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Anticipatory Effects of Judicial Review

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Abstract:

The effects of Judicial Review are not limited to the annulment of laws but also include effects to the legislative process in parliament. This is known as an anticipatory reaction to judicial review. This research shows the extent of this reaction as well as its impact on the legislative process. The methods used include both quantitative and qualitative analysis of the protocols of Parliamentary Legislative committees in the Knesset as well as interviews with those involved in the legislative process. The findings show the existence of a significant amount of anticipatory reaction to judicial review, which shapes the legislative process at its various stages.

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Contents

Over the past few decades, courts all around the world were granted the power to declare laws passed by the legislative branch as unconstitutional through a process called judicial review. Judicial review enables courts to decide which laws show a lack of agreement with the constitution of the country and should therefore be invalidated. This reality has triggered heated discussions as to the legitimacy of judicial review in a democracy. It has also had significant effects on the structure of political institutions and the process of decision making.

There has been some research on the effects of judicial review on the legislative process. Some theorists have suggested the presence of such effects because of *the law of anticipatory reaction* and the fact that legislators often change their legislative agenda in order to conform to what they anticipate the court will say with respect to their proposed legislation (Stone Sweet 2000). However, very little empirical research has tried to show the extent to which the presence of judicial review affects the legislative process through the empirical study of the legislative process.

Research Question

This research will try to answer the following question empirically: How significant is the effect of the presence of judicial review on the legislative process in Israel?

Literature Review

External Effects of Judicial Review

As mentioned previously, there is a heated debate as to the legitimacy of Judicial Review (See, for example: Sunstein et al. 2006, Sapir, 2003; Bellamy, 2007; Waldron, 2005; Ely, 1980; Brettschneider, 2007; Dworkin, 2002). Recent studies have explored the effects of judicial review on the interaction between courts and the legislators (Vanberg, 2001). Such effects include, for example, "anticipatory effects" on the legislative branch because of which the legislative branch does not legislate certain laws out of the fear of judicial review.

The theoretical model explaining these external effects is based on the *law of anticipated reaction.* This theory dates back to at least 1937 when it was outlined by Carl Joachim Friedrich and in itself is based on various theories of political power (Friedrich, 1937). Theories of political power try to find the impact of one player over the other: "A has power over B to the extent that he can get B to do something he would not otherwise do" (Dahl, 1957). Explained that way, it is clear that the judiciary has "power" over the legislative branch in the context of judicial review. Since the judiciary can stop certain legislation from passing, it forces the legislature to then change the current legislation. For this reason, many studies, already dating a few decades back, have tried to study the extent of this "impact" (Wasby, 1970).

One of the shortcomings of these existing studies is that they fail to take into account the *law of anticipated reaction.* To understand this theory, let us imagine the two players in the previous example, A and B. If B feels he can anticipate what A will do, even without A doing it, then he will alter his behaviour without A's "command." This effect is especially important in the relationship between the legislative branch and the judicial branch when judicial review is present. Questions such as "is it constitutional?" and "What is the court likely to do?" are frequently asked by

legislators and policy-makers (Feely, 1973). The answers to those questions affect their behaviour without the need for actual interference of the courts. Risk aversion causes legislators to "vet" their legislation before trying to pass it in order to ensure their legislation will not be cancelled (Hiebert, 2002, p. 222). One kind of anticipatory reaction, autolimitation, refers to the exercise of self-restraint by parliament in anticipation of an annulment by the courts (Favoreu, 1982). The legislature is then sometimes even willing to sacrifice initially held policy objectives in order not to get them annulled by the courts (Stone Sweet 2000, p. 74). It is precisely this anticipatory reaction that this study will try to outline.

Recent research has shown examples of cases where such anticipatory effects can be found in the United States (Balkin, 2010; Pickerill, 2004), Canada, where it is referred to as Charter Proofing (Roach, 2003; Hiebert, 2002), Europe (Stone Sweet 2000) and Israel (Mizrachi & Meydani, 2006). In Israel, this reality has even attracted some attention in the news (Shachar, 2001). Some recent studies have even theoretically suggested that this effect is the most significant effect of judicial review (Vanberg, 2001).

Missing Piece in the Existing Research

While there is wide evidence of the existence of anticipatory effects of judicial review on the legislative process, no wide empirical study has yet been undertaken to study the existence of such effect and to try to assess the extent of those effects empirically.

This is exactly the contribution that this study hopes to bring to the literature on this topic, while focusing on the case of Israel as a case study for such effects.

Israel's 'Constitutional Revolution'

The Israeli judiciary rarely exercised the power of judicial review of legislation until the beginning of the 1990s[1]. The reason for this is that since its foundation in 1948 and until the 1990's, the State of Israel had no Bill of Rights. However, in the beginning of the 1990's, after the Knesset passed three new basic laws which included protection of several human rights, the courts interpreted this as the Knesset granting them wider power of judicial review

The first case to reveal that power was *Mizrachi v. Migdal.* However, interestingly, in that case, the court did not annul the contested law but rather only declared its power to judicial review. Only in 1997 did the Supreme Court first cancel a section of a law on the basis of the power granted by the new basic laws.

The Supreme Court has since used its powers to invalidate sections of laws or entire laws in only eight cases through judicial review (Segal, 2008[2]), but it is widely felt in Israel that there is judicial activism by the courts, and therefore, one can expect anticipatory effects on the legislative branch (Mizrachi & Meydani, 2006).

Israel as Case Study

The case of Israel is especially appropriate for our study because of these important reasons:

[1] One of the few exceptions was a case of Aharon Bergman vs. Finance Ministry where a law was stricken down on procedural grounds and not on substantive rights-based grounds (See also hc 246/81; 141/82; 2060/91.

[2] Since the publication of this article, two more laws have been declared unconstitutional by the courts for a total of eight laws. These are the Private Jails law and the Tal Law (dealing with the enlistment of Ultra-Orthodox Jews).

First of all, the 1992 expansion of judicial review in Israeli Constitutional Law makes it easy to see the evolution of the anticipatory reaction to judicial review.

Also, since Israel is still a young country and faces many constitutional issues, whether it is issues of religion and state, or issues related to security or the relation of the State to the Arab minority, this reality will give us a number of opportunities to assess the extent of such an effect.

Another aspect which can help make this issue salient in Israel is the fact that major policy decisions in Israel are challenged through petitions before the Supreme court sitting as the high court of justice. For example, major issues such as the disengagement plan and the security fence were analyzed by the Supreme Court. This makes the presence of the Supreme Court to be significant in the mind of policy makers, including legislators.

Hypothesis

As our working hypothesis, we expect to establish a significant link between the existence of judicial review and the existence of anticipatory effects from the legislature to judicial review.

Methodology

The goal of this research is to verify the significance of the anticipatory reaction to judicial review in Israel. In order to verify this phenomenon, we have designed a three-fold research method which includes quantitative content analysis of parliamentary protocols, qualitative content analysis of those same protocols and a series of interviews with key actors in this phenomenon. We will present in the

following pages the basic outline of the methodology. A more detailed presentation of this methodology is available in Appendix 1.

Content Analysis

Content analysis is a research method which aims to analyse and organize forms of communications into defined categories based on explicit rules of coding (Stemler, 2011). Content analysis research can be divided into two broad types: qualitative and quantitative (Krippendorff, 1980, p. 87).

First, in our research, we did a simple quantitative content analysis based on the frequency of incidents in which the anticipatory reaction to judicial review came up. Then, a qualitative content analysis was conducted to enable us to gain deeper insight into our subject.

These methods were used to explore the existence of previously unexamined evidence which were used to answer our research question in the protocols of the Israeli Knesset's legislative committee.

In the quantitative analysis, we analyzed 190 protocols of sessions of the Constitution, Law and Justice Knesset legislative committee and coded whether each protocol included an instance of anticipatory reaction to judicial review or not.

We focused our analysis on the Constitution, Law and Justice Committee. We also focused our analysis on the years between 1993 and 2011 in order to see the evolution of this effect starting right after the legislation of the new basic laws. The reason why earlier protocols have not been included is due to technical limitations since protocols are available electronically only from 1993.

We also decided to limit ourselves to the month of January in each of those years. The month of January is appropriate since it is a month where the Knesset sits in full session. There are no holidays or break in that month. Therefore, January is a month in which we can expect less interruptions than in other months of the year. All the data we used is freely available from the Knesset Archives.

After this analysis, we created an index showing the ratio of protocols including anticipatory reactions in the total number of protocols for each group of two years. Through this index, we were able to see the progression of the presence of the anticipatory reaction to judicial review.

In order to ensure reliability, we have used the Cohen's Kappa test which tests the level of agreement between raters after accounting for chance (Stemler, 2011). The results for that test are included in the results section of this research.

We then moved on to qualitative content analysis. In this analysis, we analyzed and categorized the various types of instances of anticipatory reactions which were found in the quantitative content analysis. We asked questions such as: how was the existence of judicial review interpreted? Was it used as a guideline as to how a legislator should legislate? Was it used as an accepted duty which the legislator must follow? Was it sometimes used as a threat against a certain legislative project? These questions were addressed qualitatively by giving examples of the texts we have analyzed quantitatively. This categorization helped give meaning to the results found in the quantitative analysis.

Interviews

The second method for our research method was to use interviews as a qualitative research method. We, first, interviewed former and current MKs who are

the main subjects of the anticipated reaction. We also interviewed legal aides from various points of the legislative process. Our goal when interviewing the legal aides was to find out how they relate to the threat of judicial review and how they communicate that threat when providing legal aid. A secondary goal was to try and understand the evolution of the institution of parliamentary legal aid to see how judicial review affected that institution. We have made sure to include people who have worked for all types of political parties in order for our results to stay objective and not be based on another variable.

Reliability

In order to ensure the conclusions we came to are relevant, we tested the data received both for reliability.

The test we chose for reliability is Cohen's Kappa test for inter-coder reliability (ICR). The Kappa test verified inter-rater reliability while accounting for the expectation that the raters will agree with each other a certain percentage of the time simply based on chance (Cohen, 1960). We used a random sample of 20 protocols in order to establish inter-rater reliability. The results for both raters are outlined in Table 1. In the table, "Yes" represents the amount of times anticipatory reaction was found while "No" represents the amount of times it was not found. The numbers in parentheses are the marginal values which are derived by the multiplication of the expected marginal values for each cell (row multiplied by column).

Table 1: Results of the Test for Reliability

Rater 1 / Rater 2	Yes	No	Expected Marginal Totals
Yes	9/20 =0.45 (0.2475)	2/20=0.10 (0.3025)	0.55
No	0/20=0.00 (0.2025)	9/20=0.45 (0.2475)	0.45
Expected Marginal Totals	0.45	0.55	1.00

We can now apply the test by applying the following formula:

$$\kappa = \frac{P_A - P_c}{1 - P_c}$$

where:

P_A = proportion of units on which the raters agree

P_c = the proportion of units for which agreement is expected by chance.

In our case, P_A = 0.45+0.45 = 0.9 and P_c =0.2475+0.2475=0.495

Therefore, solving the equation we get κ= 0.405/0.505=0.802

According to the traditional interpretation of the Kappa test, this is a substantial and close to almost perfect score for the strength of agreement since a close to perfect score is from 81 and above (Stemler, 2011). This makes sense since our content analysis necessitated very little interpretation and simply aimed to define

each protocol as either including an instance of anticipatory reaction or not. The very few times where the coders disagreed can stem from the fact that in some rare occasions, the anticipatory reaction is masked in the regular discussions of the protocols and therefore, in those rare occasions, different interpretations can lead to different coding results.

Results and Initial Discussion

In this section, we will present the results for each of these methods and provide an initial interpretation of those results.

Quantitative Content Analysis

In the course of the Qualitative Contest Analysis, over 200 protocols were analyzed. Of those protocols, 193 were discussions of proposals of new bills. Therefore, those were the basis of our analysis. The main question asked about all of those bills was then, was an anticipatory reaction to judicial review raised in this protocol or not?

In the 193 protocols, 53 of them included a question or comment which shows an anticipatory reaction to judicial review. The results were organized in pairs of two years in order for the sample for each group to be big enough to find significant results. Those results, organized by groups of two years, are shown in Table 2.

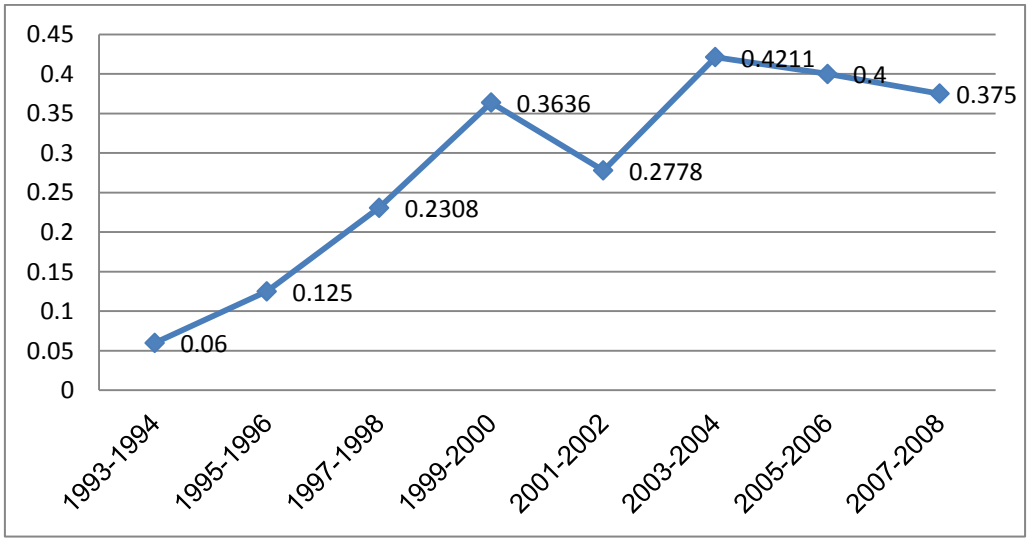
Table 2: Data from the Protocols

Years	Number of Protocols	Instances of Anticipatory Reactions	Instances of anticipatory reaction per discussion on a bill
1993-1994	18	1	0.06
1995-1996	40	5	0.125
1997-1998	13	3	0.230769231
1999-2000	33	12	0.363636364
2001-2002	18	5	0.277777778
2003-2004	19	8	0.421052632
2005-2006	20	8	0.4
2007-2008	32	12	0.375

After collecting this information, we created an index in which we divided the number of instances of anticipatory reactions by the number of protocols. This allowed us to see the instances of anticipatory reactions per protocol for each year. The results for the calculation of this index are also found in Table 2.

In order to give meaning to these results, we organized them in a graphic that allows us to see the progression of the evolution results. This progression can be seen in Chart 1.

Chart 1: Instances of Anticipatory Responses per discussions on a bill



In this graph, we can clearly see that the existence of anticipatory reactions to judicial review grew significantly as judicial review became more present in Israel. In 1993-1994, the basic laws had been enacted but judicial review, based on those laws, had not been practiced yet. While it can be assumed that some anticipatory reaction was practiced even in those years for the limited amount of judicial review that did exist (such as the case of Aharon Bergman vs. Finance Ministry), this anticipatory reaction was not seen in the protocols of the years of 1993-1994. In 1995, the Supreme Court revealed its power to declare laws unconstitutional based on the basic laws without actually using that power (Bank Mizrahi v. Migdal Cooperative Village, 1995). At that point, we can see a slight enhancement in the presence of anticipatory reactions to judicial review. It is only in 1997 that the Supreme Court exercised its power to declare laws unconstitutional based on the basic laws (The Israel Investment Manager's Office v. The Minister of Finance, 1997). We can see that this new reality, in which the Supreme Court can and does declare laws unconstitutional creates a strong anticipatory reaction to judicial review amongst legislators and that this reaction can be seen in the protocols detailing the discussions in the parliamentary committees of the Knesset.

Significance

In order to verify the significance of our results, we used a Z-test for differences between proportions. Our goal was to verify that the difference between the presence of anticipatory response in the first years we analyzed (for the *Mizrach* court case) and the presence afterwards was significant.

The results of the test for difference between the results in the years 1993-1994 (0.06) and 1997-1998 (0.231), after judicial review had not just been presented

theoretically in the *Mizrachi* case but also applied, gave us a Z score of 1.44. This result is significant if we set the significance level at 0.15. When comparing the results between the years 1993-1996, before a law was declared unconstitutional by the Supreme Court, with the years 1997-2008, after the first law was declared unconstitutional by the Supreme Court based on the new basic laws, we get a Z score of 3.58. This result is significant even if we set the significance level at 0.001, a very strong significance. These tests therefore show that our results can be accepted as significant for the purpose of our research.

In short, the quantitative content analysis provided us with significant evidence which showed the evolution of anticipatory reaction to judicial review as a reaction to the courts using their power to declare laws unconstitutional.

Qualitative Content Analysis

As we mentioned earlier, the second stage of our research method was a qualitative analysis of the protocols which we had previously quantitatively analyzed for signs of anticipatory reaction to judicial review.

Three patterns which relate to anticipatory reaction emerged from the analysis of the protocols. In the next few paragraphs, we will discuss these three patterns and provide examples of their existence.

The Basic Laws as guidelines

Before the famous *Mizrachi* court case (Bank Mizrahi v. Migdal, 1995) in which the Supreme Court outlined its power to declare laws to be unconstitutional, discussion about the compatibility of new legislation with the new Basic Laws which had been legislated in 1992 was already present.

It is important to note that the discussions we are including in this subsection are discussions which happened before judicial review was a reality in Israel, and therefore cannot be considered anticipatory reactions to judicial review. In the protocols, we can even see clear statements by MKs that state that the courts would not be able to declare laws passed by the Knesset as unconstitutional. For example, MK Eli Goldschmidt commented in one of the protocols that:

> Without even addressing the question of standing, as soon as there is a primary legislation, unless the new basic law called Basic Law: Human Rights and Constitution would be passed[3], you cannot petition to the High Court of Justice[4]. (Constitution, Law and Justice Committee, 1993)

Therefore, the MKs did not feel the threat of judicial review. However, a qualitative analysis of the protocols enabled us to locate another effect which the legislation of the new basic laws had. While this is not an anticipatory effect to judicial review, it is relevant to our discussion since it can help us understand the evolution of the reaction to the basic laws with the introduction of judicial review.

The effect from the basic laws at that point in time, as can be seen in the protocols, was mostly one in which the basic laws were used as guidelines for legislating properly. This can be seen in a discussion which took place in the Knesset's Constitution, Law and Justice Committee in 1994:

> Dalit Dror: Beyond changing the definitions (ed: in the law), the Government should adopt the proposal for the amendment to Article 8 of the Law for eavesdropping. Section 8 refers to protections in the public domain. A person

[3] This was a basic law that was meant to formally give the power of judicial review to the courts
[4] This quote is evidence of the fact that MKs did not believe that the Supreme Court could declare primary legislation to be unconstitutional without the legislation of the new basic law.

> has a right to confidential dialogue, it is part of the right to privacy which today is a fundamental right protected in the Basic Law: Human Dignity and Liberty […] (Constitution, Law and Justice Committee , 1994)

The law was then changed in order to abide by the principles of the basic law.

Quite clearly, since the High Court of Justice had not exercised or declared its power of judicial review, the courts here are not really actors in the reaction. The courts are not mentioned. They don't seem to influence the decision to amend the law. The reaction is to the basic laws and not to judicial review.

Therefore, in this subsection, we saw an example of the basic laws serving as a guideline. While this is not an anticipatory reaction to judicial review per se, it is definitely a reaction to the legislation of the basic laws, a type of reaction which will continue to exist after the start of judicial review.

Auto-limitation

As we have seen in the literature review, one of the expected anticipatory reactions to judicial review is *auto-limitation.* Auto-limitation refers to the exercise of self-restraint by parliament in anticipation of an annulment by the courts (Favoreu, 1982).

In the course of the research in the protocols, many different cases of auto-limitations were seen. In these cases, the committee decided to make changes to the legislation proposals in order to avoid getting their legislation declared unconstitutional. For example, in a discussion in 1996 on a bill regulating the adoption of children, there was a discussion about limiting the number of non-profit organizations participating in part of the adoption process. An idea came up to limit it to non-profit organizations that have been around for less than two years. However, someone raised the problem that the High Court of Justice would declare any law with

an arbitrary number as unconstitutional since it limits the Freedom of Occupation (which is protected in a basic law) of the non-profit organizations. After verifying with the legal advisors, the MKs found a legal solution to the dilemma that will allow it to avoid being declared unconstitutional by the Supreme Court. Instead of using a number of years of experience, which can be seen by courts as arbitrary, they will make a substantive requirement in which the Minister will have the right to reject the participation of a non-profit organization that he is not convinced will act for the good of the child (Constitution, Law and Justice Committee , 1996).

In this case, we can see that the legislators engaged in auto-limitation and retracted a proposal because of the threat of judicial review, and instead opted for an alternative proposal which they believe would pass the test of judicial review.

Anticipatory Reaction as a Threat

One additional way which anticipatory reactions was seen in the protocols was when judicial review was used as a threat against a certain legislator, stating that if he should legislate a certain bill he should expect the bill to be challenged in the courts.

As we mentioned earlier, legislators usually do not like when their laws are declared unconstitutional. Therefore, when a certain actor wants to prevent a bill from being passed, he can use a threat of judicial review to deter the legislator from passing it.

One example of such a type of response can be seen in a discussion from 2003 about the professional regulations binding accountants in Israel (Constitution, Law and Justice Committee, 2003). The parliamentary committee wanted to decrease limitations to the type of work an accountant can do for his client other than

accountancy. In the course of the discussion, Eitan Bar Adam, who represented interest groups, told the government's deputy legal advisor:

> Ms Davida Lachman-Messer, I tell you that if these regulations will be approved, I'll file a petition to the Supreme Court, because it contradicts what is written in the law. (Constitution, Law and Justice Committee, 2003)

This is a threat against the regulator telling him clearly: if these regulations are passed, they will be petitioned against and there is a chance they will get canceled. One of the participants in the dialogue understood this and asked Bar Adam to stop making threats during the committee's discussion. In the discussions which followed, there was clear antagonism between Bar Adam and other participants who did not appreciate being threatened with judicial review.

We can see from this example the presence of judicial review being used as a threat against legislators. Thus, the qualitative analysis discussed here outlined three different types of reactions to the legislation of the Basic laws in 1992.

First, before the courts used their power of judicial review, the basic laws served solely as a guideline for MKs to legislate by in order to ensure coherence in the legal system. Then, we saw clear signs of autolimitation as an anticipatory reaction to judicial review itself. Finally, we also saw that judicial review is sometimes used as a threat in order to block legislative agendas.

Interviews

In order to further assess and understand the significance of the anticipatory reaction to judicial review, we have conducted a number of interviews with various actors in the legislative process: current or former MKs and legal advisors working

for the Knesset's legal advisory. The MKs we interviewed were of various political convictions, coming from numerous party including a spectrum from the left wing Meretz party to the right wing Israel Is Our Home party. These interviews allowed us to discern other types of anticipatory reactions which had not come up in the protocols.

Provocation as an Anticipatory Reaction

One of the types of anticipatory reactions that were identified during the interviewing process was first mentioned by MK Reuven Rivlin who pointed us to public statements he made on this subject (Rivlin, 2012). In those statements, Rivlin described a phenomenon in which legislators anticipating judicial review decide to pass bills knowing they will be declared unconstitutional (Bender, 2011). Other MKs also described this same phenomenon.

The reasons for such an action can be diverse: some might do this in order to gather public support against the judicial branch and then make it weaker (Meridor, 2011). Others, including some who are strong supporters of judicial review, do it as part of a strategy to advance an idea in the public discourse (Cohen R. , 2012).

Unlike other types of reactions which we have seen, this reaction encourages, rather than discourage, suggesting bills that go against the principles outlined in the Basic Laws.

Automatic Anticipatory Reaction

Another type of anticipatory reaction described to us was an automatic habit to verify the constitutionality of laws before even proposing a bill. Since this reaction happens before a bill's proposal, we could not see this type of reaction in the protocols that we analyzed.

Prof. Amnon Rubinstein, a former MK, explained that he had never brought up a bill which could be declared unconstitutional because he always verified the constitutionality of his bills before proposing them (Rubinstein, 2012). Anat Maor called this habit an "automatic consideration" which she considered before proposing a bill (Maor, 2012). Dan Meridor explained that as a jurist who understands constitutional law, he would always test the constitutionality of his legislative projects before proposing bills (Meridor, 2011).

All of these interviews clearly point to the fact that there are anticipatory reactions which happen before a bill even reaches discussion in parliamentary committees and therefore points to the fact that our findings in the quantitative analysis only show part of the picture when it comes to anticipatory reactions to judicial review.

The change in the role of Legal Advisors

The role of legal advisors to the Knesset has undergone several significant changes since the start of the 1990s. This change includes the legislation of a law defining the role of the advisor and also a large expansion of manpower.

The legislation passed defining the role of the legal advisors in the Knesset was an amendment to the law of the Knesset which was passed in 2000 (Law of the Knesset, Section 17, 2000). In that legislation, the role of the Knesset's legal advisor, his nomination process, and his employment conditions were all defined and institutionalized for the first time. Before the legislation of this law, the Knesset's legal advisor had a very limited role and he depended heavily on the Government's legal advisory. This legislation ensured that the Knesset's legal advisor and his team would be considered a separate entity with full independence from the government.

There was also a large expansion of manpower. At the beginning of the 1990s, the Knesset had between 8 and 10 legal advisors while today they have around 50 lawyers working in the office of the legal advisor. In practice, this meant that at the beginning of the 1990s, legal advisors were shared between various Knesset legislative committees, while today each major legislative committee has its own legal advisor, with the larger committees having several lawyers providing legal advice (Marzook, 2012).

The reasons for these changes can be summarized by describing three different phenomena which occurred during that time:

First, the trend of personal bills presented by MKs (as opposed to government bills), greatly increased with the years. If in the 10th Knesset (1981-1984), only 415 bills were initiated as personal bills, in the 15th Knesset (1999-2003), there were 4234 such bills initiated. This demanded a lot of manpower for legal advisors in the Knesset to help with the legislative process of these bills from start to finish (Knesset's Data, 2012).

Second, there was also a need to enhance the division of powers between the executive and the legislative branch. If, originally, most legislation came from the government, and therefore an independent legal advisor was less critical, as private bills became more popular, it was important that those who would give legal advice to the MKs bringing these private bills would be working for the Knesset (the legislative branch) and not for the government (the executive branch). This can explain the need for the institutionalization of an independence Knesset legal advisor which is completely separate from the government's legal advisor.

Third, the institution of judicial review based on the new basic laws also redefined the role of the legal advisors. While this cannot be seen as the sole reason for the increase in manpower, it is definitely part of the reason for this change. The institution of judicial review in the Israeli system brought about a need for the verification by the legal advisors of the constitutionality of bills to advise MKs about the constitutionality of their legislative attempts. This created more work and added to the demand for more manpower.

This change in the role of the legal advisors, which now had to help ensure the constitutionality of bills during the legislative process, was also expressed by several MKs during the interviews. Naomi Chazan explained that the legal advisors now not only help with the process of legislation and with the formulation of the bills, but also have to say whether bills are constitutional or not. She used the term *bagitz*, which comes from the word *bagatz* (meaning High Court of Justice in Hebrew) - the term that has entered the Israeli vocabulary to describe a bill that would pass the test of constitutionality. According to Chazan, legal advisors now had to comment on that question (Chazan, 2012). Amnon Rubinstein also confirmed this reality, explaining that the legal advisor's role changed since they now needed to advise MKs on the question of whether laws contradicted the basic laws or not (Rubinstein, 2012).

The legal advisors today advise MKs about the constitutionality of their bills at every step of the legislative process (Marzook, 2012). According to our research, most problems of constitutionality are resolved even before the bills come up for a preliminary reading in the Knesset's plenum. This happens because most MKs do not purposely want to pass bills which have problems of constitutionality. Therefore, when the legal advisors point out the problems before the preliminary readings, in the

great majority of cases, the MKs accept the need for changes and make those changes before the preliminary reading. Therefore, the effect of auto-limitation exists before the preliminary reading as well. For various reasons, some MKs do not accept these initial changes. Their reasons are sometimes practical and not necessarily substantive: they simply say that they need to get this bill past the preliminary reading quickly and that the problems of constitutionality will be fixed in the committee readings anyways. In these cases, the legal advisors will, throughout the discussion in the committees, advise about the constitutionality of the bill and suggest changes when necessary.

This reality is significant for our research since it stresses that our findings in the quantitative section of our research, while significant, are not descriptive of the whole picture. In the protocols, all that we can see are anticipatory reactions which occur after the bill gets to the committee. This ignores the effects which occurred before the preliminary readings. This means that the actual effects of anticipatory reactions are much greater than the effects which we have seen in our quantitative research.

Examples of Anticipatory reactions

In the course of our interviews, we were also given several examples of cases of anticipatory responses to judicial review. We will list three of these cases here.

Dan Meridor discussed with us a bill proposal which came to him while he was chairman of the Foreign Affairs and Defense committee during the fifteenth Knesset (Meridor, 2011). This was the Knesset that ruled at the time of the start of the second intifada. As the defense establishment tried to deal with the rise of terrorism, the existing definitions and distinctions between civilians and soldiers became

difficult to apply. Some legislators, therefore, decided to create a new definition which would remove all civilian protections from anyone involved with terrorism. Meridor believed that this new definition would not pass the test of constitutionality, since it would contradict the "Basic Law: Human Dignity and Liberty" in a disproportionate way. After studying the matter, the legal advisor decided that, according to his analysis, the infringement of rights protected by the basic laws was extremely disproportionate. He therefore advised against passing this bill into legislation. The committee members accepted the interpretation of the legal advisor and the bill was shelved.

Ran Cohen discussed the example of a law that he passed in which the government would destroy monuments created in memory of terrorists (Cohen R., 2012). The reason behind this law was that a monument had been built in memory of Baruch Goldstein, the terrorist who killed 29 Palestinians during the 1994 Cave of the Patriarchs massacre in the city of Hebron. Cohen explained that he received advice on several sections of the bill in order to ensure that it would not be considered unconstitutional by the courts (for reasons of freedom of expression). He explained that, whenever asked to, he made the necessary changes in order to ensure his law would not be considered unconstitutional.

Hamad Amar of the "Israel is Our Home" party also gave us another example (Amar, 2012). The bill aimed to use affirmative action in order to compensate for the discrimination which Amar believed was directed towards soldiers who completed a mandatory military service. Since these soldiers were coerced into military service, Amar wanted to compensate the loss of income and the fact that they were only starting to work and/or get an education three years after someone who was not forced

to enlist. However, this law could be seen as discriminating against sections of the populations which did not traditionally serve in the military, including most of the Arab and Ultra-Orthodox population of Israel. Therefore, Amar used the Knesset's legal advisors in order to help find the right formula which would enable this bill to be passed into legislation without contradicting constitutional principles.

Summary

The interviews allowed us to add three main elements to our analysis. First of all, we saw the various stages at which anticipatory reactions could happen even before the bill is presented, thus completing the picture which we had seen in our qualitative analysis of the protocols. Secondly, we learned about the evolution of the role of legal advisors to the Knesset, which completed our quantitative analysis of the protocols by allowing us to see another place in which the significance of the presence of anticipatory reactions increased. Finally, we saw various practical examples of instances in which MKs described their own anticipatory reactions to judicial review.

Discussion

After seeing the results of all of our empirical research, both quantitative and qualitative, we are now able to design a model which describes the presence of anticipatory reactions to judicial review in Israel. We will divide this section into two parts: In the first part, we will look at the process through which a bill gets passed into legislation and try to outline the various instances in which anticipatory reactions to judicial review occur. Then, we will review the various types of evidence which we found that showed that as judicial review became more present in the minds of the Israeli legislator, so too did anticipatory reactions to judicial review become more present. Throughout our analysis, we will be answering our research question,

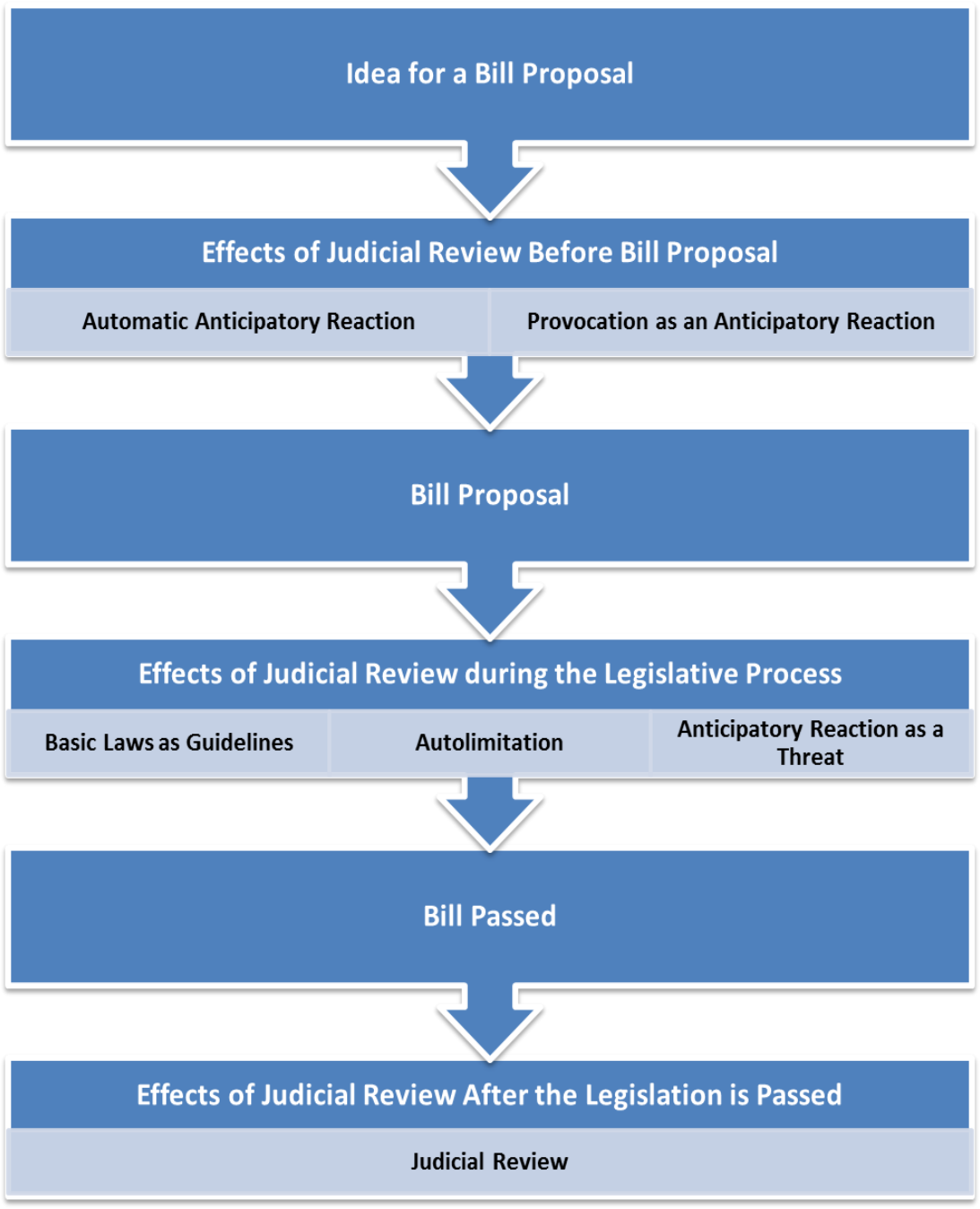
namely: How significant is the presence of anticipatory reactions to judicial review in Israel?

Anticipatory Reactions and the Legislative Process

The legislative process in Israel includes stages which vary based upon the type of bill that is being presented (government bills, committee bills or private members' bills). However, all types of bills have the same common stages that are relevant to the anticipatory reaction to judicial review. In all cases, we can divide the legislative process in three stages: before the bill is presented to the Knesset, during parliamentary discussions (which includes several readings in the Knesset's plenum), and after the bill had been passed into legislation. The triggers which show us the division between these stages are the bill proposal, which ushers in the stage of parliamentary discussions, and the passing of the bill into legislation, which brings us to the post-legislative process stage. Of course, this whole process starts with the idea of a bill which, depending on the type of bill, can come from the government, a parliamentary committee, or a private MK (Legislation, 2012).

In Figure 1, we outline those very stages, stating the different types of anticipatory reactions which come up at every stage.

FIGURE 1: The Legislative Process and Anticipatory Reactions



The Anticipatory Reactions before the Bill Proposal

Before the bill is actually proposed in the Knesset, there are two different types of anticipatory reactions which come up.

First of all, there is the automatic anticipatory reaction through which MKs verify the bill autonomously before presenting it. Several bills will be automatically made irrelevant since MKs will not bring up bills which are likely to be declared unconstitutional.

Secondly, there is the case where anticipatory reaction is used as provocation. The MK, knowing that his bill is likely to be declared unconstitutional, decides to advance it specifically in order to promote some agenda of his. The agenda can sometimes be found within the content of the bill (Cohen R. , 2012) or sometimes the agenda can simply be to enhance the tension between the legislative and judicial branch of government (Bender, 2011).

Anticipatory Reactions during Parliamentary Committees

Between the time in which the bill is proposed and before it is passed into legislation, there are several readings and parliamentary discussions which occur on the subject of the bill. During this phase of the legislative process, there are three types of reactions to the legislation of the basic laws.

Basic Laws as Guidelines: While this reaction to the legislation of the Basic Laws in 1992 cannot be considered an anticipatory reaction to judicial review, since it preceded the existence of judicial review, it is to be included in our model in order for us to receive a full picture of the effects of these laws to the legislative process.

In this reaction, MKs take the basic laws into account not because they feel coerced to do so because of the existence of judicial review, but rather because they

believe the basic laws represent basic fundamental values which the legislator should take into account. It is impossible to see how much this effect is still present today, since MKs who argue for Basic Laws as guidelines will simply use the argument of constitutionality and judicial review. However, one can assume that this effect still exists.

Auto-limitation: The second type of anticipatory reaction in this stage of the legislative process is auto-limitation. In a case of auto-limitation, legislators decide not to move on with their legislative agenda after someone brings up the issue of the constitutionality of the bill. If the MKs believe that their bill will be declared unconstitutional by the High Court of Justice, they will decide to either stop the legislation of the bill or change it to meet the standards of constitutionality.

Anticipatory Reactions as a Threat: The final type of anticipatory reaction found in the parliamentary discussions was the use of judicial review as a threat against a legislator. In this type of reaction, when the legislator wants to pass a bill which has opponents, the opponents of this bill use the question of its constitutionality to try and prevent the bill from advancing and passing into legislation. Since the question of the constitutionality of the bill is sometimes unclear, a threat by someone who tells the legislator thathe will challenge its constitutionality in courts, might create a strong deterrent for the legislator to advance this bill.

The Effects of Judicial Review after Legislation

After the legislation is passed, the only effect that judicial review still has is judicial review itself. This is only one of the many effects which judicial review, and therefore focusing only on post-legislative effects of judicial review, gives an inaccurate picture of reality.

The Increased Influence of Anticipatory Reactions

In the course of our research, we have also seen various sources of evidence pointing to an increase of anticipatory reactions to judicial review as judicial review became more present in Israel's legal system. In this section, we will summarize the main evidence which we have found.

First of all, our interviews with the legal advisors to the Knesset allowed us to see the evolution of the role of legal advisors to the Knesset. We have seen that there was a significant increase in the manpower in the legal advisor's office. While this evolution was not only due to the anticipatory reaction to judicial review, it definitely was partly due to that phenomenon.

Secondly, our quantitative content analysis of the protocols of the Knesset allowed us to see a statistically significant effect through which the institution of judicial review in the Israeli legal system ushered in greater anticipatory reactions to judicial review.

Through these two methods we have seen that the anticipatory reactions to judicial review became increased as the presence of judicial review increased.

Conclusion

In this research, we aimed to answer the following question empirically: How significant is the effect of the presence of judicial review on the legislative process?

Through a qualitative content analysis of the protocols of the discussions of parliamentary committees in the Knesset, as well as interviews with MKs and legal

advisors to the Knesset, we were able to see the various parts of the legislative process which are affected by judicial review.

In our quantitative analysis of the same protocols, as well as in the interviews with legal advisors, we saw how the anticipatory reactions to judicial review grew significantly as judicial review became more present within the Israeli legal system.

These findings are of great importance when trying to understand the effects of judicial review. One cannot only look at the number of laws which have been declared unconstitutional since this is only one of the effects of judicial review. Another significant effect comes from the anticipatory reactions to judicial review which occur all along the legislative process.

Further research on this subject could include research on the political significance of the strength of anticipatory reactions to judicial review: are certain actors made stronger by this reality? Another interesting question would ask whether the presence of judicial review has changed the discourse in the legislative process (through the analysis of the protocols), going from a value based discourse to a legal discourse, or, alternatively, going from a nationalistic discourse to a rights-based discourse (as claimed by Dan Meridor in our interview with him). This would be an additional effect of judicial review.

APPENDIX 1: Methodology

Content Analysis

Content analysis is a research method which aims to analyse and compress forms of communications into defined categories based on explicit rules of coding (Stemler, 2011). There are two types of content analysis research: qualitative and quantitative content analysis (Krippendorff, 1980, p. 87). Over the last decade, both types of content analysis have become increasingly popular with the development of computer technology, which is readily available and facilitates such research (Neuendorf, 2002, p. 1).

First in our research, we did a simple quantitative content analysis based on the frequency of times in which the anticipatory reaction to judicial review came up. Then, a qualitative content analysis was done to enable us to gain deeper insight into our subject.

These methods were used to explore the existence of previously unexamined evidence which were used to answer our research question in the protocols of the Israeli Knesset's legislative committee. Through content analysis of these protocols, this research was able to test the hypothesis and answer the research question.

Collection of Data

The first step in our method was the collection of the data needed for the content analysis. As previously stated, the content which we analysed was the protocols of Knesset legislative committees. For the purpose of this research, and because of the inevitable time constraints, we focused our analysis on the

Constitution, Law and Justice Committee. We also focused our analysis on the years between 1993 and 2011 in order to see the evolution of this effect starting right after the legislation of the new basic laws. We also decided to limit ourselves to the month of January in each of those years. The month of January is appropriate since it is a month where the Knesset sits in full session. There are no holidays or break in that month. Therefore, January is a month in which we can expect less interruptions than in other months of the year. All the data we used is freely available from the Knesset Archives.

Quantitative Content Analysis

The first step of our analysis was a quantitative content analysis. In order to organize our research, we will use a flowchart suggested by Neuendorf (Neuendorf, 2002, p. 50).

As mentioned earlier, the content was taken from the protocols of the Constitution, Law and Justice Knesset legislative committee in the month of January between the years 1993 and 2011. The content was then divided in batches of two years, in order to give us big enough samples to see significant results.

At this point, we were ready to engage in the analysis. We analyzed each of the various protocols and started by verifying if the protocols were discussing a bill proposal (or amendment proposals), or simply the protocols of a general discussion of various topics. If the protocols were not from a bill proposal or amendment proposals, we removed them from our sampling data since we are focusing solely on the legislative process. This final content includes over 190 protocols of sessions of the Constitution, Law and Justice Knesset legislative committee.

From this data, we looked through the protocols to see if we could see signs of anticipatory reaction. These signs include questions about the constitutionality of the bill, questions about legal tests which the bill must pass, questions about the chances of the bill to pass the scrutiny of the High Court of Justice, and any other questions which shows us the effect that Judicial review has on the design and content of the bill. The results were then tabulated and turned into graphics in order to allow for an easy analysis of the progression of this effect. The table included, for each bill, the name of the proposed bill, the date it was proposed on and the decision as to whether or not the bill included signs of anticipatory reaction. In order to analyze the progression, we also created an index which calculated, for each of the two years (only with the months of January), the number of times anticipatory reactions were seen per number of protocols. This index allows us to calculate the intensity of the presence of anticipatory reaction within the protocols and also allows us to verify, through our knowledge of the legal history of the State of Israel, which events or court cases enhanced the presence of legal discussion in those parliamentary committees.

In order to ensure reliability, we have used the Cohen's Kappa test which tests the proportion of agreement between raters after accounting for chance (Stemler, 2011). The coding itself was done by the author of this paper, while the Cohen Kappa Test was conducted with the help of one additional coder who is a graduate student in Social Sciences. The results for that test are included in the body of this research.

Qualitative Content Analysis

For this next step, we have engaged in Qualitative Content Analysis on the data which we have previously analyzed quantitatively.

As mentioned by Weber, "to make valid inferences from the text, it is important that the classification procedure be reliable in the sense of being consistent: Different people should code the same text in the same way (Weber, 1990)." Therefore, we defined every step of the analysis in the most objective and detailed way possible.

The goal of our qualitative analysis was to verify the significance of the results gained in the quantitative analysis. We qualitatively analysed the instances where we have found that anticipatory reaction to judicial review was present, and separated these instances in various categories which we described qualitatively.

Therefore, when there was an indication of anticipated reaction, we made the following distinctions which helped us define the *extent* of the effect of anticipated reaction and thus answer our research question. We made a distinction between the various types of enquiries found in the protocols which related to the anticipatory reaction to judicial review. We asked: how was the existence of judicial review interpreted? Was it used as a guideline as to how a legislator should legislate? Was it used as an accepted duty which the legislator must follow? Was it sometimes used as a threat against a certain legislative project? These questions were addressed qualitatively by giving examples of the texts we have analyzed quantitatively.

The Link between the Method and the Hypothesis

Our hypothesis stated that we expected to find a link between the existence of judicial review and the amount of anticipated reaction. Through the quantitative analysis and the index we created, we expected to be able to see evidence to such a link and analyzed the evolution of the extent of judicial review.

Our hypothesis also stated that we expected the extent of this reaction to be "significant." The index created in quantitative analysis allowed us to see this significance, and the qualitative analysis allowed us to inquire more deeply and truly define how much of an effect this anticipated reaction has on the legislative process by letting us know how this effect interacts with the legislative process.

The Shortcomings of the Method

Like in every research method, there are some shortcomings to our method as well. The most obvious shortcoming is that the method is open to questioning of the reliability of the process and the possibility for replication (Weber, 1990). While it has been clearly shown throughout the description of the method, this researcher has taken all possible measures to ensure the results are objective and can be replicated, there are some steps in qualitative content analysis which will require the judgement of the researcher (Stemler, 2011). As stated earlier, we have also used the Cohen's Kappa test, which tests the proportion of agreement between raters after accounting for chance (Stemler, 2011) and have included the results of that test in a following section.

One additional limitation is that the current methods can only verify the presence of anticipated reaction in protocols, therefore only studying a limited amount of the phenomenon of anticipated reaction. For example, if a Member of Knesset (MK) does not even bring up a legislative idea because he, in his mind, thinks it will not pass judicial review, this idea will not be discerned in the analysis. If an MK asks for advice from the legal aids of the Knesset in order to discern if the idea can pass judicial review, this will also not appear in the analysis. In other words, there are countless numbers of reactions which cannot be discerned inside the protocols.

Therefore, while this method might help us obtain evidence of the existence of anticipated reaction, and also a good idea as to the extent, we could expect the actual extent to be much greater than what might be found by this specific research method.

Interviews

The second method for our research method was to use interviews as a qualitative research method.

In our case, the interview method was chosen because it was well suited to the exploration of attitudes, values, beliefs and motives (Richardson, Dohrenwend, & Klein, 1965). This method is therefore highly efficient when approaching people such as former Members of Knesset (MKs) and trying to understand their implicit reactions to judicial review or their attitudes and reactions to legal advice which they received when it implies the risk of judicial review. It may allow us to see their attitudes to the risk of judicial review for their clients and can also let us outline their beliefs as to their roles with respect to this risk. The existence of risk aversion and anticipated reaction can often only be seen implicitly in a subject's answers and therefore interviewing might be one of the only ways to truly research this concept.

In order to fully describe the process involved in our application of this method, we will first define who we interviewed and why, define what information we wanted from each of them, and then discuss the way we analyzed the reactions.

Who will be interviewed

In order to properly define and understand the concept of anticipated reaction to judicial review, we have interviewed people who can be found at various stages of the process which theoretically leads to such a reaction. We, first of all, interviewed former and current MKs who are the main subjects of the anticipated reaction. We

also interviewed legal aides from various points of the legislative process. Our goal when interviewing the legal aides was to find out how they relate to the threat of judicial review and how they communicate that threat when providing legal aid. A secondary goal was to try and understand the evolution of the institution of parliamentary legal aid to see how judicial review affected that institution. We have made sure to include people who have worked for all types of political parties in order for our results to stay objective and not be based on another variable.

The Link between the Method and the Hypothesis

This method allowed us to verify, from various angles, how different actors of the legislative process react to the presence of judicial review, and how the presence of judicial review influences their legislative actions. It also allowed us to see the institutional changes to legal actors which happened in the Knesset since Judicial review. These things allow us to complete the picture and gain a better understanding of the extent of the effects of judicial review on the legislative process.

Limitations to this Research Method

Interviews are often criticized for being weak evidence since they rely solely on testimony. Interviewees might have an interest in twisting the truth. This is especially true in our case where there is only a small number of interviews. The solution to that is to usually triangulate the results of the interviews with other research methods. Therefore, the use of content analysis as triangulation will be useful (Kennedy, 2006).

One of the other reasons why interviews are considered weak evidence is because of the subjectivity through which the results of the interview are analyzed. Therefore, the design of the method tried to remain as objective as possible, but it is

clear that some decisions or interpretations of the researcher might still be put to question.

APPENDIX 2: Interviews

List of MKs and Former MKs interviewed:

1. Anat Maor, Meretz – 2012-02-14
2. Amnon Rubinstein, Meretz – 2012-01-18
3. Naomi Chazan, Meretz – 2012-01-19
4. Ran Cohen, Meretz – 2012-02-06
5. Otniel Shneller, Kadima – 2012-03-26
6. Reuven Rivlin, Likud – 2012-01-16
7. Dan Meridor, Likud – 2012-01-24
8. Shaul Yahalom, National Religious Party – 2012-02-06
9. Hamad Amar, Israel is our Home – 2012-01-30
10. Eliezer Cohen, Israel is our Home – 2012-02-20

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