

Do Legislators Fear Judicial Invalidation of Their Legislation? An Empirical Study on How the Anticipation of Judicial Review Impacts Legislative Debates on Omnibus Legislation

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Omnibus legislation in Israel

- Arrangements laws (1985-)
- 2004: introduction of judicial review (*Poultry Farmers*)



רשומות

הצעות חוק

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31 באוקטובר 2016

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כ"ט בתשרי התשע"ו

עמוד

הצעת חוק התכנית הכלכלית (תיקוני חקיקה ליישום המדיניות הכלכלית לשנות התקציב 2017 ו"התשע"ז-2016)

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198 פרק ג': רשויות מקומיות

200 פרק ד': שירות נסיעות שיתופיות

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576 פרק י"א: הגבלת שוק החימום

586 פרק י"ב: שונות

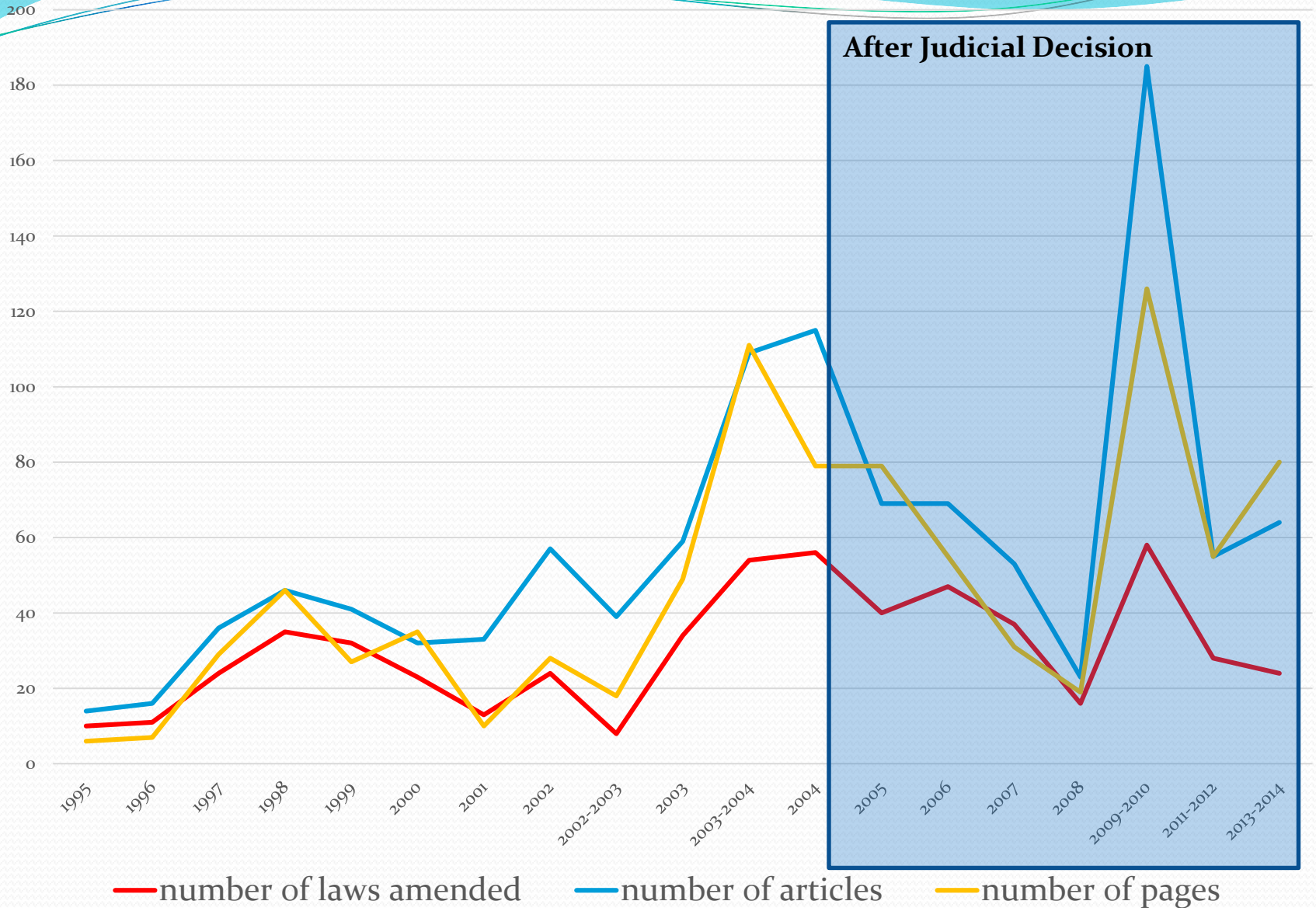
590 פרק י"ג: תחילה

The Study

- RQ: How did legislators respond to introduction of JRLP of Omnibus Legislation?
- The study:
 - Legislative behavior: all arrangement laws 10 years before & 10 years after judicial decision (Sept. 2004)
 - Content analysis of legislative debates for indications of judicial impact: ~400 committee meetings, spanning ~12,000 pages
 - Process-tracing

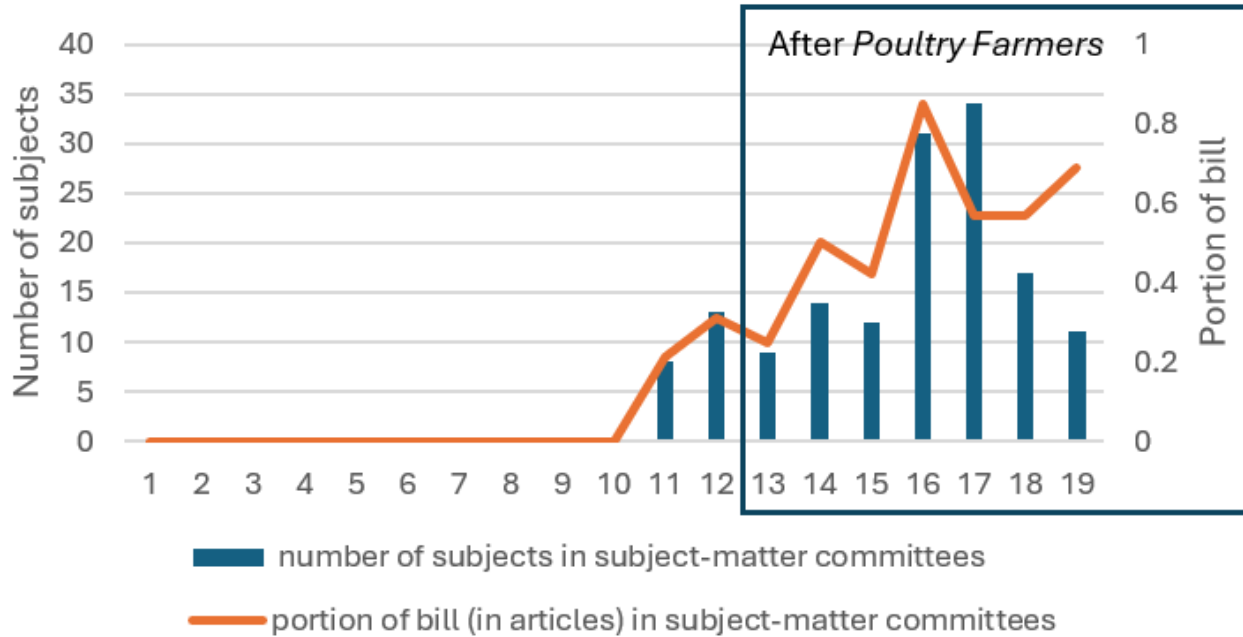


I. Changes in Legislative Behavior:

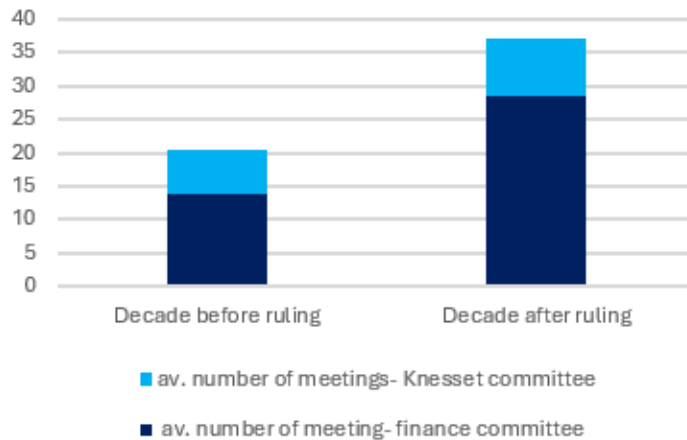


- Knesset started removing subjects from arrangements laws' draft bill before their tabling
- Knesset Committee started removing entire subjects from arrangements laws.
- Knesset Committee increasingly directed subjects for consideration by committees other than finance committee
- Increase in the number of committee hearings and extent of debate

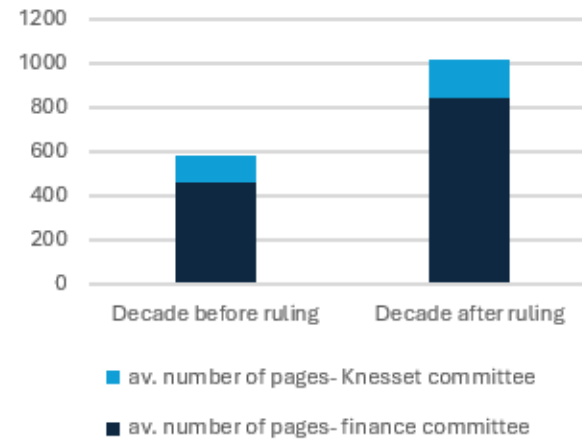
3. Procedural Splits to Committees other than Finance Arrangements Laws 1995-2014



4a. Av. number of committee meetings per decade



4b. Av. extent of committee debate per decade



Summary of Changes in Legislative Behavior

- Evident and substantial short-term change in extent of arrangements laws in the first four years following the judicial decision (2005-2008).
- More significant and longer lasting changes in the legislative process of arrangements laws.



**II. Can Changes in
legislative behavior be
linked to legislators'
fear from judicial
invalidation?**

Findings

- Wealth of evidence of judicial impact
 - 137 speech acts discussing the judicial decision
 - 127 speech acts anticipating judicial review
- Both persuasive impacts and deterring impact

Statements indicating deterrent impact:

MK Gideon Saar:

“[...W]e have to consider [...] the Supreme Court's decision which tells the Knesset: Be warned – we can ignore it, as if it doesn't exist, but I am telling you what would be the result...”

“when a legal adviser writes that if we do not accept the recommendations that she includes in her opinion, this could have an operative legal result beyond the criticism that the court gave to the Knesset in the past... she actually tells us: You can also consider other considerations, but this is a law that will be invalidated by the HCJ”

(17.5.2006)

Statements indicating deterrent impact:

MK Yaacov Litzman, Chair of Finance Committee:

“As a temporary committee chair I have to know exactly what the Supreme Court said, that's why I am asking that it would be clarified according to the Court's ruling, what is allowed and what is not. I am asking the [Knesset] Legal Advisor to tell me, what I am required to do by this Court decision, and what I am not allowed to do....

Following this debate, we are entering a debate in [our committee], and a certain MK will say: according to the Court, you may not [do that]. He will submit a petition to the Court, and I don't want that. Is allocating [the chapter on] the water authority to the finance committee - legal or not? Will I be subject to judicial review or not?”

(17.5.2006)

Statements indicating deterrent impact:

MK Reuven Rivlin:

“My question is whether the demand given to the Knesset, through this ruling, is a sign and a signal to the Knesset that if it does not use [reclaim] its exclusive powers, the High Court of Justice will intervene?”

Because if there is no understanding by the government that in the separation of powers test, the judiciary steps up and says you have gone too far, we may find ourselves in a situation where when the opposition and the coalition are replaced, it will continue to be.

Every time we are in the opposition we will be against and every time we are in the coalition we will be in favour. And those who are always in the opposition will always be against. I see it as a great danger.”

The operation of deterrent impact:

1. Eyal Yinon, Knesset Legal Adviser:

“Here I would like to persuade the committee to split the amendment, on the subject of the Entry into Israel Law, a substantive split, and transfer it to a regular legislative process.... impossible for the legal advisors... to protect such legislation in court.”

2. Opposition MKs join (H Oron: “I remember only a few times that the Knesset Legal Advisor told the Knesset: Dear friends, you are going beyond the extent that I can defend before the HCJ. That’s what he told us here.”)

3. Ministry of Finance resist

4. Knesset Committee Chair, MK Yariv Levin:

“I also think that it is impossible to run the Knesset on the basis of fear of what the HCJ will say or what the HCJ will do, and so on.

At the same time, I say with the same breath...as long as we live in a certain reality, as described by the Knesset's Legal Advisor, I think his words, at least on the tactical level, are things that need to be taken into account, and I suggest, Mr. Deputy Minister and Mr. Chairperson of the Coalition, that we take these comments seriously, because this law is absolutely essential and must be in the statute book.”

Process tracing:

5. Deputy Finance Minister remained resistant, while the Chair Levin repeated this advice a couple more times in the debate, until the Deputy Minister said that he will consider it.

6. MK Zeev Elkin, Chairperson of the Coalition: “I listened attentively to the words of the Knesset Legal Adviser... and I think that the issue should really be considered seriously, and it will be weighed seriously.”

7. 10 days later: the subject was removed from arrangement law.

Levin: result of “agreement and in coordination with the chairman of the coalition, MK Elkin, and taking into account the comments of the Knesset legal advisor and remarks made here by members of the Knesset.”

Summary of Findings from Legislative Debates

- In the first years following the *Poultry Farmers* decision, MKs observed a turning point in the Knesset conduct in enacting arrangement laws.
- Their statements reveal that the judicial ruling played a role in this significant change.
- These statements show that part of the Court decision's impact stemmed from its persuasive powers. Yet, it seems that its greater source of impact was its deterrent effect.

Conclusion

- Evident impact of judicial review on legislative behavior
- both persuasive impacts and deterring impact
- But deterrence more crucial
- Hence:
- JRLP can help curb excessive use of omnibus legislation
- BUT, threat of judicial invalidation must be credible
- Legal advisers play important role

Thank you!