

The Israeli Referendum: A Politico-legal Assessment of Qualified Majority Requirements

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The Referendum in Israel

The referendum is literally an unprecedented event in Israel – along with India, Japan, Holland and the USA the only democratic country never to have held a nation-wide referendum. Israel – was until recently – "an example of representative democracy with authoritative decisions being made only by a duly elected parliament".

The recent constitutional changes make this assessment difficult to sustain. Israel is in a process of, what we might call, direct democratisation. Political scientist Arend Lijphart has argued that there are four institutions of direct democracy; the recall, the primary, the direct election of the chief executive, and the referendum.

Israel has introduced all but one of these devices. Primaries have been held, the direct election of the Prime Minister was introduced in 1992 (the first election was held in 1996), and the *Basic Law: Referendum* is to be enacted by the Knesset in the spring of 2000 – though it remains unclear in which form, as the Knesset is debating two bills; Likud MK Silvan Shalom's *Referendum Bill* and the Government's *Basic Law: Referendum* (Bill).

The enactment of a referendum act appears to be the most radical of these constitutional developments. The referendum is not a novel phenomenon in the political discourse in Israel.

The referendum has, in fact, been proposed several times – although no referendums were held. Ben-Gurion proposed a referendum on the introduction of a majoritarian electoral system in the 1958 (to reduce the influence of the NRP), Begin proposed the introduction of a legislative initiative (which would have allowed 100.000 citizens to demand that a proposed law be submitted to a referendum). The referendum was briefly discussed in the 1970s, when a plebiscite over the future of the West Bank was considered. The referendum re-entered the political discourse in the 1990s when Yitzhak Rabin proposed that a peace deal with Syria should be submitted to popular approval in a referendum. This proposal was included in the Labour Party's manifesto in 1996, as well as the commitment was part of *One Israel's* election platform in the 1999.

The attraction of the referendum device is that it – for better or for worse – can be seen as the ultimate system legitimising device. Yet democracy is not just majority rule. Indeed, it is often argued that referendums produce a caricature of democracy. Not least when we are considering referendums on territorial and ethnic issues. These difficulties have led to a widespread tendency

to regulate the referendum, by introducing qualified majorities, majority quorums, etc. This brief is intended to present an update on the subject.

Qualified majorities

The legitimacy of a referendum rests on its decisiveness. No one in this day and age of democracy is likely to argue against 'the voice of the people' as expressed in a convincing and decisive majority. However, a close result obviously decreases the legitimacy of the result. There are a handful of examples of referendums which were decided by a whisker (cf. The Danish Maastricht referendum in 1992 (51%-49%), French Maastricht referendums in 1992 (51%-49%), the Quebec secession referendum in 1995 (50.1%-49.9%), and the Irish divorce referendum in 1995 (51-49).

It must be stressed that close results are rare. Referendums are normally decided by wide margins. Only a handful of the 200 referendums held in the Western democracies have been decided by close margins. There are indications that the outcome of a referendum on the Golan Heights will prove equally decisive. A poll conducted by the *Jaffe Centre for Strategic Studies* thus found 70 percent of the eligible voters supported withdrawal from the Golan heights and that six out of ten Jewish Israelis would give up the Golan Heights. Yet, this statistical finding does not detract from the fact that close results can raise serious political problems, which must be addressed.

The problems arising from the possibility – or risk – of a close outcome are frequently discussed in politics, which employ the referendum. There have been special majority requirements in Denmark, Britain, New Zealand and – somewhat exotically – in Gambia. Moreover there is a considerable number of legal cases challenging special majority requirements at the state level in the United States. The same is true for Canada, where the Supreme Court of Canada, in 1998, ruled that a special majority requirement should be enacted lest a narrow majority of the voters in Quebec should vote for secession without prior negotiations with ROC(rest of Canada). The court, consequently, recommended that the "political actors" should determine "what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken".

The Canadian government has – through the Clarity Bill (C-20) – sought to implement the Court's recommendations. The underlying rationale behind the government's bill is to ensure that the outcome of a future referendum in Quebec reflects the settled will of the citizens of the province.

For as the Canadian minister of intergovernmental affairs, Stephane Dion (herself from Quebec) has argued,

"You don't break you a country with support of 50% plus one. That's just never happened. On the contrary, outside the colonial context, referenda held as a part of a successful process of secession have always generated majorities of over 70 %. Separatist leaders around the world say: 'let my

people vote under fair conditions and you'll see that they want to separate'. They are not saying: 'half of my people want to separate'.

The bill stipulates that the outcome of the referendum must be "a clear expression of a will by a clear majority of a province that that province cease to be part of Canada". However, the government has refrained from stipulating a specific percentage below which the result of a referendum becomes legally void.

The Canadian bill is – in many ways - comparable to the bill proposed by Likud MK Silvan Shalom – although Shalom has proposed a 50 percent threshold. Shalom's bill stipulates that a qualified majority of 50 per cent of the eligible voters must vote in favour of a proposal for Israeli withdrawal from the Golan Heights.

The bills represent but a few of several enactments aimed at securing that a super-majority supports proposed legislation submitted to the voters. The enactment of Silvan Shalom's bill would not, therefore, be unique. Yet provisions for special majorities remain rare in most democracies. We may distinguish between the following requirements:

- Turnout requirement: a proposal is only enacted if the turnout in the referendum surpasses a specified threshold (Cf. the Italian Constitution's stipulation that the turnout must be higher than 50 per cent for the result to be valid).
- Geographical Requirements (Double majority): a majority of the citizens as well as a majority of the states (or Cantons) must support A referendum in a federal state. Known from constitutional referendums in Australia and Switzerland.
- Majority of the registered voters: a majority must support a proposal, which represent a specified percentage of the eligible voters. (E.g. constitutional amendments in Denmark must be supported by a majority, which represents at least 40 per cent of the registered voters). Silvan Shalom's proposed bill falls in this category.
- Qualified majority: A specified percentage, e.g. 60 per cent of the voters must approve the proposal (known from constitutional changes in some American states). Was used in Gambia in 1965 (but not in 1996).
- Ethnic majority requirement: a majority of a specified ethnic group must support a proposed change (Cf. South Africa's referendum on the abolition of Apartheid in 1992, in which only white South Africans could vote).

Qualified majority:

Pure qualified majorities are rare. Constitutional changes in New Zealand had to be approved by 64 per cent of the voters between 1908 and 1914, and a similar provision was used in Gambia in 1965. However, the provision was not used in 1996 referendum on the new constitution. No

nation-wide qualified majority provisions are currently in force. Qualified majority requirements exist in some state constitutions in the USA. The constitution of West Virginia thus stipulates that political sub-divisions may not incur bonded indebtedness or increase tax rates beyond those established by the state constitution without the approval of 60 percent of the voters.

The reason for the apparent lack of similar provisions is, possibly, that the high threshold is unacceptable to the large majority, and, possibly, that the requirement is unnecessary as large most referendums – contrary to the general perception – are decided by wide majorities. The Canadian Clarity-stipulates that a future referendum on Quebec independence would have to be ‘decisive’, be endorsed by more than 50 per cent plus one, yet the bill does not – as noted above - prescribe a specific percentage. Possibly because a qualified majority requirement has been deemed to be politically unacceptable in Canada. However, the litigation over similar requirements has not been successful. The courts thus rejected a challenge to the provision in the constitution of West Virginia.

Majority of the registered voters requirement:

Likud MK Silvan Shalom has proposed 50 per cent of the eligible voters must support an agreement for this to come into force. Opponents have declared this proposal ‘antidemocratic’. Fellow Likud MK Mrs. Limor Livnat, however, believes that a "reasoned assessment of the facts leads to just the opposite conclusion". Mrs. Livnat bases her argument on provision in other comparable countries' constitutions, which stipulate that a mere 50 per cent, plus one majority is insufficient for the passage of a proposal. There are examples of such requirements. Yet registered voters requirements are extremely rare. They have never been used in the countries which have used the device most frequently. The majority of registered voters requirements have thus never been used in France, Australia, Switzerland, Italy and Ireland

The best known example of a *majority of the registered voters requirement* is, perhaps, the, so-called, 40 per cent rule (or Cunningham Amendment), introduced by a Labour back-bencher George Cunningham, before the Scottish and Welsh devolution (home rule) referendums in the late 1970s. The Cunningham amendment stipulated that the majority in the devolution referendum should represent not only a majority of those voting, but at least forty per cent of the eligible voters. Another example of a *majority of the registered voters requirement* is the Danish Constitution's Article 88 which stipulates that "a constitutional bill shall within six months after its final passing be submitted to the Electors for approval or rejection by direct voting...If majority of the persons taking part in the voting, and at least 40 per cent of the Electorate has voted in favour of the Bill as passed by the Parliament, and if the Bill receives the Royal Assent it shall form an integral part of the Constitution Act".

These requirements might seem sound in theory. Yet they have often proved unworkable in practice. The Scots voted in favour of devolution (51.6 per cent yes) on a 63.6 turn out, yet the result was declared void as the majority only represented 32.9 per cent of the electorate. The outcome did not increase the legitimacy of the process. The outcome was rather viewed as the English' desperate attempt to hold on to Scotland at any price. The Danish provision has proved no less unworkable and has even yielded farcical outcomes, most notably when a 91.8 per cent majority in favour of a constitutional amendment in Denmark was declared void because the

majority only represented 44.5 per cent of the electorate (45 per cent of the eligible voters had to support the proposal according to the Danish constitution of 1920).

However, the introduction of a *majority of the registered voters requirement* likely to be unnecessary in a referendum concerning ethnonationalist referendums. A majority for an agreement with the Syrians on a low turnout does not carry much authority, and would be a cause for concern. Yet the fact of the matter is that the problem of a low turnout is almost non-existent in ethnonationalist referendums. The turnout in the East-Timor vote was a full 94 per cent and the turnout in the Northern Ireland referendum was 81 per cent. These turnout rates are not unusual in ethnonationalist referendums. Ethnonationalist issues arouse interest unlike the interest in mundane issues like wage-indexation (Italy 1985), Nuclear Energy (Austria 1979) or Divorce (Ireland 1995), and it is, therefore, almost certain that the majority almost automatically would represent a majority of the registered voters.

The problem of a low turnout – and of a close result – could be resolved by making the result advisory only. This arrangement would allow the MKs to interpret the result. It is unlikely that a majority in the Knesset would go-head with a narrow victory, as well as it is unlikely that a majority would overrule the people if they have voted massively in favour of an agreement. The same conclusion has been drawn from Scotland's 1979 referendum.

Critics argued, prior to the vote in Scotland in 1979, that the 'forty percent rule', in effect, would allow abstainers to be treated as no voters. This is not, however, an accurate legal assessment as parliament – under British [and, perhaps, Israeli] constitutional law – ultimately is to decide whether the result should be binding or not. Yet the situation is – as Vernon Bogdanor has commented – "very different if the referendum is mandatory", i.e. binding and not advisory, as was the case in Denmark in 1939. "Such an outcome [a rejection despite a 91,8 percent yes-vote] could have been avoided with an advisory referendum, and perhaps that the experience of the 40 percent rule shows one of the advantages of a flexible constitution [such as Israel's]."

A special version of the *majority of the registered voters requirement* exists in several American states (e.g. in Wyoming and Minnesota). Art 52 (f) of Wyoming's constitution thus stipulates if the votes in favour of a measure are in excess of 50 per cent "of those voting in the general election" the measure shall pass. This provision has led to some rather paradoxical results. A constitutional amendment in Minnesota – incidentally on the introduction of the initiative – failed although 53,3 percent had supported the measure. 12 percent of those voting in the general election had failed to vote. The requirement (in Wyoming) has recently been challenged in the courts. The federal court rejected this challenge;

"We believe that the State of Wyoming has a legitimate and reasonable interest in seeing that an initiated measure, for example, is not enacted into law unless it is approved by a majority of those voting in the general election in which the initiated measure is being considered. If Wyoming wants to

make it 'harder', rather than 'easier', to make laws by the initiated process, such is its prerogative, and, in our view, does not violate the First Amendment. A state understandably wants to...make it difficult for a relatively small interest group to enact its view through an initiated measure"

Geographical Requirements (Double majority):

This requirement is a notable feature in federal states. Constitutional changes in Australia and Switzerland must not only be supported by a majority of the voters, but also by a majority of the states, or cantons. Art 128, Section 4, of the Australian Constitution states: If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the governor-general for the Queen's assent.

Article 123 of the Swiss constitution states that: "the revised Federal Constitution or the revised part of it, as the case may be, shall enter into force if it has been approved by the majority of the Swiss citizens casting a vote and the majority of the Cantons".

These provisions were concessions to the smaller states as a means of safeguarding local – or cantonal – prerogatives. Whether these requirements are suitable for a unitary state like Israel is an open question. The fact of the matter is, however, that the requirement has had relatively little effect on the fate of the proposals submitted to the Swiss and Australian voters. Only eight of 43 proposals have been approved in Australia, but only three have failed because they failed to reach a double majority. The figures for Switzerland are even less impressive: only six out of 143 proposed constitutional amendments were rejected because they failed to achieve the double majority (in 1866, 1955, 1970, 1973, 1975 and 1983). The double majority requirement is not, therefore, a particularly efficient barrier against change. Moreover it is difficult to see how a similar provision could be introduced in a unitary state like Israel.

Turnout requirements:

The legitimacy of a referendum stems from the assumption that the result expresses the will of the majority of the people. However, the lower the turnout, the greater the possibility of distortion (in which the percentage voting yes varies considerably from the percentage that would have resulted if all citizens had voted) in these instances of high voter apathy a special interest group of committed citizens may well take advantage of the situation by trooping to the polls in great numbers while the majority of the electors stay at home.

This problem is often sought avoided by stipulating that a qualified majority must support the proposal. Art 75, Section 4 of The Italian constitution states that: "the proposal submitted to referendum shall be approved if a majority of those eligible have participated in the voting, and if it has received a majority of valid votes". That is, the proposal is only approved if the turnout is

above fifty per cent. This stipulation has proved to be a severe obstacle in recent years; all seven referendums held in 1997 failed as a result of the 50 per cent requirement. The provision is an efficient safeguard against, so-called, *false majorities* (a minority's exploitation of voter apathy). Yet voter apathy is unlikely to be a problem in the forthcoming Israeli referendum, as the turnout in Israel, on average, is 80 percent. The introduction of a similar requirement is not, therefore, likely to have any notable effect on the legitimacy of the outcome.

Ethnic majority requirement:

Ethnonationalist referendums are seldom conducted on a nation wide basis. Only those living in the area typically vote on plebiscites affecting the territorial integrity of a state (e.g. East Timor in 1999).

A variation of this type of referendums is to restrict the franchise to members of a particular ethnic group, e.g. the settlers in the occupied territories or the Jewish citizens of Israel. An opponent of the peace deal has argued:

"The state of Israel was established against the wills of the Arabs, and its fate, for better or for worse, should therefore be decided only according to the will of the Jews. This is the approach we should be taking to the referendum Prime Minister Ehud Barak has promised on the withdrawal from the Golan in return for an agreement".

The strongest objection against this proposal is that it is very likely to be intolerable to the international community. The 1983 referendum on a new constitution for the Republic of South Africa – in which the franchise was limited to whites - was condemned by the international community precisely because the electorate was limited to white and coloured South Africans.

However, it should be noted that the international community hailed a referendum on the abolition of Apartheid in 1992 (in which the Blacks were excluded from participating). For two reasons a) it followed a process of elite bargaining, and b) because it prevented the ultra-rightist parties from denouncing the negotiations with the ANC as politically illegitimate and against the stated will of the people. A case could be made for the view that a "Jews only" plebiscite could be conducive to a long-term solution, as a defeat for the opponents of the peace-process would be a fatal blow to their future agenda.

Yet an emulation of the South African experience is not an option. A 'Jews only' referendum would be inconsistent with public international law as it would discriminate against legal Israeli citizens.

Conclusion

It is difficult to make a strong case for either of the above models. Special majority requirements rarely have the intended effect. The only lesson which can be learned – as far as the majority requirement is concerned – is that efforts must be made to ensure that the electorate is as wide and as inclusive as possible.

A case can be made for the view that a close result threatens the legitimacy of the outcome. Yet, specific requirements are unlikely to increase the legitimacy of the result. It might be stipulated that the turnout should be above 50 percent lest a controversial policy be enacted against the knowledge and wills of the voters. But this situation – which has occurred in Switzerland – is unlikely to be a problem in Israel where the turnout-rate usually is above 75 percent.

Special majority requirements (e.g. qualified majority requirements and registered voters requirements) are comparatively rare. They have frequently been challenged in the courts – though thus far unsuccessfully. The proponents of qualified majority requirements can, perhaps, take heart from the fact that the Canadian Supreme Court, in fact, has endorsed the use of special requirements.

The political use of referendums indicates that such provisions (e.g. the Shalom Bill and the Canadian Clarity Bill) tend to be unnecessary. Most referendums are decided by a clear margin. To introduce qualified majority requirements make the process unnecessarily rigid. What should be sought are rather mechanisms, which make the use of the device more flexible. Stipulating that the referendum be advisory rather than binding could do this.

Appendix I

Constitutional Provisions for Referendums in Western Democracies

Table 1: Provisions for Types of Referendums in Constitutions in Western Polities

Country	Ref.Provsn.	Const.Am.	Faculative	Min.Ab
Australia	Yes	Sec.128(23)□	-	-
Belgium	No#	-	-	-
Denmark	Yes	§.88, 29(6)	§.20(1)	§.42(4)
Finland	Yes	-	Art.22A(1)	-
France	Yes	Art.89(0)	Art.11(8)	-
Ireland	Yes	Art.46(17)	-	Art.27(0)
Italy	Yes	-	Art.123,132	Art.71*,75(38)
Israel	-	-	Basic Law: Ref.	-
Norway	No	-	-	-
Sweden	Yes	-	Ch.8.§4,15(1)	-
U.K	-	-	-	-

New Zealand	=	Sec.189(6)	=	C.I.R.A(1)
Austria	Yes	Art.44(1)	-	Art. 48*
Total		Const.(53)	Facul.(11)	Min.ab(43)

Ref.Provsn = Provisions for referendums mentioned in the constitution.

Const.Am. = Optional Referendum for constitutional amendments.

Facultative = provisions for facultative referendums on non-constitutional measures.

Min.Abr.Ref = minority-veto, abrogative referendum, or other constitutional provisions for semi-direct democracy*
 Popular petition, (resp.Volksbegeh (Austria), *Iniziativa di legge popolare* (Italy)).

C.I.R.A= "Citizen Initiated Referendum Act 1993". The numbers in the parentheses show the number of referendums, which have been held under this provision. 53.3 percent of the constitutions in Blaustein and Flanz' *Constitutions of the Countries of the World* contain provisions for referendums. The countries are, in addition to the ones already mentioned, Afghanistan, Albania, Algeria, Angola, Antigua-Barbuda, Argentina, the Bahamas, Bangladesh, Belarus, Botswana, Bulgaria, Cameroon, Cape Verde, the Central African Republic, Chile, the Comoros, the Congo, Cuba, Dominica, Egypt, El Salvador, Ecuador, Equatorial Guinea, Ethiopia, Gabon, Gambia, Georgia, Greece, Granada, Guatemala, Guinea-Bissau, Guyana, Hungary, Iceland, Iran, the Ivory Coast, Jamaica, Japan, Kazakstan, Kiribati, Latvia, Lithuania, South Korea, Liberia, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Mauritius, Mongolia, Morocco, Myanmar, Nauru, Niger, Pakistan, Panama, the Philippines, Poland, Portugal, Romania, Russia, Rwanda, St Kitts and Nevis, St Lucia, St Vincent, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Singapore, Somalia, Spain, Sri Lanka, Surinam, Switzerland, Syria, Togo, Tunisia, Turkey, Vanuatu, Venezuela, Vietnam, Ukraine, and Uruguay. All American states, except Delaware, have provisions for constitutional referendums.

Appendix II: Constitution of the State of Wyoming, Art 52

Most American states have provisions for referendums. These referendums are strictly regulated. The following extract from the Constitution of Wyoming (Art 52) is an illustrative example.

- (a) The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.
- (b) An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred (100) qualified voters as sponsors, and shall be filed with the secretary of state. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.
- (c) After certification of the application, a petition containing a summary of the subject matter shall be prepared by the secretary of state for circulation by the sponsors. If signed by qualified voters, equal in number to fifteen per cent (15%) of those who voted in the preceding general election and resident in at least two-thirds (2/3) of the counties of the state, it may be filed with the secretary of state.
- (d) An initiative petition may be filed at any time except that one may not be filed for a measure substantially the same as that defeated by an initiative election within the preceding (5) years. The secretary of state shall prepare a ballot title and proposition summarising the proposed law, and shall place them on the ballot for the first state wide election held more than one hundred twenty (120) days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

(e) A referendum petition may be filed only within ninety (90) days after adjournment of the legislative session at which the act was passed, except that a referendum petition respecting any act previously passed by the legislature may be filed within six months after the power of referendum is adopted. The secretary of state shall prepare a ballot title and proposition summarising the act and shall place them on the ballot for the first state-wide election held more than one hundred eighty (180) days after adjournment of that session.

(f) If votes in an amount in excess of fifty percent (50%) of those voting in the general election are cast in favour of adoption of an initiated measure, the measure is enacted. If votes in an amount in excess of fifty percent (50%) of those voted in the general election are cast in favour of rejection of an act referred, it is rejected. The secretary of state shall certify the election returns. An initiated law becomes effective ninety (90) days after certification, is not subject to veto, and may not be repealed by the legislature within two (2) years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty (30) days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

(g) The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, enact local or special legislation, or enact that prohibited by the constitution for enactment by the legislature. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.