

Esther Hayut's war against democracy

The Supreme Court president has transformed the court into a super-legislator, empowered to dictate the terms of laws to the people's elected representatives, based on the values of the justices.



Israeli Supreme Court president Esther Hayut arrives to a hearing at the Supreme Court in Jerusalem on March 19, 2019. Photo by Olivier Fitoussi/Flash90.



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(January 22, 2023 / JNS) Friday morning brought the first piece of good news from Israel's Supreme Court in years. *Yediot Ahronot's* top headline declared

that Supreme Court President Esther Hayut intends to resign if the Knesset passes Justice Minister Yariv Levin's judicial reform package.

Hayut's stewardship of the court over the past six years has been disgraceful and destructive to both the court and the State of Israel. The Hayut court dropped even the pretense of judiciousness. Hayut cast the court on a course of ideological radicalism and politicization that has no parallel anywhere in the world.

Hayut's radicalism was well known in the legal community. She wasn't then-justice minister Ayelet Shaked's first choice for the court's top slot. But Shaked had no say in the matter. Israel's current judicial selection process protects justices from accountability to the public and its elected representatives. Supreme Court justices have a veto over nominees to the court, so everyone who gets the nod from the Judicial Selection Committee, including ostensibly conservative jurists, must embrace the organizational culture and values of the sitting justices.

The justices also control who serves as president. Under the current selection system, the president is the senior associate justice when the sitting president reaches retirement age. By controlling who gets appointed when, the justices are able to predetermine the identity of the president. In 2017, Shaked tried but failed to cancel the seniority selection process, and Hayut was promoted.

Outside observers were exposed to Hayut's radicalism immediately before she took office. She set it out in a speech before the Bar Association in September 2017. Not one for understatement, Hayut compared herself and her colleagues to God.

As she put it, “There’s a disadvantage that we flesh and blood judges have in comparison to the Creator of the Universe. Even in the situations where we understand fairly quickly the dilemma that brought the petitioners before us, it often happens that the solution we view as just and proper isn’t possible under the practice and requirements of the law. These situations in my view are among the most difficult and complex ones that we as judges are called upon to contend with.”

She continued: “How do we bridge the gap between the law and what is right? Finding an answer to this question, discovering the secret ... ‘spice’ is perhaps one of the greatest tasks that lies before us as judges.”

By the time Hayut gave her speech, the court’s penchant for political judgments was well documented, and in the context of those judgments, her intentions were self-evident. On the eve of her inauguration as president, Hayut declared that the court would disregard the law whenever it contradicted the justices’ values. And given the ideological conformity of the court, those values would without question be aligned with the leftist fringe of Israeli society, a fringe that would never, ever win an election.

Over the past few years, the Hayut court followed her non-legal judicial philosophy to the letter. An examination of a selection of her judgments suffices to demonstrate how it has worked.

In March 2020, without a shred of legal authority and in clear contravention of Basic Law: The Knesset, Hayut and her associates ordered then Knesset Speaker Yuli Edelstein to convene the Knesset plenary to vote on his replacement.

Following the third of four Knesset elections that took place between April 2019 and March 2022, after Benjamin Netanyahu was unable to form a 61-seat coalition, the mandate to form a government was transferred to the Blue and White Party leader Benny Gantz. When it grew apparent that Gantz would also fail to form a Knesset, Gantz's party decided to add dynamite to Israel's political maelstrom.

Under Israel's Basic Law: The Knesset, during the tenure of a caretaker government, the Knesset Speaker will remain the speaker elected under the previous Knesset. That is, from the moment a government loses a confidence vote in the Knesset and new elections are called, until a new government is sworn into office, the incumbent Knesset Speaker will remain in office.

In the face of political deadlock that prevented both Netanyahu and Gantz from forming a government, Gantz and his then partner Yair Lapid petitioned the Supreme Court to coerce Edelstein to convene the Knesset to elect a new speaker. The idea was that Blue and White would govern from the Knesset while Netanyahu would be completely paralyzed as caretaker prime minister.

The Supreme Court had no legal power to intervene. Basic Law: The Knesset stipulates explicitly that the Knesset "shall determine its procedures." And as professor Talia Einhorn explained at the time, the Knesset Speaker is solely responsible for implementing the Knesset's procedures.

Despite its utter lack of legal authority, the Supreme Court accepted Blue and White's petition, and in record time ordered Edelstein to convene the plenary immediately to choose his successor. Not wishing to openly defy the court by refusing to execute its illegal ruling, Edelstein resigned.

After her predecessor Miriam Naor's court overturned three laws that sought to compel illegal aliens to leave the country in various ways, in March 2020, Hayut and her associates struck down the Knesset's only remaining law to incentivize illegal aliens to depart the country. The law in question, dubbed, the Deposit Law, required work migrants to deposit a fifth of their earnings in a trust, and for their employers to deposit 16 percent of their national insurance deductions into the same trust. The funds would be paid to the migrant, with interest, upon his exit from Israel.

The court ruled that this was unfair because migrants make so little. The fact that the law was entirely legal made no difference to the justices. The law sat wrong with them, so Israel's last legislative means to incentivize illegal aliens to leave was removed.

In his judicial revolution of the 1990s, Aharon Barak, the father of Israel's judicial aristocracy, arrogated to the court the power to abrogate duly promulgated Knesset laws, with no legal authority. Last month, Hayut and her colleagues seized the Knesset's power to write laws.

In a stunning ruling on Israel's Citizenship Law, the court instructed the Knesset to expand the law to include four categories of persons eligible for citizenship that the Knesset had not included. The ruling constituted a breach of all the boundaries between the work of the court and the lawmaker. It transformed the court into a super-legislator, empowered to dictate the terms of laws to the people's elected representatives, based on the values of the justices.

Last May, the court gave standing to the government of Ukraine to seek the abrogation of the Interior Minister's power to regulate entry of Ukrainian citizens to Israel. Following Russia's invasion of Ukraine, millions of

Ukrainians sought refuge in foreign lands. In an effort to prevent Israel from being flooded with tens of thousands of Ukrainian refugees, then interior minister Ayelet Shaked set a quota of five thousand Ukrainians that would be permitted to enter Israel. Last July, the Supreme Court sided with Ukraine against the government and ordered Shaked to abandon the quota and open the gates of Israel to Ukrainians, as if there were no war and no refugee crisis.

The capstone, to date, of Hayut's seizure of the powers of the Knesset and government came last week, when she and her colleagues absconded with the Knesset's exclusive power to approve duly constituted governments, and the prime minister's exclusive power to appoint his ministers. Without legal basis, Hayut and her associate justices ruled that Health and Interior Minister Aryeh Deri, the leader of the Shas party, may not serve as a minister in the government.

Hayut and six of her associates ignored the fact that there is no legal basis for the ruling, and simply decided that it was "extremely unreasonable" for Deri to serve as a minister because he has a history of criminal convictions. Six justices also ruled that Deri shouldn't be permitted to serve as a minister because in a plea deal last year, Deri agreed to resign from Knesset.

As understood by the state prosecution at the time, his resignation from Knesset only related to the 24th Knesset, not to future Knessets. Despite this, six justices claimed that by serving as a minister, Deri was breaking the terms of his plea deal (which in and of itself has no bearing on the legality of his service as a government minister).

Both grounds for Deri's dismissal were rooted in Hayut's notion that Supreme Court justices are endowed with special powers to discern right from wrong that mere mortals do not possess. The Deri decision effectively struck down

the judgment of four hundred thousand Shas voters. Indeed, it struck down the ballots of 2.3 million Israelis who voted for Likud, the National Religious Party, Shas and United Torah Judaism, with the goal of forming the current Netanyahu government, in which, all concerned assumed, Deri would serve as a minister. The court's legally unhinged decision also struck down the Knesset's exclusive power to approve governments, and the prime minister's power to appoint his ministers in accordance with law.

The Hayut court's contempt for the public and its elected representatives is rooted in Hayut's pseudo-historical understanding of Nazism. She explained her views in an address before the Israeli-German Association of Jurists in May 2019 in Nuremberg. After chronicling the manner in which the German courts were taken over by the Nazis in the early 1930s, Hayut made the preposterous claim that had the German courts been stronger, they could have prevented the Nazi takeover of Germany, and the Holocaust.

Hayut's revisionist history was transparently self-serving, and deeply hostile to both the historical record of Nazism in Germany and to her own people. Her implicit thesis was that everyone has a Nazi inside of him. Left uncontrolled, democracy, wherever practiced, is liable to bring Nazis to power. Politics, culture, history have no impact on the character of a nation. The only way for the Nazis to be kept in the bottle, whether in Germany or Israel, is for the courts to be more powerful than the public and their representatives.

Hayut then explained how Israel's judicial aristocracy performs its function of guarding the people from their internal Nazis. German Jews in the 1930s, she argued, weren't too concerned when Hitler rose to power, because the Weimar Republic's constitution guaranteed their civil rights. They trusted that the Nazis would respect the constitution and the laws in force. In 1995, the Israeli Supreme Court used Basic Law: Human Dignity and Liberty and a means to

transform itself into the protector of the liberal order from the politicians whose internal Nazis lurk under the surface, always.

As she put it, “One of the universal lessons that it is worthy to learn from the historical events that I discussed here is that judicial independence and the absence of judicial accountability on the institutional and personal level, is one of the important guarantors that the individual will have a place to turn to protect his rights.”

In the face of Hayut's transformation of the Supreme Court from one that had some discourse with laws to one where judges are free to follow their passions in usurping the powers of the Knesset and government and people, it is clear that the most urgent order of business for the Knesset and the government is to restore judicial accountability.

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