Judicial Discretion by Aharon Barak, (New Haven and London: Yale University Press, 1989) pages i-xiv, 1-270, index. Price US$27.50 (Hardback) ISBN 0 300 04099 7.

Judicial Discretion is the culmination of sustained self-reflection by someone who has been intimately involved with the law as student, teacher, attorney and judge. It draws on a very wide literature, displays familiarity with cases and developments in many different countries, and the arguments and analysis it presents are systematically elaborated and sensible. Nobody who is interested in legal reasoning can fail to benefit from Judge Barak's important contribution.

The position on judicial discretion which Barak defends is a variation of the one elaborated by H. L. A. Hart in his *The Concept of Law*[1]. The central claim is that, in a few hard cases, an unavoidable indeterminacy may arise because (a) a concept has an uncertain use, (b) the rule which a given authoritative precedent gives rise to is unclear and (c) a general standard, requiring interpretation, has to be applied. Thus, according to the Hartian view, a judge must sometimes confront a penumbral area in which he or she is forced to exercise discretion (so that it is true to hold that judges sometimes legislate). Barak pays closer attention to the reasons for ambiguity in the law than Hart, offering a chapter on what he calls 'the substantive sources of judicial discretion' in which he provides a comprehensive list of the various points where conscientious individuals may reach conflicting opinions. His conclusions about the limits of legal reasoning are: (1) much of the law is unambiguous in that experienced practitioners agree about what is required; (2) judicial discretion exists because the law is necessarily indeterminate in some hard cases; (3) in these hard cases, judges are confronted by two or more lawful possibilities and there is no one correct answer.

It is in dealing with criticisms and alternative perspectives that I found Barak's book weaker than I had hoped. Let me review some of the problems and his responses briefly.

A serious problem is that judges do not often act as though they have discretion in any unbridled sense. Thus, apart from a few brazenly political judges, most do not think it appropriate either to impose their own values or to review public policy considerations in the manner of legislators. Not only do they usually take trouble to distinguish legal from purely political considerations, they also suppose that they are bound by legal standards.

It is unclear how anyone who embraces the Hartian view of judicial discretion can account for and justify this reticence. Indeed, he or she will have trouble demonstrating why a judge should not resolve a hard case by spinning a coin. Of course Barak is unhappy about this possible response and vigorously defends the common sense of conscientious judges who offer reasons for their decisions. But it is not clear why we should allow him to rule the solution illegitimate for, in terms of his account, whether the coin comes up heads or tails, the result should be acceptable (because each of the possibilities is legally permissible). How, then, can Barak support his claim that spinning the coin is arbitrary? Barak suggests that a judge must seek another way of distinguishing between the possibilities and must necessarily reach beyond the law towards the realm of values, ideology and politics in framing his or her response. But why should future judges be considered bound by such a finding when the arguments cited in support of it are extra-legal? It appears to carry no more authority than a spinning coin. Although he addresses this issue in an interesting way, Barak fails to answer it adequately.

He does, however, describe how he supposes that values, ideology and politics may be brought into play, for he strongly supports the view that a judge exercising authority should have more inhibitions than a legislator. Thus, a judge must take into account that conceptions of the public interest may be controversial and partisan. Barak tells us that he or she must demonstrate:

> that judicial discretion is being exercised objectively, through a neutral application of the laws and of the fundamental values of the nation; that the judicial discretion is exercised in order to maintain the articles of faith of the people and not the articles of faith of the judge; that a judge is not a party to the power struggles in the state and that he is fighting not for his own power, but for the rule of law (p. 217)

In summary, Barak refines the intuitions which account for judicial reticence. Thus, he supposes that a solution which is strictly legal cannot be found in hard cases, yet he requires judges to provide

interpretations which establish one of the possibilities as the best available; moreover, the interpretations they offer must be of a distinctively judicial kind (although precisely what this means is left vague).

It is not clear why the common sense of the judiciary should be accepted as an adequate theory. What we need is a justification of practice which will inform and shape it and this is missing from Barak's account. In this regard it is unfortunate that Barak did not revise *Legal Discretion* (which was first published in Hebrew in 1987) when the English translation was prepared (for publication in 1989) to take into account Ronald Dworkin's *Law's Empire* (published in 1986). It clearly is the case that with only the smallest revision, placing a heavier emphasis on the importance of principles in the law, Justice Barak's views about the discretion available to judges in hard cases could be transformed into those of the Dworkinian judge, Hercules. Unlike Barak, Dworkin offers reasons for supposing that judges should not regard their task as an invitation to make policy and it would be interesting to know the former's considered response to his arguments.

It would also be interesting to see how Barak reacts to the view that the boundary between hard and easy cases is necessarily blurred and shifting because all legal reasoning involves interpretation drawing on values, ideology and a sense of history. From within what Dworkin calls an 'internal' perspective, many disputes are easy to resolve, for only one of the competing alternative interpretations will usually be available to a judge, even though different possibilities will be recommended. This is because any particular interpreter of the law will value integrity. Thus, he or she will seek to work within a given framework even when other possibilities are available. A hard case for Dworkin occurs only when alternatives present themselves within a chosen interpretation; as happens when the principles we recognise conflict and we are not sure how to resolve the antinomy. Here, there is no proliferation of obvious solutions, only uncertainty about the best way forward. Barak's position is less satisfactory and quite different. For him, a hard case is perceived 'externally' when we read the various opinions offered by others. The stance he takes is above the fray and the alternatives present themselves as equally acceptable accounts of the law. One problem he faces as a consequence is that he cannot easily distinguish hard from ordinary cases, in that every competent lawyer offers an interpretation favouring his or her client as a lawful possibility. If these are all acceptable solutions (and the matter would not usually be before a court if they were not), it seems that there can be no easy cases. Barak tries to answer this criticism but his response is unpersuasive.

I suspect that it is because he fails to notice the importance of viewing law hermeneutically, from within a given interpretation, that Barak finds Dworkin's notion that there is usually a right answer to legal problems so implausible. His book would have been strengthened had he considered the implications of the internal-external distinction which Dworkin makes so much use of. As it stands, we are offered an interesting and competent elaboration of the Hartian view along the lines suggested by Joseph Raz and Neil MacCormick but the strengths of the alternative Dworkinian position are not adequately confronted.

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[1] Hart, H.L.A., *The Concept of Law* (1961).