family to study law, so it was not something in my immediate surroundings. But from a relatively early age, I was interested in society, in the public arena. And the law is a very relevant perspective for that.

LEVI: You were a law professor and dean before becoming a judge. Your scholarship has focused on constitutional and administrative law. What's the origin of your interest in these two subjects?

BARAK-EREZ: It goes back to what brought me originally into law — my interest in the public arena and social issues. My first positions were also in the public sector, in the district attorney offices of Tel Aviv and then the judge advocate general offices. In addition, Israel is a relatively young state with burning issues in the constitutional realm. So all these issues seemed relevant, intriguing, and important.

LEVI: In May 2012, you were appointed to the Supreme Court of Israel. How did that come about?

BARAK-EREZ: Well, such an appointment is always partially a mystery or a miracle in terms of how exactly it actually materializes. More concretely, at some point I really wanted to have more impact on real life issues. Most justices on the Israeli Supreme Court are career judges who climbed the judicial ladder. That's important, because I really appreciate judicial experience.

But at the same time, the mission of the Supreme Court includes issues and dilemmas that are less in the expertise of the lower courts. Therefore, from time to time, some jurists get appointed directly to the Supreme Court. So our Court is a mix of career judges and others like myself.

LEVI: What was that shift from the academy to the court like?

BARAK-EREZ: Not all academics are the same. Some operate only in the theoretical sphere, whereas others might also be engaged in questions of the real world and serve on public committees. I was the latter kind of academic. I was a member of the Council of Higher Education and the chair of the Council of Administrative Tribunals in the Ministry of Justice — as a volunteer, of course. There were all kinds of things that I did alongside my academic career that gave me connection with the real world. Also, some of my research areas were relevant to the questions of the day in public law in Israel.

Being a judge was not something that was completely different from my academic career. That made the transition relatively easier for me.

LEVI: Can you give us a short course on the Israeli Supreme Court? Because I know it doesn't operate in the same way as the U.S. Supreme Court. It's quite different in some respects.

BARAK-EREZ: The Supreme Court of Israel is the highest court in the country. It functions both as a court of appeal for the most important appeals in all areas of law, administrative, criminal, civil. In addition, the Court also has original jurisdiction in petitions against the government and in the area

of judicial review of legislation. So the coverage of the Court is very broad.

If I want to make a simple comparison to the U.S. legal arena, I would say that our Supreme Court is a hybrid of a state supreme court and a federal supreme court. Like a state supreme court, we hear the most important appeals in the regular areas of law. At the same time, like the federal supreme court, we decide sophisticated constitutional law cases. For the so-called regular appeals, we sit in panels of three justices, whereas for the more important precedent-making constitutional cases, we sit in large panels.

LEVI: In those instances of precedent-making constitutional cases, will you sit with the whole court?

BARAK-EREZ: We have 15 justices on the Court, so sitting with the full panel is not very functional. When I say a large panel, this might be nine or 11 according to the circumstances of the case. When this happens, the justices join the panel on the basis of seniority to avoid any manipulation in the mixture of justices. In fact, the Court sat in its full bench of 15 justices only once, a few months ago, on the important question of judicial review of a constitutional amendment.

LEVI: We'll talk about that case in a moment. So if a case is heard by a panel of three, is there a possibility of appeal to the entire Court — or is that it?

BARAK-EREZ: If, after the fact, it is realized that a case involved a path-breaking issue, each of the parties has the right to request a further hearing before a larger panel.



LEVI: Who makes the decision initially on the size of the panel?

BARAK-EREZ: Most cases are heard by a regular panel of three, with the option of a further hearing. If the panel determines the case to be more substantive and precedential, the three justices originally assigned to the panel may decide to broaden it. And sometimes the president can make a decision of this kind beforehand. But these are the minority of cases.

LEVI: Do you have life tenure?

BARAK-EREZ: We have a life term in the sense that once we are appointed, we have a secure office. We are not dependent on any decisions to prolong our position, which is very important in terms of judicial independence. But we do have a mandatory retirement age of 70.

LEVI: Somehow 70 no longer seems that old to me.

BARAK-EREZ: Well, indeed, this was the choice in the '50s when the law was initially made. I don't know if it'll be reconsidered. Some retired justices are engaged in arbitration, mediation, teaching, or service on public committees.

LEVI: In the U.S., when it comes to decisions about judicial tenure or other issues, traditions and expectations deriving from our Constitution tend to guide us. Israel does not have a written constitution the way the U.S. does. Instead it has something called basic laws. Can you discuss this?

BARAK-EREZ: The original vision was that Israel would have a constitution. And this commitment is even

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ON THE TRADITION OF LEGAL INTERPRETATION IN ISRAEL

mentioned in our declaration of independence. But sometimes things take a different course, and Israel was born into a bitter war of independence, which was not the ideal time for writing a constitution. There were also conflicting visions about what the constitution should look like. The political compromise was to postpone the constitutional project. So rather than writing a formal constitution, we would have a gradual process of enacting the constitution on a chapter-by-chapter basis. Each basic law is in fact a chapter of our country's future constitution.

And so far, we have a long series of basic laws that actually cover most of the issues that should be addressed by the constitution. Why don't we have a constitution? Because the things that were pushed to the later stages of the process were the most controversial issues, which are difficult to decide or get to a consensus about. But for prac-

tical purposes, the Court applies the basic laws as a constitution, and the basic laws serve as the basis for judicial review of legislation, just as a constitution does.

LEVI: When you review basic laws, do you have the same debates that the U.S. Supreme Court has over methods of interpretation, originalism, or textualism?

BARAK-EREZ: We have, I would say, different visions about interpretation. When you discuss originalism in the United States, you have a document that was formed in a certain period, whereas the basic laws keep changing in Israel because the process is not complete. Maybe some of the arguments would be different in terms of textualism versus more relaxed or liberal forms of interpretation. But this is certainly an issue for us, too.

LEVI: And then you have the whole field of biblical interpretation, which we're about to get to, which might overlap in some ways — at least in technique — with constitutional interpretation or interpretation of any text.

BARAK-EREZ: Well, this book is also a book about interpretation, but it's not reflective of the interpretive tools I use in my everyday practice as a judge. The book is for me a way to think about the eternal moral dilemmas of law and not something that I developed in order to use as a judge.

LEVI: Before we get to the book, last summer, Israel's parliament, the Knesset, passed a bill that would limit the Court's ability to overturn decisions by the government that the Court finds extremely unreasonable. This was very controversial.

And in January, the Supreme Court, by an 8–7 vote, overturned the law and held that “the amendment causes severe and unprecedented harm to the core characteristics of Israel as a democratic state.”¹ I know you can’t discuss the opinion directly, but can you help us understand how the role of Israel’s Supreme Court has become controversial?

BARAK-EREZ: To put things in context, I think it’s important to remind ourselves that only in autocratic regimes courts are *not* controversial, because they always take the view of the government. The fact that a government may not be very happy with certain judicial decisions is part of the democratic system. I would not say that we don’t have specific or additional tensions. To some extent, it’s in the eye of the beholder. It really depends on whom you ask.

But if you ask me, one reason is that our constitutional project is still not finalized. When the debates are not only about regular politics or regular legislation, but also about the vision of what the constitution should look like, that has the potential to intensify the controversy.

Maybe I can add another perspective. In our political structure, there is, I would say, a lot of proximity between the legislature and the government. The legislature does not function as a very effective control on government. The Court is the only institution that really serves as an independent critical voice. Therefore, it obviously attracts attention.

LEVI: Your book is long, interesting, and extremely thoughtful. How did you manage to write this book while being a justice?

BARAK-EREZ: As a former academic, for me, writing is a habit and also a hobby. It’s second nature, and I just never stopped, even after being appointed to the Court. This is something that I do for myself. I’ve also published other books since I was appointed. But this is my first book in English since my appointment, because it takes more time to work in English. It’s not my mother tongue.

LEVI: Well, we’re lucky you chose to write a book in English. What inspired you to write this book, and who were you thinking of as your readers?

BARAK-EREZ: For me, the Hebrew Bible is an important text. It’s a constitutive text of our culture and of world heritage. In addition, it’s very important because it includes legal texts, historical narratives, and books of wisdom and philosophy. All the moral dilemmas of law are in there. Also, in many ways, the Hebrew Bible was my first encounter with legal questions in my childhood. I was not brought up in a religious family. But in the Israeli context, the Hebrew Bible is very important, not only from a religious perspective but also from a cultural perspective. For me, it was natural to think about some of these legal stories and dilemmas. And now as a judge, it was also interesting for me to go back to these dilemmas and consider how I see them now.

LEVI: Can you describe the general structure of the book for potential readers?

BARAK-EREZ: The structure is by subject matter. In this sense, it’s less traditional. I don’t discuss the stories according to their order of appearance in the text, but rather according

to the subject matter from a legal perspective. I have six chapters — on law and government, judges and judging, human rights and social justice, criminal law, private law, and family law and inheritance — according to the divisions that we are familiar with from law school. I organized the text in a way that also brings together stories and texts that don’t appear one next to the other in the Hebrew Bible but become more meaningful as they’re read one next to the other.

LEVI: Let’s talk about part two of your book, which is on judges and judging. I think your purpose there is to reflect on what makes for a just and fair judicial system. That seems to be the overall spirit of the inquiry. And you start this section of your book by looking at the famous biblical story of the judgment of Solomon. Probably everybody in this room recalls the story, but they might need a little bit of refreshing. Can you help us there?

BARAK-EREZ: In a nutshell, it’s the story of two women who come to the wise King Solomon, and each of them argues that a baby is hers. And we should remember that we are discussing times with no DNA tests. So the question is how the king would know, as a judge, who is the real mother. The story is very dramatic, and traditionally is considered as reflecting King Solomon’s wisdom. He offers that the baby would be cut into two, and each of the women will get half. And then one of them says, “No, spare the baby.” And the king says, “OK, she is the real mother.”

We are all familiar, I think, with this big, dramatic story. But from a legal or judicial perspective, I think it’s a wonderful story to think about the balance between the aspiration to get to ►

a just result and the importance of due process.

Because what we have here is a trial where there's no due process, and we would not recommend that any judge today manipulate the parties to get to a just result. But still, for innocent readers of the story — as I was in my childhood — it seems to be a wonderful solution for a difficult situation. For me as a judge, it's a key story to think about whether we are willing to settle for a just result while sacrificing due process. Today, I would say no — again, without challenging the biblical story — but I take it as a starting point for a learning process. In addition, if we think about it not only from a moral perspective but also from a perspective of efficiency, this kind of manipulation can work only once. The second time, it's not so effective.

The story is also interesting from various other perspectives because it poses the question, "What are the qualifications of a judge?" The judge in this story is maybe more a psychologist than a jurist. What kind of judges do we need? Judges who are psychologists, who know human nature, or legal experts?

Maybe one last point, because this story has so many layers. I recommend going back to the text and noting that the only biographical detail mentioned is that the two women are prostitutes. Even their names are not mentioned. From my current perspective, I think it's also a good example of the important message that everyone should have access to justice. Even simple prostitutes could access a trial with King Solomon and get justice.

LEVI: Do you think that's the point of the story, though? I think it might be different. It might be that only women who are prostitutes could get access in this way, because otherwise they

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ON THE STORY OF THE JUDGMENT OF KING SOLOMON

would be part of a family in a patriarchal society. It would be the man who would be appearing and not them.

BARAK-EREZ: That's also true. From a down-to-earth perspective, it would explain the social background of the story. Because otherwise, the babies and the women would be known and not have to go and litigate.

LEVI: That, too.

BARAK-EREZ: But I think that, after the fact, we can also use it as a moral story to promote other messages.

LEVI: You've also written on women in the Bible, and I think you point out that there's actually only one female judge in the Bible, and also that women rarely appear as litigants on their own behalf.

BARAK-EREZ: It's true that the Hebrew Bible has only a few examples of women as litigants — but even that is meaningful and cannot be taken for granted if we remember the context of history and the social structures of the time. But it is indeed true that only one woman is mentioned as a judge, and this is the prophetess, Deborah, in the Book of Judges.

By the way, it's interesting that all the judges in the Book of Judges are not really judges in the modern sense. They are more leaders — usually military leaders who are there to save the people. And the only one who is really a judge, even before she is called to service, is Deborah. This, I think, really testifies to the high regard she probably received from society at the time.

LEVI: You pose a question, but I think you don't actually answer it in the book. You call the Solomon story deeply satisfying because we're so confident in the outcome, and it seems very clever in the way in which he got the two women to admit which one was the real mother. But you say it's hard to explain our sense of satisfaction when we realize that the process itself was so unfair and maybe even somewhat risky. Why do you think it still feels so deeply satisfying?

BARAK-EREZ: Because we know the end of the story. But I think that in real-life scenarios, when I sit as a judge, there's no one telling me what's the right decision. And since I don't know that, I think the best and most secure way to go about judging would be to stick to due process.

LEVI: You also cover in that chapter — and I think elsewhere as well — the process of making decisions randomly by throwing dice or lots. There's some

tradition of random decision-making in that way, but it's just so flawed from the point of view of fairness.

BARAK-EREZ: It really depends on the context. I think it's a problematic method when used for judging. But we can think differently about the context of administrative decisions when all people are equally situated and there's a matter of allocation of limited resources. Sometimes maybe having a lottery between people who are equally situated might make sense — but not for judging. Still, I think that the answer might change according to the context and the kind of function we have to fulfill.

LEVI: I think that's definitely true. Judges are also assigned to cases randomly. And that makes it fairer, at least in one sense, because then people don't worry that the process has been manipulated.

BARAK-EREZ: Exactly. Once again randomness might be the right thing or the wrong thing according to the context.

LEVI: One of the other stories covered is the case of Naboth the Jezreelite. Can you tell us about him?

BARAK-EREZ: That's a difficult story of a man who had a wonderful vineyard, which was coveted by King Ahab. The king wanted to buy the vineyard, but the owner said, "No, this is the land of my fathers, I'm not willing to sell." And the king was upset, went back to his palace, shared the story with Queen Jezebel, and she told him, "You go to rest, and I'll take care of the situation." And the way she took care of it was sending a message to the elders of the city — the judges — and telling

them, "Put Naboth to a false trial and bring false witnesses to testify against him." This is exactly what was done. And then he was found guilty and executed. And according to the law of the time, his property went to the king, since Naboth was executed as someone who betrayed the king.

This was a miscarriage of justice that constituted a judicial murder, leading to the desired result of the king getting the vineyard. This is a story that is known in a legal context, usually for teaching us the relatively well-known rule that murderers cannot inherit (rejecting of the outcome in the story of Naboth, as did Elijah the prophet). And it brings back into mind the famous New York case from the 19th century, *Riggs v. Palmer*, where

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ON THE STORY OF THE
DAUGHTERS OF ZELOPHEHAD

the Court was inspired by the biblical story to decide that a murderer cannot inherit from his grandfather.

But this was not the main reason I brought up the story. These things are already known. For me, I find this to be a key story for understanding, explaining, and teaching the principle of judicial independence. Because what's so shocking in the story is not only the murder, but also the willingness of the judiciary to surrender to the tyranny of the king and queen. I think it's a very important story for making us understand what happens in a system where the judiciary is not independent.

LEVI: And this is a judiciary that also has the prosecution power within it. It's also, in a way, about prosecutorial independence.

BARAK-EREZ: I think the most shocking aspect is the willingness to completely surrender to government.

LEVI: In the section of the book on law and government, you have a very interesting discussion of Sodom and Gomorrah, which you call the "Outrage of Sodom." And you ask, "what actually was the sin?" Tell us about that.

BARAK-EREZ: Obviously there are many traditional interpretations and many perspectives, but I think the most interesting part of the story is that the angels who come to the city of Sodom can only find one individual in the whole city who is willing to host them. That is Lot, the nephew of Abraham. None of the others are willing to host. On the contrary, when they hear that foreigners found refuge in Lot's home, they demand that those foreigners be surrendered to them. ►

What we see here is that Sodom is a prosperous city where all the residents have the same view. They all think the same — except for Lot. This for me is a starting point to discuss the problem of the tyranny of the majority. That social consensus is not necessarily a good thing, because sometimes it can bring about evil. And sometimes it's also important to take notice of what the minority believes. So this is my perspective on the story of Sodom and Gomorrah.

LEVI: I think we have time for one more explication. Please tell us about the Daughters of Zelophehad and what you call the incremental nature of legal reform. It's an interesting story about women in the Bible.

BARAK-EREZ: I include it as a story of justice and gender. This is part of the stories of what happens to the people of Israel as they go in the desert for 40 years from Egypt. And it's about a man who was supposed to get property, because all land was planned to be allocated among the families about to enter Israel. But this man dies in the desert with five daughters and no male heir. And according to the laws of inheritance — which were not egalitarian at the time — only sons were entitled to inherit.

His family was troubled by the fact that they will not have any kind of

support because there was no one to inherit. What's interesting is that the daughters bring the case to Moses, who is the leader and also the main judge. And they bring a complaint that it's not just. Then Moses takes the story to God, and God says, "Yes, they are right. They should inherit under these circumstances." And this has become a precedent.

This is a very optimistic story of litigation for social change. It brings not only justice in that particular case but also a change in the law for generations to come. But it's also a story that sheds light on the limitations of litigation for social change, because the law of inheritance does not totally change. The main rule remains, that only sons inherit. An exception is only made for cases where there are no sons and only living daughters. This, again, emphasizes the limitations of litigation for social change, because the patriarchal system is not challenged as such. It is a change within the system. It's important to have patience, certainly when it comes to litigation or social change. Not everything can be done in one day.

LEVI: You've written and published another book in Hebrew about judging. The English version you're preparing now is tentatively called *Making Judgments*. Does the book advocate for or describe a particular kind of judicial philosophy?

BARAK-EREZ: No. I don't feel that at this point I'm in the position to propose a grand theory of judging. But it's a book in which I reflect on the practice of judging and on key issues that judges have to deal with — reasoning, writing minority opinions, setting exceptions to rules, and all the questions that we encounter on a daily basis. It's important for me to reflect on what I'm doing.



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¹ Ari Rabinovitch, *Israel's Supreme Court strikes down disputed law that limited court oversight*, REUTERS (Jan. 1, 2024) (quoting the Court) (internal quotation marks omitted), <https://www.reuters.com/world/middle-east/israels-supreme-court-strikes-down-disputed-law-that-limited-court-oversight-2024-01-01/>.