

Israel: Legal Aspects of Ceding Israeli Territory

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Israel: Legal Aspects of Ceding Israeli Territory

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SUMMARY The Knesset (Israel’s parliament) has adopted several legislative measures that impose special requirements for the ratification and implementation of international agreements and unilateral plans for territorial concessions. The constitutional, procedural, and political effects of these legislative measures, however, are debatable.

I. Introduction

Israeli territory currently extends to areas within the 1949 demarcation lines based on armistice agreements with Egypt, Jordan, Lebanon, and Syria following the 1948 Arab-Israeli War (Green Line).¹ Israel also extends its jurisdiction to East Jerusalem and to the Golan Heights, both captured in the 1967 Six-Day War.² Israel has not extended its law and administration to the West Bank (Judea and Samaria) or the Gaza Strip, territories it similarly occupied in the 1967 war.

On August 15, 2005, Israel unilaterally withdrew from the Gaza Strip.³ The withdrawal has been the subject of increasing controversy in Israeli society.⁴

The Knesset (Israel’s parliament) has considered on a number of occasions the Israeli government’s authority to enter into or implement agreements or unilateral plans for ceding jurisdiction over specific or nonspecific territories to which Israeli jurisdiction applies. A review of relevant legislative developments reflects an interest on the part of the Knesset in subjecting governmental authorities in this area to increased procedural requirements for approval, including a special parliamentary majority vote and public approval by referendum.

This report describes the evolution of conditions for approval of governmental actions for implementation of international agreements and unilateral acts ceding Israeli jurisdiction. The report further analyzes the significance and potential impact of such conditions on the government’s ability to commit to territorial concessions.

¹ Text of the agreements is available in *THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS* 74–102 (R. Lapidoth & M. Hirsch, eds., 1992).

² *Six-Day War*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Six-Day-War> (last visited Aug. 21, 2018), archived at <https://perma.cc/M8NC-JS3K>.

³ See *Special Update: Disengagement-August 2005*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Aug. 15, 2005), <http://mfa.gov.il/MFA/AboutIsrael/History/Pages/Disengagement%20-%20August%202005.aspx>, archived at <https://perma.cc/77CU-4ZZ2>.

⁴ William Booth & Ruth Eglash, *A Decade Later, Many Israelis See Gaza Pullout as a Big Mistake*, WASH. POST (Aug. 15, 2015), https://www.washingtonpost.com/world/middle_east/a-decade-later-israelis-see-gaza-pullout-as-big-mistake/2015/08/14/21c06518-3480-11e5-b835-61ddaa99c73e_story.html?utm_term=.54ee635882a5, archived at <https://perma.cc/SEY6-LJAG>.

II. Legislative History of Approval Conditions for Territorial Concessions

The introduction of legislative and constitutional requirements for the approval of territorial concessions appears to relate to the ceding of Israeli jurisdiction over territories acquired in the 1967 Six-Day War. Later developments involving additional requirements, while similarly intended to apply to such territories, could in principle apply also to other territories within the Green Line in the context of possible negotiations on territorial swap proposals.⁵

A. East Jerusalem

1. 1967 Extension of Municipal Boundaries by Government Declaration

Following the 1948 Arab-Israeli War, Jerusalem was divided between Israel and Jordan, with its eastern part (East Jerusalem) falling under Jordanian control and its western part under Israeli control. In the 1967 Six-Day War, Israel gained control over East Jerusalem.⁶

On June 28, 1967, the Israeli government issued the Jerusalem Declaration expanding the limits of the Jerusalem municipality. The Declaration provided a detailed description of the areas included in the Jerusalem municipality on the date of its issuance, including East Jerusalem.⁷ The Declaration was issued by the Minister of Interior in accordance with the Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, which provided that “[t]he law, jurisdiction and administration of the State shall extend to any area of Eretz Israel [referencing the biblical land of Israel] designated by the Government by order.”⁸

2. Ensuring Sovereignty under a Basic Law

The legal status of the extension of Israeli law and administration to East Jerusalem, initially guaranteed under the Declaration, was later enhanced by the passage of Basic Law: Jerusalem

⁵ See, e.g., David Makovsky et al., *Imagining the Border: Options for Resolving the Israeli-Palestinian Territorial Issue*, THE WASHINGTON INSTITUTE FOR NEAR POLICY, <https://www.washingtoninstitute.org/policy-analysis/view/imagining-the-border-options-for-resolving-the-israeli-palestinian-territor> (Jan. 2011), archived at <https://perma.cc/82SG-YE2E>; see also Barak Ravid & Jack Khoury, *Netanyahu Offers Swapping Israeli Arab Communities With Settlements in Future Deal With Palestinians*, HAARETZ (July 27, 2017), <https://www.haaretz.com/israel-news/netanyahu-offers-swapping-israeli-arab-towns-with-settlements-1.5436367>, archived at <https://perma.cc/T75Y-G8PM>.

⁶ Mona Boshnaq et al., *The Conflict in Jerusalem Is Distinctly Modern. Here's the History*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/world/middleeast/jerusalem-history-peace-deal.html>, archived at <https://perma.cc/G4YX-KPNL>.

⁷ Jerusalem Declaration (Extension of Municipal Areas) 5727-1967, KOVETZ HATAKANOT (subsidiary legislation) No. 2065 p. 2693 (June 28, 1967), available at <http://www.nevo.il> (by subscription, in Hebrew), archived at <https://perma.cc/8Z3N-NZD>; see also Ron Klein, *The Weight of the "Referendum" Issue: Law and Administration Law (Repeal of Law, Adjudication and Administration (Amendment) 5771-2010*, LAWS IN SHORT (Dec. 2010), available at <http://www.nevo.il>, archived at <https://perma.cc/SP33-2JJ8>.

⁸ Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, 21 LAWS OF THE STATE OF ISRAEL (authorized translation from the Hebrew Prepared by the Ministry of Justice) 75 (5727-1966/67).

Capital of Israel on December 30, 1980.⁹ The Basic Law declared that “[t]he complete and united Jerusalem is the capital of Israel.”¹⁰ It also provided that “[t]he limits of Jerusalem include, for the purpose of this Basic Law, the whole area described in the addendum to the declaration of the expansion of the limits of the Jerusalem municipality of . . . June 28, 1967.”¹¹

In 2000 the Knesset passed Basic Law: Jerusalem Capital of Israel (Amendment). The Amendment Law required that a transfer of any part of Jerusalem land to a foreign political or governing power, or to another similar foreign authority, whether permanently or for a given period, had to be supported by sixty-one of the full plenum of 120 Knesset members.¹² A subsequent amendment of the Basic Law passed in January 2018 included a provision that further increased the majority requirement to eighty of the total of 120 members. The amendment further stated that a sixty-one-member majority of the Knesset would be required to alter this provision.¹³

Commentators have opined that the January 2018 amendment has not substantially altered the legal requirements regarding the Knesset’s power to ratify territorial concessions, as

[a] future government could simply void the law with a regular majority of 61 votes. In any case, a Basic Law: Referendum already requires an 80-vote majority for approving conceding territory in Jerusalem – which too can be cancelled with a simple majority of 61.¹⁴

B. Golan Heights

A year after the passage of Basic Law: Jerusalem Capital of Israel, on December 15, 1981, the Knesset adopted the Golan Heights Law, 5742-1981.¹⁵ This Law expressly applied Israeli law, jurisdiction, and administration to the Golan Heights. Unlike the extension of jurisdiction to East Jerusalem, deviation from which was regulated under a basic law initially requiring a special majority and later approval by public referendum, procedures for the removal of Israeli jurisdiction from the Golan Heights were not specified either in a basic law or in regular legislation.

⁹ For a discussion of the legal hierarchy of laws in Israel and the status of basic laws, see *Basic Laws*, THE KNESSET (2018), http://knesset.gov.il/description/eng/eng_mimshal_yesod.htm, archived at <https://perma.cc/T7H8-NLBJ>.

¹⁰ Basic Law: Jerusalem Capital of Israel § 1, SEFER HAHUKIM [SH] [BOOK OF LAWS (official gazette)] 5740 No. 980 p. 186; unofficial English translation available at <http://knesset.gov.il/laws/special/eng/BasicLawJerusalem.pdf>, archived at <https://perma.cc/V5WW-ELH4>.

¹¹ *Id.* § 5.

¹² Basic Law: Jerusalem Capital of Israel (Amendment), SH 5761 No. 1760 p. 28.

¹³ Basic Law: Jerusalem Capital of Israel (Amendment No. 2), SH 5778 No. 2680 p. 94; see also Ruth Levush, *Israel: Restrictions on Ceding Areas in Jerusalem Municipality to Foreign Entities*, GLOBAL LEGAL MONITOR (Jan. 5, 2018), <http://loc.gov/law/foreign-news/article/israel-restrictions-on-ceding-areas-in-jerusalem-municipality-to-foreign-entities/>, archived at <https://perma.cc/HAA7-9EC>.

¹⁴ Nir Hasson & Jonathan Lis, *Analysis: The Israeli Right’s Vaunted Jerusalem Amendment Changes Nothing*, HAARETZ (Jan 3, 2018), <https://www.haaretz.com/israel-news/.premium-bennett-s-vaunted-jerusalem-amendment-changes-nothing-1.5630331>, archived at <https://perma.cc/HUG6-3728>. For a discussion of Basic Law: The Referendum and additional relevant laws see *infra*, under *Referendum Requirements*.

¹⁵ Golan Heights Law, 5742-1981, SH 5742 No. 1034 p. 6.

III. Referendum Requirements

A. 1999 Legislation on Ceding Territories

Public referendum requirements as a precondition for territorial concessions were first introduced in 1999 with the adoption of the Law and Administration (Voiding Extension of Law, Adjudication and Administration) Law, 5759-1999.¹⁶ According to the Ordinance, a government decision that provides that the law, jurisdiction, and administration of the State of Israel no longer applies in a certain territory requires confirmation by a majority of Knesset members.¹⁷ The implementation of such a decision further requires its approval by a public referendum, effective the day on which a basic law regulating public referendums goes into effect.¹⁸

B. 2010 Referendum Law

Ten years after the adoption of the 1999 legislation, on November 22, 2010, the Knesset passed the Law and Administration Ordinance (Voiding Extension of Law, Adjudication and Administration) (Amendment) Law, 5770-2010 (2010 Referendum Law). The amendment provides that the government should not ratify or sign any agreement that involves ceding Israeli territory in the absence of Knesset approval by two-thirds (eighty of 120) of its members. In the alternative, approval by a regular majority of Knesset members may suffice, if the decision enjoys the support of the majority of voters participating in a public referendum.¹⁹

The 2010 Amendment Law establishes procedures for conducting a referendum. Among others, it requires that the referendum be held within ninety days of the confirmation of an agreement that involves ceding Israeli territory by the Knesset.²⁰ It also requires that the referendum be open to all persons eligible to vote in the Knesset elections²¹ and provides the text of the question that should be submitted for voting.²²

The constitutionality of the 2010 legislation was challenged soon after its passage in a petition to the Israeli Supreme Court. The petitioner argued that a requirement that a measure approved by the Knesset must be confirmed in a public referendum should have been based on primary

¹⁶ Law and Administration Ordinance (Voiding Extension of Law, Adjudication and Administration) Law, 5759-1999, SH 5759 No. 1703 p. 86.

¹⁷ *Id.* § 2 (translated by author).

¹⁸ *Id.* §§ 3–4.

¹⁹ Law and Administration Ordinance (Voiding Extension of Law, Adjudication and Administration) (Amendment), 5770-2010, SH 5771 No. 2263 p. 58, up-to-date text available at <http://www.nevo.co.il> (by subscription, in Hebrew), archived at <https://perma.cc/MQ24-VYML>. For analysis see Ruth Levush, *Israel: Subjecting Land Concessions in Peace Negotiations to Public Referendum*, GLOBAL LEGAL MONITOR (Nov. 23, 2010), <http://loc.gov/law/foreign-news/article/israel-subjecting-land-concessions-in-peace-negotiations-to-public-referendum/>, archived at <https://perma.cc/Q9KG-UUXF>.

²⁰ Law and Administration Ordinance (Voiding Extension of Law, Adjudication and Administration) (Amendment), 5770-2010, § 4, *as amended*.

²¹ *Id.* § 6, *as amended*.

²² *Id.* § 7, *as amended*.

legislation, as it affected the parliamentary system of government that exists in Israel.²³ In such a system, political decisions are adopted by Knesset members and not directly by the people, as is required in a referendum.²⁴ The petition was withdrawn by consent after becoming moot by the adoption of Basic Law: Referendum on March 19, 2014.²⁵

C. Basic Law on Public Referendums

Basic Law: Referendum applies to any government decision to ratify or sign an agreement, or implement a plan, according to which the law, jurisdiction, and administration of the State of Israel shall no longer apply to territory in which they currently apply. Such a decision must be approved by referendum, unless it has been approved by an eighty-member majority of the Knesset.²⁶

To protect against the repeal of the Basic Law's requirements by the passage of emergency regulations or legislation, the Basic Law further provides as follows:

Stability 4. Emergency regulations do not have the power to change this basic law, to temporarily invalidate it, or to set conditions to it.

Rigidity 5. This basic-law can only be changed by means of a basic law adopted by an absolute majority of the Knesset Members.²⁷

The legitimacy of the Basic Law requirements for confirmation by a special Knesset majority or by referendum has been questioned as potentially unjustified considering the absence of similar requirements for the initial extension of Israeli jurisdiction over the same territories.²⁸ It should be noted, however, that the Basic Law might not always lead to a referendum. In the parliamentary system that applies in Israel, if the coalition government does not wish to have a referendum it may easily change the Basic Law.²⁹ In the case of a large coalition government, there is no need to even amend the law, as it is sufficient to have eighty members of the Knesset in support of the move. The peace agreements with Jordan and Egypt, for instance, enjoyed overwhelming support in the Knesset.³⁰

²³ HC 9149/10 Vataf v. Israel Knesset (petition withdrawn May 13, 2014), available at <http://www.takdin.co.il> (by subscription, in Hebrew), archived at <https://perma.cc/8KNP-BKW3>.

²⁴ Ron Klein, *The Weight of the "Referendum" Issue: The Law and Administration Ordinance (Voiding Extension of Law, Adjudication and Administration) (Amendment), 5770-2010*, LAWS IN BRIEF (Dec. 2010), https://law.huji.ac.il/sites/default/files/law/files/ron_referendum1.pdf, archived at <https://perma.cc/9Z5E-7XKA>; see also Dana Blander, "Basic Law: Referendum" Changes the Rules of the Game in the Israeli Democracy, ISRAEL DEMOCRACY INSTITUTE (Mar. 10, 2014), <https://www.idi.org.il/articles/7690>, archived at <https://perma.cc/A6A7-AYVD>.

²⁵ Basic Law: Referendum, SH 5774 No. 2443 p. 400, unofficial translation available at <http://knesset.gov.il/laws/special/eng/BasicLawReferendum.pdf> (last visited Aug. 29, 2018), archived at <https://perma.cc/4LMC-JSUZ>.

²⁶ *Id.* § 1.

²⁷ *Id.* §§ 4 & 5.

²⁸ Amnon Reichmann, *Innovations and Developments in Public Law in Israel in the Year 2014*, 11 DIN UDVARIM 5778 p. 205, 210 (Feb. 2018).

²⁹ Coalition governments are usually composed of groups of party lists representing a majority of Knesset members.

³⁰ Reichmann, *supra* note 28.

One scholar has further suggested that the use of the terms “ratification of the agreement” by the government and “a government decision not by way of an agreement” in Basic Law section 1’s discussion of cases where a referendum is needed “limit the government but . . . not the Knesset.”³¹ According to this view,

[t]he ratification of the agreement by the Knesset has not been discussed by the basic law, and the case of delivery of a territory by way of legislation, including by a unilateral withdrawal, is not regulated as requiring a referendum. Therefore almost paradoxically the main effect of the Law may be regarding the mode in which the government will act: If an agreement or a decision shall be formulated, they may be submitted for approval by the cabinet and not by the government, or they will be brought directly for approval by the Knesset, and then under the dry letter of the Law they will not require a majority of 80 Knesset members. Therefore, there seems to be a certain gap between the expressive level of the Basic Law—the effort to “block” public representatives by a referendum—and the technical-legal level of the Basic Law. It is possible that the drafters of the Law believed that by adopting a Basic Law public pressure would be created on the Prime Minister to conduct a referendum even in situations that are not covered by law.³²

³¹ *Id.*

³² *Id.* (translated by author).