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THE SUPREME COURT under Miriam Naor and her predecessor Asher Grunis has "taken a judicial withdrawal from very extreme activism," says Daniel Friedmann. (Photo by: YOSSI ALONI/MAARIV)

Former justice minister: Settlers, haredim 'dictating country's agenda'

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In an interview with the 'Post,' former justice minister also says Supreme Court, A-G 'running the state.'

Justice Minister Ayelet Shaked and many others on the political Right, in attacking the Supreme Court for judicial activism, often cite former justice minister Daniel Friedmann as the father of their ideology.

Yet many on the Right may not have carefully read The Purse and the Sword: The Trials of Israel's Legal Revolution, his 2013 book, which was recently updated and translated into English, in which he espouses views they may find surprising.

Considered a black sheep by some in the legal establishment due to his confrontations with it, Friedmann, a former dean of Tel Aviv University Law School and a former justice minister, is also one of the court's most formidable scholarly critics.

He is, by the way, a big fan of Shaked for taking on the legal establishment.

In a detailed sit-down interview with The Jerusalem Post in the living room of his Ramat Aviv home, the 80-year-old but still extremely feisty Friedmann explains his views in depth. His trademark high-grown mane of hair and intense eyes immediately draw you deeply into his world.

Friedmann describes himself as a centrist who "supports civil marriage" and who "does not support settlements."

On the settlers – of whom he writes that, along with the haredim (ultra-Orthodox), "they have been able to dictate the country's political and social agenda – he says, "You can have different groups, but it is excessive power, it is excessive."

Most ominous for his right-wing supporters, in some cases Friedmann attacks the criminal justice

system for pushing Israel to move to the Right politically.

If one recalls that Friedmann was justice minister under former prime minister Ehud Olmert, some of these views should not be surprising. But they certainly are not mentioned on the Right when he is held up as a scholarly basis from which to attack the Supreme Court for judicial activism (incidentally most of the legal establishment still views Supreme Court intervention as critical to defend minority rights – though the debate on this is less lopsided than it once was and criticism of specific interventions has increased.)

Why, then, is he used so often on the Right? First, Friedmann's views about the Supreme Court are much easier to realize and take action on than his views on the broader political issues.

For example, despite his personal politics, he is against the court's involvement in many issues regarding the settlements, which disturbs the Right, because he thinks any changes "need to be in the Knesset and at the ballot box and not by the court."

In other words, there is little he can do as a legal scholar to endanger the settlement enterprise. At the same time, he can be very useful to the Right in dissuading the Supreme Court from intervening or even hearing cases against settler interests.

This brings us back to the views he expounds in his book and for which he is known for and celebrated on the Right. Friedmann views his ideas as the antidote to the "judicial revolution" of empowering the court at the other branches' expense (as he views it), started by former Supreme Court president Meir Shamgar and advanced at high speed by former Supreme Court president Aharon Barak, a revolution which he opposed.

In Friedmann's view, the two chief justices, especially Barak, radically departed from the court's pre-Yom Kippur War "classical" position of deference to the other branches of government and from intervening only to resolve nonpolitical disputes and where imperatively necessary.

He writes that the same weakness of the large political parties, which has allowed the settler movement and the haredi parties to take over the national agenda, "created a vacuum that enabled the legal system to seize new powers for itself, transforming it into a central force in the running of the state."

In the post-Barak era, he says, the Supreme Court can hear petitions on nearly every issue and intervene on nearly every issue, even striking down Knesset laws on a variety of topics if it finds them "unreasonable" – a standard that it determines itself.

Over the last year, the Supreme Court struck down the government's natural gas policy and its migrant policy (for a third time; a fourth policy appears to have passed muster).

According to Friedmann, the court did not even have the authority to hear the natural gas policy issue on multiple potential grounds.

First, he argues that none of the petitioners had standing – meaning it did not personally infringe on any of their fundamental rights. Also, he says the issue did not connect to any other aspect of its jurisdiction. Regarding the migrants ruling, he said that the petition was absolutely within the

court's jurisdiction, but that it should have refrained from intervening under classical principles of narrowly interpreting statutes and its authority to intervene.

He is also up in arms that the Supreme Court has any role in evaluating the legality and fitness of the government's ministerial and other executive appointments.

The former justice minister writes about legal over-activism, as he views it, especially in the arena of the attorney-general in both his legal adviser and prosecutorial capacities.

First, he is one of the lead advocates of splitting the powers and "two hats" of the attorney-general into two separate roles and offices. This would mean that different persons would be the country's top legal adviser and its top prosecutor.

Friedmann complains that the "power the attorney-general has to open investigations and indict anybody, including the prime minister, obviously tremendously strengthens his position when he gives advice to the same prime minister whose case is under his examination."

His critics would respond that he is inverting the issue of the strange relationship between the roles of prime minister and attorney-general. For example, many are worried that Attorney-General Avichai Mandelblit will give Prime Minister Benjamin Netanyahu uncalled-for leniency in probes of him, due to having served as his cabinet secretary and having gotten his current job with his help.

They would add that the prime minister and the Knesset have the power to fire the attorney-general if he oversteps his bounds.

Friedmann responds, "Today this is basically impossible politically. Once the attorney-general is investigating the prime minister, he cannot fire him."

On the issue of the prosecution going after top officials, he still believes that Olmert should not have had to deal with allegations against him until completing his time as prime minister and also that he should have been acquitted on some of the Holyland allegations he was convicted of.

On the same line of thinking, he is also a fan of the controversial "initial review" procedure by which top ministers are not troubled with full criminal investigations until very serious evidence against them is revealed. Further, he supports a new bill to hold-off prosecutions of sitting prime ministers from "low-grade" financial crimes.

Apart from his objection to one person holding the government's top legal adviser and top prosecutor roles, he objects to the Barak revolution which declared that the attorney-general's legal opinion is binding on the government and the prime minister.

He says that until Barak overruled them, prior top legal officials, including Shamgar (who he still believed to be to interventionist in some areas), had suggested that the attorney-general's opinion must be seriously considered, but was not binding.

Still, most of the legal establishment is vehemently on Barak's side on this issue. Critics of Friedmann say that if the attorney-general has intervened more, it is only because the executive

branch has lost some of its moorings and attempted power-grabs or violating civil rights that once would never have been imagined.

Where Friedmann would criticize the Supreme Court for denying the will of the public and the Knesset on the African migrants issue, critics would respond that the court is the sole actor that has succeeded in taking a firm stand to defend equal rights and the public's views regarding integrating haredim into the IDF.

To this, Friedmann asks that after a series of decisions of hundreds of pages of fancy legal writing and numerous hearings before special expanded panels of the Supreme Court, "What was the result? Until now, haredim are not drafted or are [drafted in] very small numbers…this begs the question: what are the limits of the court. The court is not constructed" for achieving such vast social change.

"If the public supports this, they need to do this in elections," he says. Pressed that he himself has said that the system has weakened the big parties to be at the mercy of the Haredi political parties, he responds that the answer is changing the manner of elections so that "the prime minister can act independent of coalition considerations," not to come to the Supreme Court for a solution.

Some critics of Friedmann say that the Supreme Court and attorney-general have been more proactive as it became apparent that Israel would continue to operate indefinitely as a constitutionless-country.

Friedmann is theoretically supportive but somewhat lukewarm about having a constitution, as he might support one which embodied ideas he agrees with, but would be concerned that it should not be "too difficult to amend" (he views the US system as making it too hard to change the constitution) and should not serve to make the Supreme Court the supreme branch of government.

A major contribution of the book's new English edition is that it discusses the post-Barak era of former Supreme Court president Asher D. Grunis and his successor, Miriam Naor in a chapter called "Moderate rulings, radical principles" and in other spots.

Friedmann says the Supreme Court under Grunis and Naor has undertaken a "partial withdrawal from very extreme activism. The withdrawal is not manifested by the Supreme Court dropping its authority.... Rather, it very much guards all of its broad powers, but it is using them a little bit more carefully and with greater restraint…we are in a process of change [away from judicial activism], but it is very incremental."

Put differently, Friedmann wishes that the Supreme Court was not even holding hearings on certain issues, but is less critical of the Grunis and Naor courts (though they are not identical, both are less activist than the Barak-Dorit Beinisch courts preceding them), since they are declining to strike down government policy in many instances where he believes the Barak-led court would have jumped in.

On top of the restraint shown by Grunis and Naor courts, he is pleased that he suspects NGOs are simply not filing petitions today that they would have under Barak. For example, he notes that

no petitions were filed against the IDF's conduct during the 2014 Gaza war whereas under Barak, the court often called in IDF commanders from the front to adjudicate over such petitions.

Another change he views as positive is that the Supreme Court justices no longer have veto power over who joins their ranks. He also adds that more justices are coming now from the private sector. Both are changes, he says, that he and former justice minister Yaakov Neeman helped implement.

These two changes help avert a court that is "monolithic" in approaching the law.

Despite these developments, and that the next year brings four new Supreme Court appointments led by Shaked, as Naor and justices Elyakim Rubinstein, Zvi Zylbertal and Salim Joubran retire, Friedmann said he is not starry-eyed about the prospect of his ideas completely reversing the court's direction in the future.

Rather, he hopes his book and his ideas will lead to "a little bit less intervention" and to clarifying "what is more and less preferable."

He concluded that he is also excited that the book will give the English reader a new opportunity to compare their experiences to "what we do in Israel."

The Purse and the Sword: The Trials of Israel's Legal Revolution was published by Oxford University Press.