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# Friends’ Clash Reflects Battle Over Israeli Court

By ISABEL KERSHNER NOV. 22, 2007

JERUSALEM, Nov. 21 — In recent days, Aharon Barak, the internationally esteemed jurist and retired chief justice of Israel, has broken a self-imposed silence and spoken publicly against an old friend, Daniel Friedmann, Israel’s minister of justice.

The struggle between the men is part of an intense battle playing out across Israel’s political and legal landscape. As Mr. Barak described it last Friday, it is “a struggle over the country’s soul,” specifically over the independence of the court, the separation of powers and the fundamental question of who is in charge.

Both sides fervently believe that Israeli democracy is at stake. Mr. Friedmann, an eminent law professor who came into office in February, contends that the Supreme Court has become a law unto itself, extending its powers into the purviews of the other branches of government and trying to make itself immune from legislative oversight.

In a recent interview, Mr. Friedmann, 71, said he wanted “to restore the

balance between the various branches of government,” which had been “completely upset in recent years.” He has argued that unelected judges are waging an antidemocratic revolution.

If this sounds like an echo of the American struggle between conservative and liberal legal theories, it is, but with an important difference. Israel has no constitution because the secular and religious parties could never agree on one.

Therefore, many of the judicial elite see the court as a bulwark for individual rights and against tyranny of the majority and see Mr. Friedmann as a considerable threat.

“All his proposals have a common theme,” said Dalia Dorner, a retired Supreme Court justice. “To emasculate the court and give added strength to the politicians.”

Israel’s Supreme Court has a long tradition of independence. But over the past two decades, largely under the influence of Mr. Barak, 71, it took the ideal of enlightened liberality to new heights. It abolished the principle of standing, meaning that petitioners need not have a direct stake in the outcome of a case they bring. This opened the court up to civil rights groups and a flood of public petitions. Because of a historic anomaly dating from the British Mandate, petitioners appeal directly to the Supreme Court, without the filter of a lower court.

The Supreme Court also broadened the rules to the point where practically every government decision is open to review.

In 1995, Mr. Barak declared what amounted to a constitutional revolution, ruling that the country’s basic laws, the set of laws outlining Israel’s structure and values, had an elevated status compared with ordinary legislation, almost like a constitution. And deriving from principles in two basic laws on human rights enacted in 1992, Mr. Barak granted the Supreme Court the authority to invalidate parliamentary legislation that contradicted the basic laws.

The Supreme Court has used these powers very sparingly. Still, Mr. Friedmann wants them curbed.

His allies include legislators as well as other sectors of Israeli society who want to see the legal establishment restrained, among them politicians and

business figures who have been investigated or indicted, and the religious and nationalist camps, which eschew the Supreme Court's liberal approach.

American conservatives have also weighed in. Robert H. Bork, a key theorist of the American legal right, has complained that Mr. Barak's ideas are "a textbook for judicial activists" and that Mr. Barak has established "a world record for judicial hubris."

Richard A. Posner, a senior American appeals court judge, called Mr. Barak "a legal buccaneer."

Mr. Friedmann's critics say it is he who presents a threat to the delicate fabric of Israeli democracy.

Arye Carmon, president of the Israel Democracy Institute, an independent research institute in Jerusalem, agrees that Mr. Barak's moves give the court undue influence over the political process. But he says that Mr. Friedmann presents "a danger to the stability of the relationship between the authorities," which is "already shaky enough."

Dan Meridor was justice minister from 1988 to 1992 and a long way from being a man of the left. Yet he worries that Mr. Friedmann's proposals and statements "may weaken" Israel's legal system, "erode its unique standing and undermine some of its most important achievements."

Mr. Friedmann denounces Supreme Court intervention in security and budgetary issues and the appointment of ministers and other officials. In one pending case, the court is about to rule on the reasonableness of a deal reached between the attorney general and Israel's disgraced former president, Moshe Katsav. The bargain saw possible rape charges dropped in exchange for Mr. Katsav's agreement to step down and plead guilty to charges of sexual harassment.

"I find this unacceptable," Mr. Friedmann said. "If the court acts this way, they make themselves superprosecutors. To me it is almost inconceivable that they should decide on the charge to be brought."

Mr. Friedmann wants to change the composition of the judicial appointments committee, in order to reduce the influence of Supreme Court justices on the appointment process and make it less of a closed club.

He also opposes the custom of appointing the chief justice on the basis of seniority.

Early this month, he submitted a bill that would, for the first time, anchor in law the Supreme Court's authority to veto legislation. But it would also place strict limitations on that authority, and give the 120-member legislature the right to overturn any veto with 66 votes.

Mr. Friedmann's views were well known before he became minister: he had published them all in a series of columns. In one, he had even expressed his disdain for the current chief justice, Dorit Beinisch, a Barak protégé.

Mr. Friedmann believes he has more supporters than critics. "Once they overstepped their authority, they lost their moral power," he said of the Supreme Court.

He has some data to back up the point. An annual democracy index published by the Israel Democracy Institute shows that public confidence in the Supreme Court has dropped from 88 percent to 61 percent since 1994. Mr. Carmon, the institute chief, believes that Mr. Barak's rhetoric was a main factor.

Yet Mr. Carmon is baffled by the proposed Friedmann bill on judicial review. He says it undermines efforts under way in Parliament, and endorsed by the prime minister, to reach a consensus on a constitution that would resolve such issues once and for all.

Another mystery is whether the prime minister, Ehud Olmert, himself under criminal investigation for possible corruption, had read all of Mr. Friedmann's articles before he made the appointment.

"If he didn't, he should have," said Ms. Dorner, the retired justice.

A version of this article appears in print on , on Page A4 of the New York edition with the headline: Friends' Clash Reflects Battle Over Israeli Court.