

IN SUPPORT OF A REFERENDUM ON THE GOLAN HEIGHTS

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On December 9, 2009, the Knesset¹ voted to advance legislation requiring that the handover of any land under the administrative and judicial authority of the State of Israel pass a national referendum.² The legislation—termed the Golan Heights and Jerusalem Referendum Bill—passed its first reading by a margin of sixty-eight to twenty-two (with one abstention).³ It now returns to committee for revisions and then must pass second and third readings, in a process that could take months.⁴

If the bill becomes law, it is expected to impede Israel from ceding the Golan Heights to Syria in a peace treaty.⁵ Israel captured the Golan Heights from Syria in the 1967 Six-Day War and, in 1981,⁶ effectively annexed it over objections from the international community.⁷ Since then, the Golan Heights has been heavily developed by Israel and now many Israelis regard it as indispensable. For at least a decade, Israeli polls have shown strong popular resistance to a withdrawal from the Golan Heights,⁸ with nearly two-thirds of Israeli Jews in opposition.⁹

By supporting this bill, Israeli Prime Minister Benjamin Netanyahu may be gesturing to his Syrian counterpart, President Bashar Assad, that a deal between the two states must be struck quickly, before the bill becomes law and before the

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1. The Knesset is the legislature of State of Israel.

2. See Rebecca Anna Stoil & Gil Hoffman, *Knesset Advances Bill Aimed at Blocking J'lem, Golan Concessions. Barak Slammed for Voting for Legislation He Opposes*, JERUSALEM POST, Dec. 10, 2009, at 1.

3. See Jonathan Lis, *Knesset Votes Overwhelmingly in Favor of Golan Referendum*, HAARETZ, Dec. 10, 2009, available at <http://haaretz.com/hasen/spages/1134131.html>.

4. This lengthy process is not unusual. Under Israeli parliamentary procedure, all bills must pass three readings before becoming law.

5. See Aluf Benn, *Netanyahu Tying His Own Hands With Golan Bill*, HAARETZ, Dec. 11, 2009, available at <http://www.haaretz.com/hasen/spages/1134026.html>.

6. See Golan Heights Law, 5742–1981, 36 L.S.I. 7 (1981–82) (Isr.).

7. The United Nations Security Council condemned Israel's move, declaring that “the acquisition of territory by force is inadmissible.” S.C. Res. 497, U.N. DOC. S/RES/497 (Dec. 17, 1981).

8. See EPHRAIM YAAR & TAMAR HERMANN, TAMI STEINMETZ CTR. FOR PEACE RESEARCH, PEACE INDEX (1999), available at http://www.spirit.tau.ac.il/xeddexcms008/download.asp?did=peaceindex1999_12_3 (“[T]he Jewish public at this time lacks a majority in favor of full withdrawal from the Golan in return for a full peace agreement with Syria.”).

9. See Ephraim Yaar & Tamar Hermann, *Poll: 70% of Israelis Back 2-State Pact, 63% Oppose Golan Pull-Out*, HAARETZ, Aug. 30, 2008, available at <http://www.haaretz.co.il/hasen/spages/877751.html>.

Israeli public gains veto power over any land transfer. This is a bold gambit, and Syria's response has been caustic, painting Israel's move as "provo[cative],"¹⁰ and maintaining that "Israel cannot hold a referendum on land that it does not own."¹¹ Setting aside for the moment Syria's legal objections though, such a referendum may be the wisest course for Israel to pursue.

The status of the Golan Heights has long been the "main obstacle"¹² to peace between Israel and Syria.¹³ Israel has considered withdrawing from the Golan Heights but has been immobilized by uncertainty over public support for such a move. Israel's most recent experience with territorial withdrawal—the 2005 disengagement from the Gaza Strip—threatened to split the nation.¹⁴ According to Attorney General Menachem Mazuz, Israel was "a step away from rebellion."¹⁵ A withdrawal from the Golan Heights—a region central to Israel's economy and to many Israelis' conceptions of their nation—promises to be just as divisive. The passage of a referendum would provide the government with a clear mandate to proceed, just as its rejection by voters would warn that there are certain peace terms that the nation will not bear.

Importantly, many of the usual criticisms of referenda—they confuse voters;¹⁶ they can be purchased by free-spending interest groups;¹⁷ and they are insufficiently deliberative¹⁸—are at least mitigated, if not fully allayed here. Israel has never held a nationwide referendum, although it came close prior to the 2005 Gaza pullout.¹⁹ Still, holding a referendum before any land-for-peace deal is an idea that has been bandied about long enough that Israeli voters understand what is at stake and will not be susceptible to exploitation.²⁰

10. Roe Nahmias, *Syria Says Israel 'Provoking World' With Referendum Bill*, YNET, Dec. 11, 2009, <http://www.ynetnews.com/articles/0,7340,L-3818452,00.html>.

11. Stoil & Hoffman, *supra* note 2.

12. Ilene R. Prusher, *In Israel, US Envoy Maps Peace With Syria*, CHRISTIAN SCI. MONITOR, July 14, 2009, at 6.

13. See Elaine Sciolino, *Syria Is Willing to Renew Talks With the Israelis*, N.Y. TIMES, Dec. 10, 1993, at A1.

14. Chaim Levinson, AG: *We Were a Step From Rebellion During 2005 Gaza Pullout*, HAARETZ, Dec. 16, 2009, available at <http://www.haaretz.com/hasen/spages/1135510.html>.

15. *Id.*

16. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 530–33 (4th ed. 2007).

17. *See id.* at 527.

18. See, e.g., Jerry W. Calvert, *The Popular Referendum Device and Equality of Voting Rights—How Minority Suspension of Laws Subverts "One-Person-One Vote" in the States*, 6 CORNELL J.L. & PUB. POL'Y 383, 412–15 (1997); John Gastil et al., *When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Elections*, 78 U. COLO. L. REV. 1435, 1440–49 (2007).

19. See Ehud Eiran, *Politics and the 2005 Gaza and North West Bank Compensation and Assistance Facility*, 14 HARV. NEGOT. L. REV. 101, 112 (2009).

20. For example, in 1994, Prime Minister Yitzhak Rabin promised that any peace agreement involving the return of the Golan Heights to Syria would be subjected to a nationwide referendum, and,

Along the same lines, the risk of ballot confusion—present in so many referenda in the United States²¹—is absent here because ballots will contain only one question. And although advertising campaigns and big-budget interest groups are likely to sway some voters, the centrality of the land-for-peace question to Israel's identity means that most Israelis will have made up their minds already. As Elizabeth Garrett explains, "In a controversial, rare, and high profile nationwide referendum [in Israel], few, if any, undecided and uninformed voters exist on election day."²² This is an image of direct democracy at its finest: high turnout,²³ informed voters, and a single, well-defined issue on the ballot.

For several reasons, deliberation and entrenchment concerns are also negligible here. First, it is worth emphasizing that, unlike recent ballot initiatives in California and Switzerland,²⁴ the Golan Heights referendum will be put to the people by the legislature and not by paid signature gatherers, so the Knesset must approve any withdrawal plan before it is submitted to referendum. Second, the bill does not propose a constitutional amendment, so there is less cause to worry about entrenchment. (Israel does not even have a constitution, although its Basic Laws serve a similar function.) Third, a popular vote against withdrawal is not irreversible, since a future referendum could revisit the issue (although, admittedly, an initial defeat could derail the peace process for some time). Fourth, the bill under consideration provides that the Knesset can bypass the referendum requirement entirely if a supermajority of legislators approves a land transfer with Syria. Such a result may seem improbable, but precedent exists: Israel's 1994 peace treaty with Jordan, which included land transfer provisions, was endorsed by a supermajority of the Knesset.²⁵

in 1999, Prime Minister Ehud Barak reiterated that promise (and extended it to include any peace agreement with the Palestinians affecting the status of Jerusalem). See Elizabeth Garrett, *Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 CHI. J. INT'L L. 159, 159 (2001).

21. On November 4, 2008, for instance, voters in San Francisco were confronted with twenty-two local ballot questions, for which they were "prepared" by a 268-page ballot book. See DEP'T OF ELECTIONS, CITY AND COUNTY OF S.F., VOTER INFORMATION PAMPHLET (2008), available at http://sfpl.org/pdf/main/gic/elections/November4_2008.pdf. In addition, voters tackled twelve statewide ballot questions, for which an additional 144-page ballot book was provided. See CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

22. Garrett, *supra* note 20, at 168.

23. "Turnout in Israel is consistently high, averaging about 80 percent of eligible voters . . ." *Id.* at 164.

24. See Aaron Zelinsky, *Constitutional Amendment by Popular Vote: Bad for Switzerland and California*, HUFFINGTON POST, Nov. 30, 2009, http://www.huffingtonpost.com/aaron-zelinsky/constitutional-amendment_b_374683.html.

25. The vote was one hundred and five to three, with six abstentions. AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* 544 (2000).

Of course, some clouds of concern linger. It remains true, for instance, that citizens voting in any single-issue referendum may lack the broad, long-term perspective of elected representatives and, consequently, may not appreciate the full implications of their votes. And, as Garrett has rightly noted, it is problematic that the mechanics of Israel's first referendum will be sorted out in the context of a particular vote, rather than in the abstract:

Ideally, a structure for a popular vote would be implemented before a government announced a decision to submit a particular issue to a referendum. Once a specific issue becomes the subject of direct democracy, the stakes become higher because one side will often be benefited by one set of implementation decisions and the other side disadvantaged.²⁶

Nevertheless, even those who ordinarily denigrate direct democracy will find that the usual litany of criticisms is abbreviated here. Whatever merit one ascribes to Israeli withdrawal from the Golan Heights, this referendum is an effective method of polling Israel's citizenry, minimizing civil discord, and avoiding deadlock. What is needed most is an unmistakable signal. A national referendum over the fate of the Golan Heights will either propel forward Israel's negotiations with Syria or caution Israel's government that it is moving faster and further than the nation will tolerate.

26. Garrett, *supra* note 20, at 159.