

## **Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study**

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### **Abstract:**

This article presents the findings of an extensive multi-method empirical study that explored the relationship between temporary legislation, better regulation, and experimentalist governance. Temporary (or “sunset”) legislation, statutory provisions enacted for a limited time and set to expire unless their validity is extended, is often hailed as a key tool for promoting experimental and better regulation. Despite the importance of temporary legislation and the burgeoning theoretical scholarship on the subject, there is still a dearth of empirical studies about how temporary legislation is used in practice. The lack of empirical evidence creates a lacuna in at least three areas of theoretical scholarship, concerning temporary legislation, better regulation, and experimentalist governance. This paper is a first step in filling this gap.

**Keywords:** better regulation, experimentalist governance, temporary legislation, sunset legislation

### **Introduction**

Temporary (or “sunset”) legislation, statutory provisions enacted for a limited time, is often viewed as a key tool for experimentalist governance approaches, and as an

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important part of the “better regulation” agenda (Van Gestel & Van Dijck 2011; Ranchordás 2014, 2015; Veit & Jantz 2011). In other areas of scholarship and in its other uses, temporary legislation appears to remain controversial (e.g., Berman 2013; Calabresi 1982; Dewey 2011; Kysar 2011),<sup>1</sup> but in the “better regulation” and experimentalist regulation scholarship, it is generally seen as an “enlightened approach” that should be used more often (Xanthaki 2014, p. 189; Gubler 2014). This multi-method empirical study about temporary legislation in Israel reveals the realities of temporary legislation in practice and explores its relationship with better regulation and experimentalist governance.

The first such study in Israel, and one of the first in the world, this study contributes to four areas of scholarship. First and foremost, to the burgeoning global theoretical debate about temporary legislation and to much-needed empirical research about it. As Finn (2009, p. 444 n.6) observed, “[t]here are a great many [theoretical] studies of temporary legislation and sunset clauses in general.... What we do not have, however, is a substantial body of literature that explores the logic and implementation of sunsets on an empirical basis, either in the abstract or in specific case studies.” Since then, there have been a handful of important empirical studies on some aspects of temporary legislation,<sup>2</sup> but none of them examined the questions explored in the current study. Hence, there is still great need for more sustained empirical evidence about the actual design and use of temporary legislation, and its relationship with the theoretical and prescriptive scholarship about proper design of temporary and experimental legislation.

Second, this study contributes to the better regulation scholarship, which requires more empirical work and greater attention to elected legislative bodies (Brown & Scott 2011; Radaelli 2007). More broadly, the study bridges between the legal and legisprudential scholarship, which tends to focus on the theoretical, normative and prescriptive aspects of better regulation and better lawmaking (Karpen 2012) and the

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<sup>1</sup> Two prominent examples of areas in which temporary legislation is often discussed, and will not be covered by this article, are fiscal legislation (Garrett 2004; Kysar 2005; Yin 2009); and antiterrorism legislation (Finn 2009; Ip 2011; McGarrity *et al.* 2012).

<sup>2</sup> See section 3.1 infra.

political science branch of legislative studies, which tends to focus on positive and empirical questions (Martin *et al.* 2014).<sup>3</sup>

Third, the exploration whether the ideas of experimentalist governance can be found in legislative practice contributes to the experimentalist governance scholarship, which also requires more empirical studies (e.g., Eckert & Börzel 2012), and attention to elected legislatures (Eckert & Börzel 2012; Fossum 2012; Kumm 2012). The study also enriches this scholarship by examining how experimental regulation is used outside jurisdictions that are considered as the classic, “robust” examples of experimentalist governance, such as the U.S. and EU (Sabel & Zeitlin 2012a). Finally, as temporary legislation is a primary tool for policy termination, this study contributes to the literatures on policy termination and policy dismantling, which require more empirical work on dismantling strategies and instruments (Jordan *et al.* 2013; Veit & Jantz 2012).

The study also has important normative and practical ramifications for improving lawmaking. Its findings suggest that the increased popularity of temporary legislation in practice has not been matched by systematic thinking in parliament about when and how to use this legislative tool, leaving much room for bringing practice closer to the theoretical ideal. The study can serve as a basis for empirically-informed prescriptive work that develops guidelines on how to properly use temporary legislation.

Part 1 defines “temporary legislation” and contrasts it with “ordinary” (“permanent”) legislation. Part 2 discusses the theoretical relationship between temporary legislation, experimentalist governance, better regulation, and better lawmaking. Part 3 presents the research questions and hypotheses. Part 4 describes the methodology and elaborates on the multi-method approach used, which combines quantitative analysis of all laws enacted in Israel between 1949 (the 1<sup>st</sup> Knesset) and October 2015, with in-depth quantitative and qualitative content analysis of temporary laws and their legislative processes. Part 5 presents the findings, and Part 6 discusses their theoretical, normative, and practical implications.

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<sup>3</sup> In this respect, this study can be seen as part of other recent work that builds similar bridges in the context of other better regulation and better lawmaking tools, such as *ex ante* and *ex post* impact assessment. See e.g. (Dunlop & Radaelli 2015; Mastenbroek *et al.* 2016; Meuwese & van Voorst 2016; Meuwese *et al.* 2015).

## **1. Defining “Temporary Legislation”**

The term “temporary legislation” is used, with some variations, in scholarship to describe different types of legislation whose validity is temporary (Ranchordás 2014). In this study, I define temporary legislation as statutes (or statutory provisions within statutes) enacted for a limited amount of time, after which they expire, unless their validity is extended.

Temporary legislation contains “sunset” or “duration” clauses that limit the period of its validity (Gersen, 2007). A typical sunset clause explicitly states that the law, or parts of it, expires at a given date or after a given period (Xanthaki 2014). However, there are additional ways of giving laws temporary validity, such as limiting their application to certain events, actions, or circumstances that take place during a fixed period. A law can stipulate, for example, that it applies only to the next upcoming elections or only during the term of the 20<sup>th</sup> Knesset.

Temporary legislation is contrasted with “ordinary” (or “permanent”) legislation, as “one of the traditional characteristics of legislation is that they apply generally for an indefinite period of time” and remain in force until abolished by later legislation (Xanthaki 2014, p. 188). Hence, one of the defining features of temporary legislation is that it reverses the default rules for policy continuation: whereas the traditional default rule in legislation is that “the statute’s legal validity continues in perpetuity, the default rule for temporary legislation is that legal validity terminates at the sunset date” (Gersen 2007 p. 261).

## **2. Experimentalist Governance, Better Regulation, and Temporary Legislation**

Experimentalist governance scholars argue that the familiar mechanisms of parliamentary legislation and traditional forms of governance come under strain and tend to fail in situations of insufficient information and uncertainty (Sabel & Zeitlin 2012a). As a solution, they advocate an “experimentalist” form of governance that establishes deliberately provisional frameworks for action and elaborates and revises these in light of

recursive review of efforts to implement them in various contexts” (Sabel & Zeitlin 2012b). This experimentalist form of governance has several main features (Zeitlin 2015),<sup>4</sup> but the relevant point for present purposes is that one of the key themes in the experimentalist governance scholarship is that legal rules (and regulation schemes, more generally) should be “provisional and subject to revision in the light of experience” (Zeitlin 2015, p. 10-11). The law should be provisional and reversible to enable policymaking through an experimental and dynamic learning process (Listokin 2008; Lobel 2004; Perez 2014; Zeitlin 2015).

Apart from experimentalist governance scholarship, there has been a recent flourishing of “legisprudence” (legislation theory) scholarship aimed at improving the quality of legislation by making lawmaking into a more rational, evidence-based process (Bar-Siman-Tov 2015a; Flueckiger 2010; Karpen 2006; Meßerschmidt & Oliver-Lalana 2016; Voermans 2009; Wintgens & Oliver-Lalana 2013). At the same time, in practice, there has been a process of policy diffusion in which political systems, especially in Europe, at EU and member state levels, adopted “better lawmaking” and “better regulation” programs to promote the use of instruments and procedures that produce high-quality legislation and regulation (Levi-Faur 2005; Popelier 2015). These programs stress the importance of information-based and evidence-based lawmaking, and tend to present similar key tools, such as *ex ante* impact assessment, consultations, transparency, examination of regulatory alternatives, and *ex post* evaluation (Levi-Faur 2011; Popelier 2015; Voermans 2016).

Theoretical scholarship about temporary legislation often emphasizes its informational effects, its ability to produce information and facilitate information-based policy making, and to reduce error costs, risks of cognitive bias, and problems of asymmetric information (Fagan 2013; Finn 2009; Gersen 2007; Ginsburg *et al.* 2014). Temporary legislation is also described as “[a]n important instrument for securing

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<sup>4</sup> For example, another important theme in experimentalist governance scholarship is a multi-level architecture and policy by devolution and decentralization, which enables learning through policy variation across states and local units (e.g., Dorf & Sabel 1998; Listokin 2008; Sabel & Zeitlin 2012b). The idea of states as laboratories is a particularly common theme in the American scholarship, which has extensively debated the question of whether (and when) federalism may be conducive to experimentation (for an overview, see e.g., Abramowicz *et al.* 2011). This theme, though important, seems less relevant for Israel as a small unitary state, and at any rate, is less relevant for the present study about temporary legislation.

retrospective evaluation on a regular basis” (Karpen 2008, p. 173), and it is viewed as a primary tool for overcoming one of the main obstacles to policy experimentation: the high hurdles of policy termination, even given negative evaluations of existing policy (Van Gestel & Van Dijck 2011; Gubler 2014; Veit & Jantz 2012). The provisional, staged, information-producing character of temporary legislation is where it interacts with experimentalist governance, better lawmaking, and better regulation agendas.

Sunset clauses have become an integral instrument in the “better regulation” toolkit (see, e.g., EU Inter-institutional Agreement on Better Law-Making 2016; UK Department for Business Information and Skills 2015; Mandelkern Group on Better Regulation 2001; Xanthaki 2014; Veit & Jantz 2011). Temporary legislation is likewise considered to be an essential component of experimental regulation, as scholars agree that “an experimental law or regulation must have an *ab initio* limited duration” (Ranchordás 2013, p. 419; Gubler 2014; Van Gestel & Van Dijck 2011). Hence, temporary legislation is often hailed as a central tool for both experimentalist governance and better regulation (European Political Strategy Centre, 2016).

The theoretical claim underlying this study is that the proposed link between temporary legislation on one hand, and experimentalist governance and better regulation on the other, should not be taken for granted but rather be subject to empirical scrutiny. Whether temporary legislation can be linked to experimentalist governance and better regulation—and more generally, whether it can fulfill its theoretical benefits and produce better-informed, evidence-based lawmaking—is contingent on the way it is designed and employed (Veit & Jantz 2012).

To develop this underlying claim and the ensuing research design, I build upon the theoretical and analytical distinction between temporary legislation and “experimental legislation” – “legislation enacted for a limited period of time in order to examine if a particular legislative measure will effectively achieve certain goals” (Van Gestel & Van Dijck 2011, p. 541; Mader 2001, p. 125). Although this distinction is sometimes overlooked, not all temporary legislation is experimental legislation. Experimental legislation is best understood as a sub-group or a certain type of temporary legislation.

Three main defining characteristics qualify temporary legislation as being also experimental legislation.<sup>5</sup> The first is the purpose of enacting temporary rather than permanent legislation. Experimental legislation “is adopted for the express purpose of generating data prior to the sunset” that legislators or “regulators subsequently take into account in determining whether to adopt the rule,” whereas other types of temporary laws are enacted for other purposes, such as responding to emergencies or some temporary problem that is expected to pass (Gubler 2014, p. 141; Gersen 2007). The second characteristic of experimental legislation is an *ex post* evaluation or learning mechanism, which is the most crucial component. “The performance of an evaluation... is an essential feature of any experimental law since the main idea behind experimental laws is to try out a new legal regime, see if it works and learn from the observed positive and negative effects” (Ranchordás 2013, p. 420). Third, while other temporary laws are primarily tools for policy termination and are therefore meant to expire, experimental laws are intended to be a first step toward permanent legislation: “new rules are enacted on an experimental basis, their effects and side-effects are evaluated, and should these rules prove to be effective, they can be adapted and converted into permanent laws” (Ranchordás 2013, p. 419; Van Gestel & Van Dijck 2011).

Thus, the debate about temporary legislation, and the extent that this type of legislation can be justified from experimentalist-governance and better-regulation perspectives, hinges on an empirical question: how is temporary legislation employed in practice? This question is the focus of this study.

### **3. Research Questions and Hypotheses**

This study has two primary purposes. The main purpose, as mentioned above, is to examine the link (or fit) between the theory of temporary legislation, particularly from the experimentalist and better regulation perspectives, on the one hand, and actual legislative practice, on the other. Yet, as the first empirical study about temporary legislation in Israel, it also has a broader exploratory purpose: to begin to explore some of

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<sup>5</sup> Additional characteristics occasionally mentioned in the scholarship (and not discussed here) are derogation from current law and a limited scope (Van Gestel & Van Dijck 2011; Ranchordás 2013).

the basic questions about temporary legislation in Israel more generally (such as how prevalent is this phenomenon, how is temporary legislation designed and to what extent this legislation remains temporary in practice). Consequently, the study focuses on four sets of questions.

### **3.1 The prevalence of temporary legislation**

Scholarship seems uncertain about the prevalence of temporary legislation; albeit the common wisdom seems to be that temporary legislation is relatively rare. For example, Ranchordás (2014, p. 9) argues that “these legislative instruments do not proliferate in most legal orders. In practice, sunset clauses and experimental laws are almost unknown instruments to legal practitioners and represent a minority of the annual production of legislation in the three jurisdictions under analysis [– the U.S., Germany and the Netherlands].” Veit and Jantz (2012) also indicate that sunset clauses are not very prevalent in primary legislation in the U.S., Australia, and Germany, at least at the federal level (albeit might be more prevalent at the state level in Germany). Gersen (2007), in contrast, agrees that “Most discussions of temporary legislation treat it as [] relatively rare,” but seeks to dispel “the notion that temporary legislation is a rarely used modern legislative oddity.”

The problem is that due to the lack of empirical evidence, scholars are left to rely mostly on general impressions and anecdotal evidence. Even after consulting with leading experts in the field from various countries,<sup>6</sup> I am aware of only four studies that provide at least partial, indirect empirical support for the argument about the scarcity of temporary legislation in a number of countries;<sup>7</sup> one empirical study about the Netherlands that directly supports this claim (Veerman & Bulut 2011); and one empirical

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<sup>6</sup> Email correspondences with Robert van Gestel, Daniel Greenberg, Sofia Ranchordás, Sylvia Veit, and Helen Xanthaki.

<sup>7</sup> The studies that provide at least a partial, indirect indication of the scarcity of temporary legislation are Gubler (2014) (showing the scarcity of experimental rules in the U.S., but focusing on experimental rather than temporary rules, and on agency rules rather than statutes); McGarrity *et al.* (2012) (showing that “sunset clauses have clearly been used sparingly” by the Australian Parliament, but focusing only on anti-terrorism legislation, in which the Australian Parliament has enacted more than 50 pieces of legislation, only two of which have included sunset clauses); de Jong and Herweijer (2004) (providing indirect indication of the scarcity of temporary legislation in the Netherlands using data on the average duration of laws (40 years) and showing that laws with a duration of less than five years were a small minority); Douglas and van den Berg (2010) (finding that sunset are still an almost unknown term to most civil servants and policymakers).

study that indicates that temporary legislation may be relatively more prevalent in the U.S. (Fagan & Bilgel 2015).<sup>8</sup> It seems that in many jurisdictions sustained empirical studies exploring the prevalence of temporary legislation are still missing. In Israel, there have been claims expressing the general impression that temporary legislation is becoming more prevalent in recent years (Navot 2014), and I share this intuition, but there is no empirical work addressing this question.

Against this background, my hypothesis is that the majority of legislation enacted is still permanent legislation, but that we will see an increase in the enactment of temporary legislation.

### **3.2 The purposes of temporary legislation**

As noted, one of the features that distinguishes experimental legislation from other types of temporary legislation relates to the stated purpose of enacting the law as a temporary measure. This study examines how many of the temporary laws enacted can be linked to an experimental purpose of generating data that would contribute to better-informed, evidence-based legislation.

Based on my theoretical argument above that experimental legislation is a subgroup of temporary legislation, and on arguments about the scarcity of experimental legislation in other countries (Gubler 2014; Van Gestel & Van Dijck 2011), my hypothesis is that some laws were enacted as temporary because of such an experimental purpose, but that the majority of temporary laws were enacted as temporal measures for various other reasons.

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<sup>8</sup> That study builds upon (Fagan 2013b) and expands it. Admittedly, Fagan and Bilgel focused on passage probability of temporary legislation rather than on prevalence of temporary legislation, but their work is pertinent to the current study, because they found that of the 1,025 randomly sampled bills introduced in the 110th Congress, 31.4% contained at least one temporary provision among permanent ones (and 17.5% were completely temporary). It should also be noted that during the 1980s there were a number of studies about sunset legislation in the American states. While these studies have not, to the best of my knowledge, examined the number and ratio of temporary laws enacted in a certain jurisdiction, several of these studies examined how many of the 50 states had sunset legislation. Generally, these studies indicate that sunset regimes became quite popular in the states in the early 1980s, mostly as a mechanism of legislative oversight over agencies, but that their popularity began to wane toward the end of the 1980s. For a good overview of these studies see (Kearney 1990).

### 3.3 The design of temporary legislation

Adding a sunset clause is not enough to achieve the ideals of experimentalist governance or better regulation. Experience from other countries suggests that design deficiencies are one of the main reasons for the failure of temporary and experimental legislation (Ranchordás 2014; Veit & Jantz 2012).

Most important, sunset clauses are of little use if they are not paired with evaluation and learning mechanisms that enable more informed decisions at the end of the initial sunset period (Veit & Jantz 2012; Xanthaki 2014). *Ex-post* evaluation mechanisms are a primary feature of better lawmaking and better regulation (EU Inter-institutional Agreement on Better Law-Making 2016; European Political Strategy Centre 2016; Oliver-Lalana 2016; Smismans 2015b; Van Aeken 2011), and an absolutely necessary feature of experimental legislation (Ranchordás 2013). These mechanisms are the main tool for enabling policy learning and informed, evidence-based decisions on whether to extend temporary legislation or replace it with permanent legislation. Hence, all temporary laws with experimental or better-lawmaking purposes – and, indeed, all temporary laws that are not enacted for the specific purpose of regulating a single event – should have an evaluation clause (cf. McGarrity *et al.* 2012).<sup>9</sup>

A proper evaluation clause should specify the purposes and goals of the legislative measure, the data to be collected, and the criteria and methods to be used to evaluate whether the legislative measure has met these goals, and define responsibilities for collecting the data and assessing results (Mader 2001). Special units responsible for the evaluation of legislation should be established, ideally as professional independent bodies (Veit & Jantz 2012).<sup>10</sup>

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<sup>9</sup> To be sure, some scholars are skeptical of the promise of ex-post evaluation mechanisms (Mastenbroek *et al.* 2016; Perez 2014). Others, claim that despite the challenges, ex-post evaluation is often well worth the cost (Oliver-Lalana 2016; Schwartz 2016). Some even claim that ex-post evaluation may be more promising than ex-ante impact assessment (Bohne 2009), while others call for a combination of ex-ante and ex-post evaluations (Smismans 2015a; Verschuuren & van Gestel 2009). At any rate, it seems clear that without any evaluation and learning mechanism, the chances of temporary legislation to achieve the expected benefits of experimentalist governance and better lawmaking are significantly lower.

<sup>10</sup> For an extensive discussion of proper design of ex-post evolution of legislation and its methods see, e.g., Van Aeken 2011; Bussmann 2010; Clapinska 2007; Karpen 2004; Mader 2001; Mousmouti 2012. see also the articles in the EJRR's recent special issue on policy evaluation in the EU (Smismans 2015b).

While *ex-post* evaluation mechanisms are of primary importance, another important question is the extent that the law's extension mechanism enables a judicious, deliberative well-informed extension decision, which takes the lessons from the *ex-post* evaluation into account when deciding whether to extend the law (McGarrity *et al.* 2012).

This study examines how temporary laws are designed by the Knesset and whether they include the requisite features that would make them instrumental in fostering better lawmaking. My hypothesis is that there is a gap between the normative and theoretical scholarship on the adequate design of temporary legislation and the situation in the Knesset in practice. This hypothesis is based on arguments about similar gaps in other countries (Ranchordás 2014; Veit & Jantz 2012), and on a study about the rules governing lawmaking in the Knesset, finding that other better regulation tools (such as *ex ante* impact assessment) are significantly underdeveloped and underutilized in the Israeli legislative process (Bar-Siman-Tov 2016).

### **3.4 The fate of temporary legislation**

As noted, one of the features that distinguishes experimental legislation from other types of temporary legislation relates to its intended fate: experimental legislation is intended to be a first step toward permanent legislation, whereas other types of temporary legislation are meant to expire. This study examines how many temporary laws have expired and how many were replaced by permanent legislation, and whether there is a connection between the fate of temporary legislation and its experimental or non-experimental purpose.

Another important question is the extent to which temporary legislation is being extended. That is, "to what extent are these laws of a really temporary nature?" (Barak-Erez 2014, p. 443). From a normative perspective, it is usually assumed that proper use of temporary legislation (whether experimental or not) should lead to relatively few extensions, and that wholesale, continual extension of temporary legislation should be perceived as an abuse of this tool (e.g., Barak-Erez 2014; Easterbrook *et al.* 2012; Van Gestel & Van Dijck 2011; Ip 2011; Navot 2014; Ranchordás 2014).<sup>11</sup>

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<sup>11</sup> Admittedly, there have also been scholars that argued that in specific legislative domains (for example, where the legislature is addressing new risks or where a regulated technology is undergoing rapid

My hypothesis, based on common claims in Israel and elsewhere, is that most temporary laws are repeatedly extended. Indeed, claims that the sun rarely sets on sunset legislation, and that the majority of these provisions are recurrently extended rather than expire or made permanent are common in the literature (Finn 2009; Kysar 2005; McGarrity *et al.* 2012; Navot 2014; Roznai 2016; Viswanathan 2007). In Israel, Justice Levi has perhaps been most explicit in his criticism that despite their promising name, “temporary provisions” too often turn out to be permanent in practice (*Galon v. Attorney General* (2012) Levi). Justice Levi also provided several examples, which provide anecdotal support for his claims. Yet, there is no empirical work examining this claim.

#### **4. Methodology**

I used a multi-method approach (Nielsen 2010), tailoring various techniques to each research question. I examined the question about the prevalence of temporary legislation using basic quantitative analysis: how many laws were enacted in each Knesset and how many of these were temporary laws. I also analyzed changes in the enactment of temporary legislation over time. The dataset included all laws enacted between February 1949 (1<sup>st</sup> Knesset) and October 2015, a total of 6,544 laws. Data were collected from the recently established National Legislation Database (NLD) on the Knesset website, the first publicly available database that includes the entire body of legislation in Israel, including both laws that are still in force and those that no longer are.

I examined the purposes of temporary legislation through in-depth qualitative content analysis of temporary laws, their draft bills, and their legislative processes (Krippendorff 2013; Slapin & Proksch 2014). The materials I examined included the explanatory notes attached to the bill and legislative records from the plenum and committee debates. I focused on the *stated* purpose of enacting the law as a temporary measure, that is, the reasons that the bill or the legislators gave for choosing temporary legislation. When various reasons were stated, I collected all but ascribed greater weight

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transformation), and under certain circumstances (particularly, when information benefits are high and extension costs are low), routine extension of temporary legislation may in fact maximize social welfare (Fagan 2013a; Fagan & Faure 2011; Gersen 2007).

to the official purpose stated in the bill and to the statements of pivotal players (McCubbins *et al.* 1994; Oh 2015).<sup>12</sup>

My analysis focused on a specific category of temporary laws: original laws. The NLD distinguishes between two categories of laws: an “original law,” which the NLD defines as legislation creating a new law that did not exist before; and an amending law, which merely amends an existing law.<sup>13</sup> My aim was to examine how the Knesset uses temporary legislation when enacting new legislation. My assumption was that we can expect more experimental legislation in this area.<sup>14</sup> I analyzed 68 temporary original laws, which were all the original laws enacted as temporary legislation.

I examined the design of temporary legislation through quantitative and qualitative content analysis of the 68 original temporary laws. Finally, I examined the fate of the 68 original temporary laws in three ways: (a) whether the 68 laws were still valid according to the NLD; (b) whether the 68 laws were still valid according to Nevo, a

<sup>12</sup> One of the anonymous reviewers questioned the reliance on the explanatory notes in bills, mentioning *inter alia*, that “there are no clear directives about what has to be provided in the explanatory notes.” While I agree that the Knesset should adopt clearer directives and more extensive requirements on the information provided in the explanatory notes (Bar-Siman-Tov 2016; Friedberg 2013), I still believe that the explanatory notes are an important and valuable source for the present study (particularly as they are only one of the sources examined in this study). First and foremost, because, as emphasized in the main text, the purpose of this study is not to uncover the hidden motivations of legislators in enacting temporary legislation, but rather to observe the formal *stated* purposes of choosing temporary legislation. As Cohn (2016) recently argued in making a similar methodological choice: “Explanatory notes to published bills are... the best reflections of formal presentations of original understandings,” whereas statements in the plenum and the committees can be seen as “semi-formal” presentations. Moreover, as the example in the discussion presented in section 5.4.4 suggests, there are indications that legislators themselves may treat the explanatory notes as more credible than arguments raised during the debate. Finally, precisely because legislative records are a valuable source of information, but may also tell only part of the real picture (Slapin & Proksch 2014), one way to improve robustness is to examine not only what legislators say, but also what they do (Bicquelet & Mirwaldt 2012). This is exactly what this study does: it examines the extent that the actual design and fate of these laws match their stated experimental purpose.

<sup>13</sup> According to the official definition in the NLD, “The original law is the law in the version that was initially adopted [by the Knesset] and published in the Official Gazette, and thus created a new law that did not exist before.” By contrast, the broader term “law” in the NLD encompasses “the original law, as well as the laws that amended the original law.” <http://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawAboutSite.aspx?g=7>

<sup>14</sup> An additional consideration was the assumption that original laws would yield more meaningful and substantive information on how the Knesset employs temporary legislation than amending laws. Indeed, some amending laws provide little to no relevant information for our study, as amending laws could sometimes be a single sentence in the form of “in a certain subsection of some existing law, the word 24 should be replaced by the word 36.” To put it simply, you can’t conduct meaningful content-analysis when there is no meaningful content to analyze. Having said all that, it should be conceded that some amending laws could be substantive and important. Hence, as elaborated in section 6, there is certainly room for follow-up studies that will examine temporary amending laws.

commercial legal database; and (c) an independent examination of the fate of each of the 68 laws. The coders followed the life cycle of each of law, focusing on two main questions: (a) was the validity of the law extended, and if so, how many times? and (b) is the law still in force? The data about the fate of temporary legislation reflect the situation as of March 2016.

I developed the research design and coding schemes after consultation with the Director of the National Legislation Database Project at the Knesset, Adv. Gali Ben-Or; the Director of the Models of Legislation Project at the Knesset Legal Department and the Legal Advisor of the Knesset's Education, Culture, and Sports Committee, Adv. Merav Yisraeli; and the Head of Legislative Drafting at the Knesset, Adv. Daphna Barnai. Content analysis was conducted manually by a team of coders, consisting of myself, two research assistants, and students in the “Legislative Process in Action Workshop” that I taught.

## **5. Findings**

### **5.1 The prevalence of temporary legislation**

I found 574 temporary laws, which represent 8.77% of all 6,544 laws enacted by the Knesset between 1949 and October 2015. A clear trend toward increasing use of temporary laws emerged over time.

#### **5.1.2 Changes over time in the number of temporary laws enacted**

Appendix 1 presents the findings about the enactment of temporary legislation for each Knesset from the 1<sup>st</sup>, which began operating in February 1949, to the 19<sup>th</sup>, which was dissolved in December 2014. Appendix 2 presents the findings about the enactment of temporary legislation over the years (as opposed to across Knessets) until October 2015, that is, into the 20<sup>th</sup> Knesset. This examination reveals the general growth in temporary legislation, as shown in Figure 1, which presents the number of temporary laws enacted in five-year intervals, and even more vividly in Figure 2, which presents the number of temporary laws enacted per decade. Of all 574 temporary laws enacted since 1949, 281 were enacted in the last 15 years.

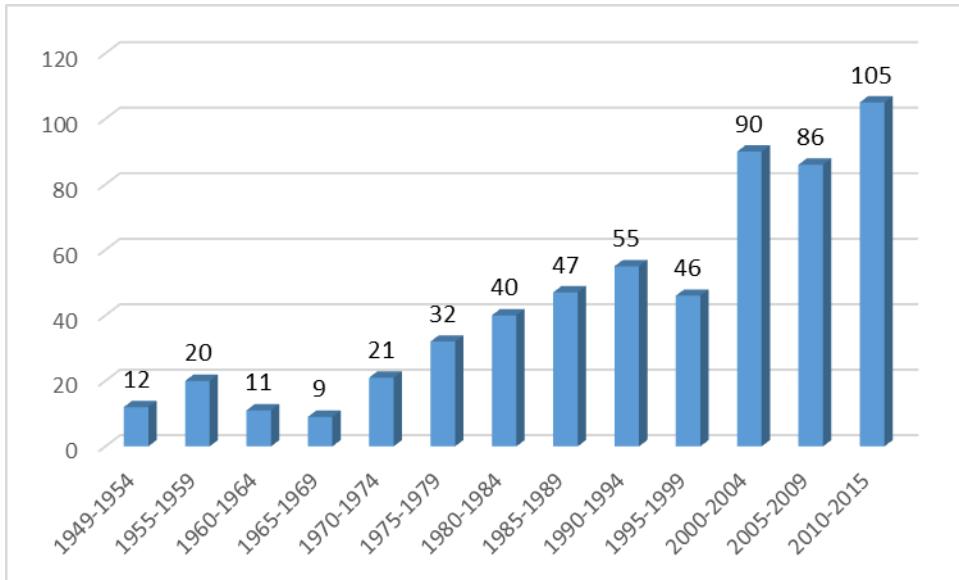


Figure 1. Number of temporary laws per half decade

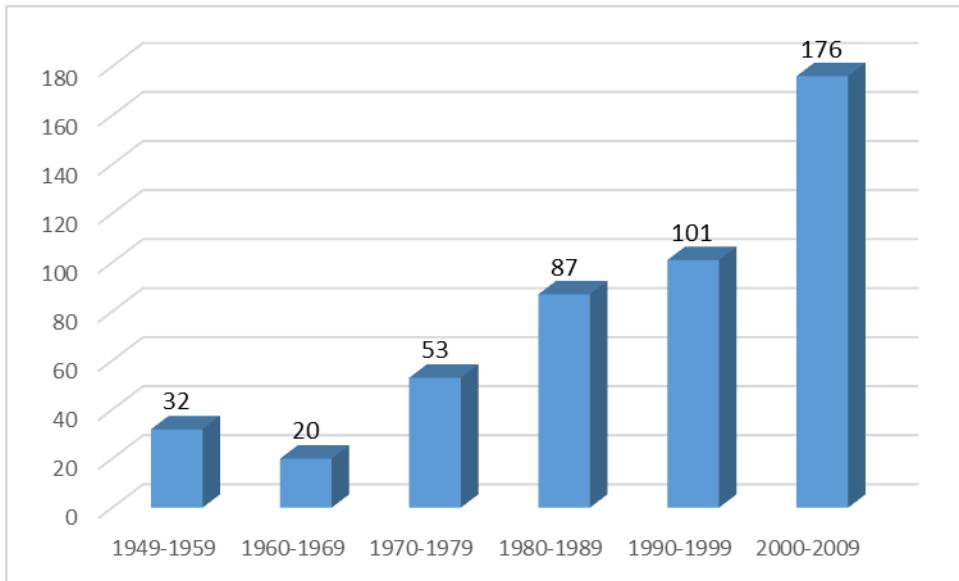


Figure 2. Number of temporary laws per decade

### 5.1.3 Changes over time in the ratio of temporary laws

Examination of the ratio of temporary laws among all laws enacted reveals the Knesset's preference for temporary laws when faced with the choice of enacting temporary or permanent legislation. The findings show fluctuations and the trend is not linear. Still, when comparing the 1<sup>st</sup> Knesset with the last one, and more generally, the

first nine with the last ten, the general trend is toward greater propensity to use temporary legislation. In the 1<sup>st</sup> Knesset, temporary laws constituted 3.49% of all laws enacted. Between the 1<sup>st</sup> and 9<sup>th</sup> Knesset, the ratio of temporary laws varied, but even at its highest (during the 9<sup>th</sup> Knesset), it never exceeded 6.45%. In the 10<sup>th</sup> Knesset, the ratio of temporary laws doubled and reached 13.59%. Since then, the ratio of temporary legislation has fluctuated, but even at its lowest, in the 14<sup>th</sup> Knesset, it did not drop below 8.75% (more than 2% over the highest ratio during the first nine Knsssets). The ratio of temporary laws peaked in the 19th Knesset, at 15.41% of all laws enacted (Figure 3).

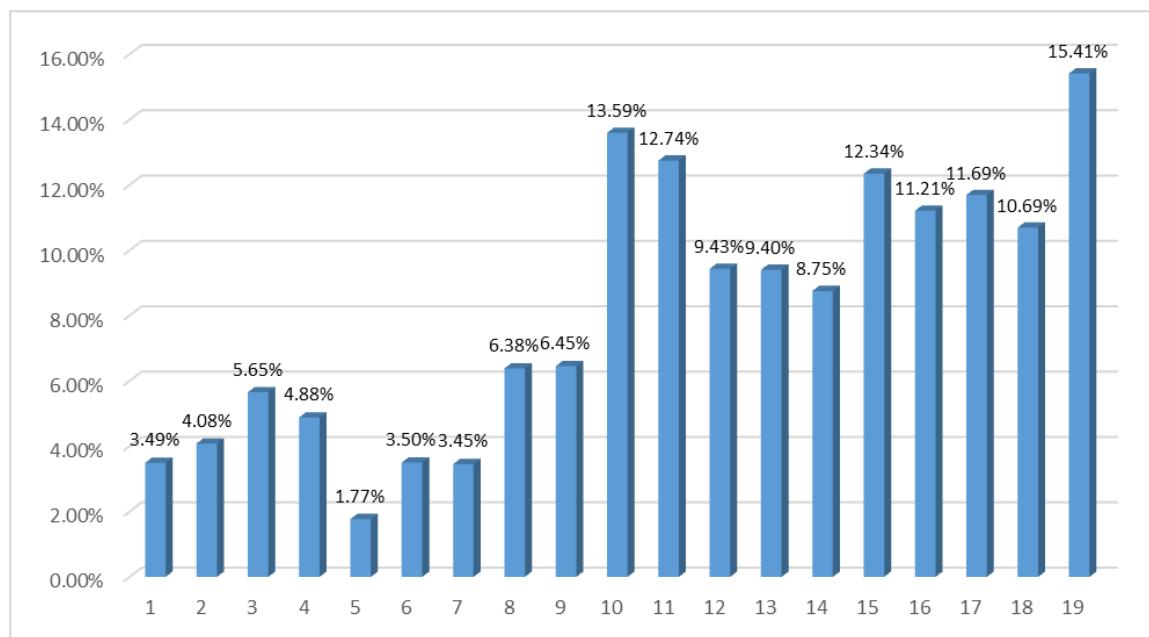


Figure 3. Ratio of temporary laws enacted by the Knesset

As seen in Appendix 2, examination of the changes over the years (as opposed to across Knsssets) reveals a similar picture: a general increase between 1949 and 2015, and a general increase between the first general period (1949-1979) and the second (1980-2015), with fluctuations within each period.

## 5.2 The purposes of original temporary legislation

As noted, my inquiry focused on the extent to which original temporary laws had a stated experimental purpose. Interestingly, it appears that the assumption that temporary

legislation can be categorized based on its experimental or non-experimental purpose is also shared by at least some governmental officials. As the legal advisor to the Ministry of Finance explained to the MKs in a parliamentary discussion on temporary legislation:

In our legislation there are two types of temporary provisions from a conceptual point of view. There are temporary provisions that stem from a temporary need, when I make a temporary provision in view of that need and it provides a response for that temporary need. There are temporary provisions that begin as a trial and a test ... in general there is sometimes a need to conduct a trial, we go into something and we don't yet know how it will work out, and you want to test the matter. (Baris, Joint Committee of the Finance Committee and the Law and Constitution Committee, 11.5.2010).

Analysis of all 68 original temporary laws, combined with in-depth qualitative content analysis of materials derived from legislative processes, revealed that of these 68 laws, 12 (17.6%) can be categorized as experimental based on their stated purpose.<sup>15</sup> Some of these were officially described as “pilot” programs. Rhetorical use of words such as “experiment” or “experimental” was common. For example, the experimental purpose of the Law for Voluntary National Service (pilot program for boys) (Temporary Provisions), was stated in the bill itself, and often reiterated during legislative debates. All 12 laws had the stated purpose of enacting the law as a temporary measure to generate data and examine whether it effectively achieves its goals, before deciding whether to adopt a new policy. The Law for Protection of Literature and Authors in Israel (Temporary Provision) provides an illustrative example. The explanatory notes attached this bill stated:

It is proposed to enact the law as a temporary measure for a period of three years, since this law is meant to correct a severe market failure

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<sup>15</sup> It should be noted that the Knesset, which also serves as Israel's constitutional assembly, also exhibits a recent growing propensity toward employing temporary measures for enacting and amending Israel's Basic Laws (Israel's constitutional norms) (Roznai 2016). At least one of these cases, Basic Law: State Budget (Special Provisions) (Temporary Provision) had a very explicit experimental stated purpose. Yet, since the subject of temporary constitutional provisions raises a host of entirely different considerations, this development is beyond the scope of this paper. For an extensive discussion see (*Bar-On v. Knesset* 2011)

in the book industry in the country in light of its unique structure. Therefore, it is proposed to test the effectiveness of the law over a limited period of three years. Based on the data collected during the period of operation of the law, the minister in charge could ... extend... the period of validity of the proposed law.

The experimental purpose was reiterated several times during debates over the bill, in the plenum and in committee, by the Minister of Culture, by the Chair of the Knesset Committee on Education, Culture and Sports, and by other speakers. For example, the Minister stated:

The law is temporary... After three years, its consequences and its results will be examined. Someone said here before, one of the members of the Knesset ... that you hope there will be results. That's just it, that's the point. This is the reason that it is for three years, to examine the consequences. (Livnat, Plenum first reading, 25.7.12).

Most of the 12 experimental laws were new, suggesting that experimental legislation is a relatively new trend in Israel. Ten of the 12 laws were enacted after 2000, seven after 2006. The topics and policy issues covered in these laws were diverse: including the literary market, voluntary national service, combating drunkenness, traffic safety, resolution of family disputes, electronic surveillance of prisoners released on bail and on probation, the conscription of ultra-Orthodox Jews, and more. It is difficult to find a policy area that attracted more experimental legislation than others.

The remaining 56 (82.4%) original temporary laws were enacted for a variety of other purposes that were clearly not experimental. Common purposes included providing a temporary solution to an urgent problem or crisis (such as the inflation crisis in the 1980s, the barrage of terror attacks during the second intifada, or the housing crisis in the last few years) (27 laws), or less commonly, regulating a single event (such as specifying rules only for an upcoming election) (10 laws).

### **5.3 The design of original temporary legislation**

#### **5.3.1 Types of duration (or sunset) clauses**

Generally, the 68 temporary laws contained two types of provisions that limited the period of their validity. Most (46 laws, 67.65%) contained a sunset clause stipulating explicitly that the law, or parts of it, will expire on a given date or after a given period. The remaining 22 laws (32.35%) limited the duration of validity not by a date of expiration but by stipulating that they apply to certain events or activities that occurred or will occur during a fixed period (e.g., during certain tax years, the term of a certain Knesset, an upcoming election, etc.). Of the 12 original temporary laws that had a stated experimental purpose, ten contained a sunset clause of the first kind.

#### **5.3.2 Duration of validity in sunset clauses**

The laws that stipulated a future date or a given period in which the law is set to expire varied in the length of the original period of validity from three and a half months to five years, with an average of about one year and nine months. For the 12 laws that had a stated experimental purpose, the average period of original validity was about 2.5 years. Therefore, experimental legislation tended to have longer periods of original validity than temporary laws in general.

The debates over the Law for Settlement of Litigation in Family Disputes (Temporary Provision) demonstrate how the experimental purpose of the temporary measure influences the duration established in the sunset clause. All participants in the debate seemed to agree that the law should be temporary given the need to test its consequences, but were divided on whether the initial duration period should be two, three, or four years. A speaker from the Ministry of Justice's Legislation and Counseling Unit argued that the validity period should be four years, to allow sufficient time to test the law and its consequences. He explained that their past experience with experimental legislation showed that short periods do not work well, and that in a previous case they were forced to extend the duration to be almost six years in total, the study alone taking three years (Segal, Constitution, Law and Justice Committee, 7.12.14). Some Knesset members, however, emphasized the risks of the experiment, suggesting that “we should think about a brief period of time even if it [does not allow] examining it in the best way.

We just do not want to see people get hurt" (Elharar, Constitution, Law and Justice Committee, 7.12.14). One Knesset member suggested limiting the period to two years (Lavie, Constitution, Law and Justice Committee, 7.12.14); the Committee Chair replied that two years were insufficient to test the law (Rotem, Constitution, Law and Justice Committee, 7.12.14), to which she responded: "But in two years, if there is any damage, you can stop. There are so many unknowns. Let's go for two years" (Lavie, Constitution, Law and Justice Committee, 7.12.14). Eventually, the validity period was set to three years.

### **5.3.3 *Ex post* evaluation or learning mechanisms**

*Ex post* evaluation mechanisms were found to be relatively rare, relatively new, and relatively undeveloped. In 59 laws, 86.76%, the temporary legislation did not contain any evaluation mechanism. All nine laws (13.24%) that did contain such a mechanism were enacted after 2006.

There is no clear pattern that characterized the nine laws that contained an evaluation mechanism, but at least in some of these cases, the mechanism can be tentatively tied to experimental legislation. Six of the nine temporary laws that contained an evaluation mechanism were experimental legislation according to their stated purpose. Note, however, that of the 12 original temporary laws that had a stated experimental purpose, only six had an evaluation mechanism.

The evaluation mechanisms established in these laws are quite basic and can be more appropriately described as reporting requirements. These laws typically only require the minister to report to a Knesset committee or to the government. Some of these evaluation clauses, moreover, are exceptionally minimalistic, merely stating, for example, that the relevant ministers "will report to the Internal Affairs and Environment Committee, every six months from the date of commencement of this act, on its implementation" (the Law for Promoting Construction in Preferred Housing Compounds (Temporary Provision). In other laws, the evaluation clauses do specify in more detail which information needs to be reported to the committee, but do not go beyond that. None of these clauses contain the specificity and all the elements identified in the legisprudential scholarship on proper drafting of evaluation clauses (as elaborated in

section 3.3), nor do they establish some elaborate *ex post* evaluation mechanism. Only in one case (the Law for Protection of Literature and Authors), was an advisory committee established, to report to the minister and to the relevant Knesset committee. The frequency of the reporting requirement varies from every four months to a year and a half and again after three years (when the validity period ends).

Laws that established reporting mechanisms tended to also have extension mechanisms in higher rates than all temporary laws (44% vs. 16% for all temporary laws). The duration of the initial validity period of laws that had a reporting mechanism tended to be longer than that of all temporary laws (an average of a little over three years vs. one year and nine months).

#### **5.3.4 Extension mechanisms**

In general, extension mechanisms were found to be relatively rare and relatively new. Most temporary laws (57 laws, 83.82%) did not contain an extension mechanism. Of the 11 (16.18%) that did, nine were enacted after 2000. Of the 12 temporary laws that had a stated experimental purpose, four contained an extension mechanism.

The extension clauses included a variety of extension mechanisms, which typically involved authorizing the government or a specific minister to extend the law, while requiring some form of parliamentary approval that falls short of the entire legislative process. The most common form of extension mechanism (7 out 11 laws) allows governmental/ministerial extension, with the approval of the relevant Knesset committee. The Business Sector Encouragement Law (Absorption of Employees) (Temporary Provision) provides a good illustration: “The Minister of Finance, with the approval of the Knesset Finance Committee, may extend the periods and dates provided in this Law, for a further period not exceeding one year.” Other variations included governmental extension, subject to approval by the Knesset Plenum in a single vote; governmental extension, subject to approval by the Knesset Plenum in a single vote, but after consulting with the relevant Knesset committee; or in one case (the Law for Protection of Literature and Authors), ministerial extension, subject to a combination of approval of the relevant Knesset committee and consultations with several professional bodies.

The Law for Protection of Literature and Authors was the only law in which there was (at least some) explicit indication that the extension decision should be linked to the evaluation of the legislation and involve a consultation and information-based process: “After examining the information submitted to the Commissioner under section 35, and if he deems that it is necessary for advancing the purposes of this Act, the Minister may, after consultation with the Commissioner, with the Director of the Antitrust Authority, with the Commissioner for Consumer Protection and with the Prime Minister's representative in the Advisory Committee, and with the approval of the Knesset's Education Culture and Sports Committee, extend, by order, the period of validity of this law by one further period of one year.”

In most of extension clauses, the possible governmental/ministerial extension period was limited to one year (or less, in one case), but in one law the authorized extension period was five years. In some cases, there was a limit on the number of possible governmental extensions (typically only one or two extensions), whereas in other cases there was no limit on the number of possible extensions. In one law, the ministers were authorized to shorten the duration of validity, but not to extend it.

## **5.4 The Fate of Original Temporary Legislation**

### **5.4.1 Current validity of the original temporary laws**

How many of the 68 original temporary laws were still valid in March 2016? The NLD, Nevo, and our independent examination came up with different answers to this question: according to the NLD, 23 (33.82%), according to Nevo, 18 (26.47%), and according to our independent examination of the life cycle of each law, 15 (22.05%) (of which 6 were enacted in 2010 or later).

Trying to resolve the inconsistencies between the NLD, Nevo, and our inquiry, we found that in some of the cases, although our coders were correct in noting that the temporary provisions expired, the databases were correct in categorizing the law, as a whole, as still valid because the law contained both temporary and permanent provisions. At other times, the databases were mistaken in categorizing the laws as still valid because they had expired according to their own terms.

Mistakes may be the result of the fact that temporary laws, even after they expire, remain on the statute book, usually because of insufficient attention paid to cleaning the book by enacting repeal legislation. Our inquiry suggests, however, that sometimes there may be political reasons for legislators' decision to keep expired temporary laws in the statute book. For example, when we examined the parliamentary debates about the bill that was supposed to repeal the Law on Partial Payment of a Convalescence Allowance in the Public Service in 2009 and 2010 (Temporary Provision), we found that the government explicitly asked not to strike the original temporary law from the statute book. Government lawyers explained that although the government had no intention to extend the law, it insisted that it was justified in its time and feared that striking it from the book may be misinterpreted as admitting that it was inappropriate in the first place (Ronen, Finance Committee, 27.6.11). The Chair of the Committee argued, however, that the real motive for keeping the law in the statute book was to enable the government to resurrect it in the future by passing an amendment that merely changes the dates of its validity, rather than enacting an entirely new substantive law, which might trigger public scrutiny and criticism of this controversial and unpopular measure (Gafni, Finance Committee, 27.6.11).

#### **5.4.2 Longevity of the original temporary laws**

Our examination revealed that the duration for which the 68 temporary laws remained in force ranged from one month to 52 years,<sup>16</sup> with an average of five years. Five of 68 (7.35%) laws remained in force for over ten years.

#### **5.4.3 Number of extensions**

Of the 68 original temporary laws, 30 (41.18%) were extended at least once. As shown in Figure 4, the number of extensions ranges from one to 16. Ten laws (33.33%) were extended only once (most typical), but 20 of the laws (66.67%) were extended more than once. Two laws stand out: the Price Stability in Commodities and Services Law (Temporary Provision), which was extended 12 times, and the Citizenship and Entry into Israel Law (Temporary Provision), which was extended 16 times.

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<sup>16</sup> The Public Housing Registration Law (Temporary Provision) from 1964 applied to registration of public housing built in 1965, and is currently still valid (the registration period is extended from time to time).

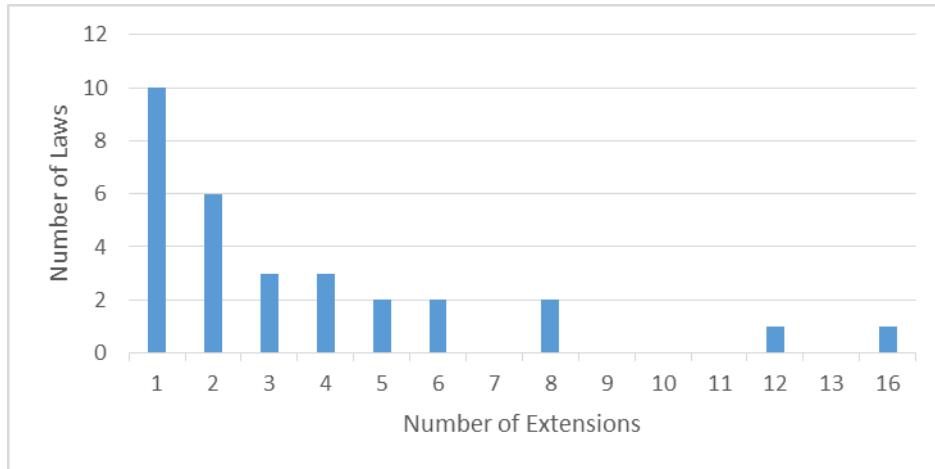


Figure 4: Number of extensions

Of the 12 original temporary laws that had an experimental purpose, six were extended. The average number of extensions for these experimental laws was two. The largest number of extensions for an experimental law was six (the law on electronic surveillance of prisoners released on bail and on probation).

#### 5.4.4 Number of original temporary laws replaced by permanent laws

Of the 68 original temporary laws, 10 (14.7%) were replaced by permanent laws. Of the 12 original temporary laws that had an experimental purpose, six (50%) were replaced by permanent laws, and one expired. The remaining five experimental laws were still in force as temporary legislation in March 2016.

The temporary law for Voluntary National Service (Pilot Program for Boys) illustrates discussions about the proper stage at which an experimental law should be considered a success and replaced by a permanent law. Discussing the government request for extension of the law in 2004, the committee's legal adviser said:

Initially, when the law was approved in 2001, it was said that this is a pilot program, and that we should examine what happened, and whether it was well implemented, etc. And I see from the explanatory notes of the government that this is a very successful program ... [and that] the need to extend it for additional periods by the government is only to periodically review the budgetary cost...

So you're saying basically, this is still a pilot program, it still needs to be examined, but the question is for how long. The question is whether it is appropriate from a legal standpoint that something that has merit, and is probably successful and effective, to leave it as a kind of temporary provision forever, and not to set it at some point as something permanent. (Wasserman, Labor and Social Welfare Committee, 26.7.04)

The Committee Chair was even more critical of the government, arguing that the extension request was “insulting the Knesset.” He stressed the need for legal predictability for the boys who are affected by the law, and suggested that there was no need for further examination to determine the success of the program, and that the issue was merely government unwillingness to commit to funding it (Yahalom, Labor and Social Welfare Committee, 26.7.04). The Ministry of Finance official responded that the program was indeed successful, but that only one parameter had been examined, and that they believed that the program was unsuccessful based on another parameter, which still needed to be examined. He therefore argued that the program was still in an experimental stage (Bar-Siman-Tov, Labor and Social Welfare Committee, 26.7.04). The Chair was incredulous of this argument, stating that it had no basis in the explanatory notes sent by the government, which stated only that the program was successful (Yahalom, Labor and Social Welfare Committee, 26.7.04).

Eventually, the Committee decided to grant the government request for a two-year extension, but called upon the government to enact permanent legislation. Indeed, in 2006, the temporary law was replaced by permanent legislation.

The temporary law for Protection of Literature and Authors raised the opposite question of how soon could an experimental law be declared a failure and repealed. At the time of the writing of this article, and after we completed the study, the Knesset enacted legislation that repealed the law and cut short the experiment before its original expiration date. According to newspaper reports, the repeal legislation was pushed by the new Minister of Culture, while trying to conceal from the Knesset the report of the expert

committee created to assess the law, which recommended continuing the experiment (Haaretz, May 27, 2016).

## **6. Discussion**

### **6.1 Growing prevalence of temporary legislation in Israel**

My hypothesis was that the majority of legislation enacted is still permanent legislation, but that we will see an increase in the enactment of temporary legislation. Indeed, the findings reveal that while permanent legislation is still the rule, the propensity for temporary legislation is growing, one might say, dramatically.

The general trend points to an increase in the use of temporary legislation. Notwithstanding some fluctuations, the growth from 12 temporary laws (3.03% of all laws enacted) in 1949-1954 to 105 temporary laws (12.34% of all laws enacted) in 2010-2015 is striking. Our findings suggest that the general growth trend is evident both in the number of temporary laws and in the ratio of temporary laws among all laws enacted, both across Knessets and over years. These findings reveal not only the growing occurrence of temporary legislation, but also a growing inclination to enact temporary legislation. This inclination reached its peak (so far) in the last Knesset, which enacted 15.41% of its laws as temporary legislation.

These findings reveal that Gersen (2007) is correct that it is time to dispel “the notion that temporary legislation is a rarely used... legislative oddity.” Temporary legislation has in fact become an important phenomenon of growing prevalence, at least in Israel. This, in turn, demonstrates the importance of an empirical study on how the Knesset employs this legislative tool in practice, which will reveal not only the quantity, but also the quality of temporary legislation. Before turning to that question, which is the central focus of this study, I will briefly mention some tentative explanations for the growth in temporary legislation and avenues for future research opened by this study’s findings.

## 6.2 Tentative Explanations for the Growth in Temporary Legislation and Avenues for Further Research

As the focus of this study about the prevalence of temporary legislation has been exploratory rather explanatory, an extensive examination of the reasons for this dramatic growth in temporary legislation was beyond the scope of the current study. Yet, this study paves the way for several promising avenues of follow-up explanatory studies.

First, while some American scholars have suggested that the rise of temporary legislation can be explained by an experimentalist agenda (that is, “Congress’s desire to preserve the flexibility to update a preexisting policy in light of new information and changing conditions”) (Patashnik & Peck 2014; Adler & Wilkerson 2012), this study suggests that caution is in order when assuming that the growth in the popularity of temporary legislation in Israel can be necessarily linked to an experimentalist agenda. Of the 68 original temporary laws, only a small minority had a stated experimentalist purpose, and even a smaller minority had the requisite characteristics of experimental legislation. This point is elaborated in section 6.3. A follow-up study can extend my study also to non-original legislation, and examine whether the same is true for temporary laws that did not create original legislation, but rather merely temporarily amended existing laws.

Additionally, a common explanation for the use of temporary legislation in the theoretical scholarship is that temporary legislation is used as means to respond to crises or emergencies (Ranchordas & Kouroutakis 2016). While this was not the focus of the current study, my study does provide at least tentative support for this explanation. Of the 68 original temporary laws in Israel, 27 (39.7%) had a stated purpose that can be categorized as providing a temporary solution to an urgent problem or crisis (such as the inflation crisis in the 1980s, the barrage of terror attacks during the second intifada, or the housing crisis in the last few years). A follow-up study can extend my study also to non-original legislation. Moreover, a different type of follow-up study can measure the correlations between periods of emergency and the extent that temporary legislation is used by the Knesset, with the assumption that periods of emergency will show an increase in temporary legislation. As the current study has not only shown a general

increase in the enactment of temporary legislation, but also analyzed changes (and fluctuations) in the enactment of temporary legislation over time, this study provides an excellent basis for such a follow-up study.

Another explanation for the use of temporary legislation in the theoretical scholarship is that temporary legislation is used to lower enactment costs and garner agreement (Gersen 2007; Porat & Yadlin, 2006; Zamir, 2105); or as more critical commentators have described it, sunsetting serves as the “spoonful of sugar that helps controversial legislation go down” (McGarrity et al. 2012; Finn 2009). And indeed, a recent empirical study about the U.S. Congress has found that the choice to include a sunset provision increases the likelihood that a bill becomes law (Fagan & Bilgel 2015). While this has not been the focus of the current study, during my in-depth qualitative examination of the experimental or non-experimental purposes of temporary legislation, I have also uncovered some tentative anecdotal evidence suggesting that temporary legislation may indeed be used as a tool for softening parliamentary opposition (and perhaps also parliamentary scrutiny).

In fact, in some cases, Knesset Members explicitly stated that they would not have supported the law had it been permanent, but are willing to support it as a temporary measure. As one Knesset Member said about the Citizenship and Entry into Israel Law (Temporary Provision):<sup>17</sup> “I think it must not be a permanent law. I oppose a permanent law on this issue... I am against the idea of this law... I do not accept the idea, but I accept the temporary provision” (Gafni, Internal Affairs and Environment Committee, 20.3.07). And as another Knesset Member added: “I want to say just one thing, I am against legislating this law... [But] I am definitely in favor of the temporary provision because I am fundamentally optimistic.... Better days will come and we will not need this law. Let's not create laws that maybe one day we will not need” (Hermesh, Internal Affairs and Environment Committee, 20.3.07). And as another Knesset Member stated in debating the Criminal Procedure Law (Detainees Suspected of Security Offenses) (Temporary Provision):

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<sup>17</sup> For an explanation in English on this law, see for example (Lapidoth & Friesel 2010).

Had this been a law that is not temporary, perhaps it would have been treated differently, my consideration of different sections [of the bill] would also be different. Since this is a temporary provision, and not a temporary provision for several years, I imagine it will be a maximum of one year, then we will definitely be able to examine the issues during this year, and if we will want to make additional legislation – we will do so, and if not – we won't. (Levi, Constitution, Law and Justice Committee, 20.6.06)

A follow-up empirical study can examine more systematically whether the desire to overcome opposition to legislation can explain the prevalence of temporary legislation in Israel. Such a study can examine, for example, the correlation between the coalition's strength (as a function of its size and its cohesion) in each Knesset and the extent of the use of temporary legislation in that Knesset, assuming that a weak coalition will resort more to temporary legislation. The current study provides a perfect basis for such a follow-up study, as it provides the data about changes in the enactment of temporary legislation between Knsssets.

Similarly, some have suggested that one of the explanations for the use of temporary legislation is the desire to minimize the infringement on human rights, based on the assumption that the proportionality principle requires preferring temporary, over permanent, suspension of human rights (McGarrity *et al.* 2012; Roznai 2016). While this has not been the focus of the current study, my qualitative examination of the experimental or non-experimental purposes of temporary legislation has also uncovered some tentative anecdotal evidence supporting this explanation. Indeed, the belief that making the law temporary will make its infringement on rights more proportional was a recurring theme in several of the debates I have analyzed. This view was stated by government lawyers, the Knesset's legal advisers and by legislators themselves, regarding several temporary laws. A representative example is the statement by the Attorney General during committee debates about the Citizenship and Entry into Israel Law (Temporary Provision):

Everyone was aware of the fact that the restrictions imposed by the law are very severe restrictions from a humanitarian standpoint and from a legal standpoint. We at the governmental legal system asked to balance and soften the law in different ways. There were two main

components we introduced to the original law. One element was that the law was set as a temporary measure and not as a permanent measure. (Mazuz, Internal Affairs and Environment Committee, 28.6.05)

Relatedly, some have hypothesized that one reason for the Knesset's use of temporary legislation is the desire to avoid judicial nullification of its laws (Navot 2014; Roznai 2016), based on some statements by the Supreme Court that "a 'permanent' law is not the same as a 'temporary' law when engaging in a constitutional scrutiny of the law, and the less we declare temporary laws void, the better." (*Adalah v. Minister of Interior* (2006), Cheshin, J., par. [118]). While this has not been the focus of the current study, I did encounter one anecdotal evidence supporting this view. During one of the Knesset's discussions on extending the Citizenship and Entry into Israel Law, the Committee Chair commented that "if this law will not be [enacted as a] temporary law, it has no chance in the world to pass the court" (Paz-Pines, Internal Affairs and Environment Committee, 20.3.07). Future studies can examine the proportionality and judicial review hypotheses.

Another possible avenue for follow-up explanatory studies for the growth in temporary legislation in Israel will examine this phenomenon in the context of the general growth in legislation in Israel. As the current study examined not only the growth in the number of temporary laws enacted, but also the growth in their ratio out of all legislation enacted (from 3.49% in the 1<sup>st</sup> Knesset to 15.41% in the 19<sup>th</sup> Knesset), we now know that the increase in temporary legislation cannot be entirely explained by the general growth in legislation in Israel. Yet, future studies can examine the extent to which explanations offered in the scholarship about the growth in different types of legislation in Israel, such as private member bills (Hazan 2001; Hazan & Rahat 2006; Maor 2008) can also serve as explanations for the growth in temporary legislation.

Finally, while this study focused on Israel, it can serve as a first step in developing a comparative-empirical research agenda (Arter 2006; Bignami 2016; Levi-Faur 2004). Future empirical studies can examine the prevalence of temporary legislation in other countries, as well as the actual use of temporary legislation in other parliaments, in order to see to what extent the insights from the current study can be extended to other jurisdictions. These studies can serve as a basis for comparative research investigating

why temporary legislation is more widespread in some legislatures than in others. At this stage, we can only suggest a few tentative thoughts about what the findings of this study may offer for this future research agenda.

First, while the limited empirical evidence that existed until now could have suggested (as explained in section 3.1) that the pervasiveness of temporary legislation may be unique to the U.S., this study demonstrates that this phenomenon cannot be simply dismissed as another case of “American exceptionalism” (Owens & Loomis 2006; Schiller 2016).

Likewise, the two available studies until now, which indicated the scarcity of temporary legislation in the Netherlands (Veerman & Bulut 2011) as opposed to the apparent relative prevalence in the U.S. (Fagan & Bilgel 2015), might have suggested an explanation based on the presidential/parliamentary system distinction, which is often given as the major explanation in comparative studies on lawmaking (see, e.g., recently, Rose-Ackerman *et al.* 2015). Yet, as Israel is a parliamentary system, this study suggests that additional explanations should be explored.

The comparison of this study’s findings vis-à-vis the findings about the Netherlands also casts doubts on whether a better lawmaking agenda can explain the prevalence of temporary legislation (Veit & Jantz 2012). The Netherlands is widely considered as one of the most advanced countries in implementing a better-lawmaking and evidence-based lawmaking agenda (Karpen 2004, 2012; Van Aken 2011; van Gestel 2007), and one of the most ardent promoters of improving the quality of lawmaking in the EU (Robinson 2014; Voermans 2016). In Israel, in contrast, the better-regulation program is in its embryonic stages, and is limited to the executive branch (Atlan *et al.* 2013). A better-lawmaking policy program for the parliamentary level is virtually nonexistent (Bar-Siman-Tov 2016).<sup>18</sup> Yet, this study reveals that temporary legislation is much more prevalent in Israel than the Netherlands. Indeed, while Veerman and Bulut (2011) found that between 1999 and 2009, only 67 temporary statutes were enacted in the Netherlands, and only 85 bills, which they estimate to be slightly over 2% of all bills, contained a sunset clause; my findings reveal that in the same period, the Knesset enacted

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<sup>18</sup> Albeit we do see a recent effort by think-tanks that try to initiate such an agenda (Mordechay *et al.* 2015).

over 2.5 times more temporary laws: 171 (11.85% of all laws). Moreover, my study found that since that period the prevalence of temporary legislation in Israel grew further. Future comparative studies can examine more systematically the relationship between the prevalence of temporary legislation and the extent that different countries have adopted and implemented a better lawmaking policy program. More broadly, future studies can examine the extent to which explanations offered in the scholarship about the diffusion and convergence of better regulation programs across jurisdictions (for recent overviews see Bignami 2016; Popelier 2015) can also explain similarities and differences in the use of temporary legislation across jurisdictions.

Furthermore, the findings from the current study problematize another possible explanation for the prevalence of temporary legislation – legislative gridlock (Auerbach 2006). The gridlock explanation sounds plausible, moreover, because it fits well with the explanation discussed above about temporary legislation as a tool for overcoming opposition to the bill. The Israeli case, however, problematizes this explanation. On the one hand, as noted, this study did produce some tentative anecdotal evidence that temporary legislation is used to reduce opposition to the bill. On the other hand, the Israeli Knesset is almost the mirror image of the American Congress when it comes to gridlock. The American federal legislative process (with features such as bicameralism, presidential veto, and the filibuster) is particularly cumbersome and veto-gate laden (Eskridge 2012; Oleszek 2014), and susceptible to gridlock especially in times of divided government and polarized parties (Davis *et al.* 2014; Hughes & Carlson 2015; Levinson & Pildes 2006). In contrast, the Israeli unicameral legislature, characterized by a lack of constitutional restrictions on its legislative procedure and very lax parliamentary rules (which, for example, do not even include a minimal quorum requirement and are very permissive in allowing procedures that facilitate lawmaking even further, such as expedited omnibus legislation), creates relatively low hurdles on the ability of the coalition government to pass its legislative agenda (Bar-Siman-Tov 2016). Indeed, while the U.S. Congress is often criticized as gridlocked and paralyzed (e.g., Binder 2015, 2003; Teter 2013; cf. Chafetz 2013; Chiou & Rothenberg 2007), the Israeli Knesset is often criticized for the opposite problem: hyper-active legislation (Bar-Siman-Tov 2015a; Chazan 2005; Friedberg 2013). The Dutch legislative process, in turn, can probably be

placed somewhere between the U.S. and Israel in terms of cumbersomeness/facility of passing legislation (Voermans *et al.* 2012). Yet, as we have seen, this fits with the prevalence of temporary legislation in the U.S. vis-à-vis the Netherlands, but not with its greater prevalence in Israel than in the Netherlands. A follow-up comparative study can examine more systematically the relationship between the prevalence of temporary legislation in different legislatures and the degree that these legislature's institutional design and legislative procedure impedes the ability to pass legislation (Bar-Siman-Tov 2015b). Other comparative studies can explore the relationship between the prevalence of temporary legislation in different legislatures and other causes and measures of gridlock.

Additionally, given the scholarship about temporary legislation as a tool for responding to crises or emergencies, a comparative study can examine whether countries facing more crises and security threats use temporary legislation more often than countries that enjoy more peaceful conditions. At first blush, this might provide one tentative plausible explanation for the difference between the Netherlands, on the one hand, and Israel (and to a lesser extent, the U.S.), on the other.

Finally, the hypothesis mentioned above about the possible relationship between judicial review and the prevalence of temporary legislation can also be examined comparatively. The existing data about the prevalence of temporary legislation in the U.S., Israel and the Netherlands tentatively suggests that this can be a promising avenue of exploration, as one of the distinguishing features between the U.S. and Israel on the one hand, and the Netherlands, on the other is the existence of strong-form judicial review of legislation (Tushnet 2009).

### **6.3 The purposes of temporary legislation and their link to experimental legislation**

The main focus of this study was on the question of the fit between the theoretical experimental and better lawmaking justifications of temporary legislation on the one hand, and the realities of legislative practice on the other. This was the main purpose of the in-depth analysis of the 68 temporary original laws and their enactment processes.

My hypothesis was that some laws were enacted as temporary because of an experimental purpose, but that the majority of temporary laws were enacted as temporal measures for various other purposes. The findings confirmed this hypothesis, and, in fact, experimental laws were a small minority of temporary laws.

The study found that of the 68 original temporary laws, only 12 (17.6%) can be categorized as experimental according to their stated purpose. We also found that only 9 laws (13.2%) can be characterized as experimental according to their design (that is, containing at least some form of *ex post* evaluation mechanism, which is the *sine qua non* of experimental legislation). These findings confirm my hypothesis, and provide support for arguments in the scholarship from other countries about the scarcity of experimental legislation (Van Gestel & Van Dijck 2011; Gubler 2014).

These findings also support the insight underlying this study, yet sometimes overlooked in the literature, that temporary legislation need not be equated with experimental legislation. As Ranchordás (2014, p. 36), for example, critically observes, “sunset laws” have been mistakenly described in the literature as the “US equivalent” of European “experimental legislation”. The findings of this study provide empirical support to the theoretical claim that experimental legislation is not the equivalent of temporary legislation, but is rather best understood as a specific type (or sub-group) of temporary legislation. At least with regard to original temporary laws in Israel, it is, in fact, a small sub-group.

Finally, as mentioned above, these findings cast doubt on whether the growth in temporary legislation in Israel can be necessarily linked to an experimentalist governance agenda.

#### **6.4 Inadequate design of temporary legislation**

The findings about the design of the 68 original temporary laws suggest that the increasing use of temporary legislation has not been matched by a corresponding increase in the sophistication with which this legislative tool is used. The findings confirmed my hypothesis that a gap exists between the normative and theoretical scholarship on the

adequate design of temporary legislation and the situation in the Knesset. This gap was even larger than I expected, and the findings revealed that most temporary laws lacked the requisite features that would make them instrumental to fostering better, evidence-based lawmaking.

*Ex post* evaluation mechanisms were scarce. Most temporary laws (86.76%) had no *ex post* evaluation mechanism at all. Even in the group of temporary laws that had a stated experimental purpose, half did not contain an evaluation mechanism. The findings suggest, however, that there may have been some improvement in recent years, and that *ex post* evaluation clauses are a relatively recent development (all nine laws that contained such a mechanism were enacted after 2006). Yet, even in the few cases that did contain an *ex post* evaluation clause, the evaluation mechanism they established was very basic. Indeed, with perhaps one exception, the design of the existing *ex post* evaluation clauses was lacking and did not meet the criteria in the theoretical scholarship (as elaborated in section 3.3) for proper design and drafting of evaluation clauses.

The design of extension mechanisms also leaves much to be desired. In most of the laws that contained an extension clause, the existing mechanisms allow the government to decide on the extension with very minimal parliamentary involvement, and raise serious concerns about separation of powers and democratic legitimacy. In American scholarship, it is usually taken for granted that the extension of temporary legislation must be authorized by the legislature, following all the steps of the formal legislative process (Gersen 2007). The extension mechanisms found by this study would probably be declared unconstitutional in the U.S. (*INS v. Chadha* 1983). That temporary legislation must be extended by a new statute enacted by parliament seems to be the ordinary assumption in Australia as well (McGarrity *et al.* 2012). And while in the UK there is admittedly a precedent of governmental extension with parliamentary approval that falls short of the full legislative process, the process requires approval by both houses, as well as consultations with a number of additional professional bodies (the Prevention of Terrorism Act 2005 (UK)). This mechanism, moreover, which goes well beyond some of the extension mechanisms found in this study, has been criticized in the UK (and elsewhere) as insufficient (McGarrity *et al.* 2012).

And yet, in Israel, only one dissenting Justice mentioned, without ruling, the question of “whether it is appropriate that the validity of the laws of the Knesset, and in particular of a law of such considerable influence, be extended by government decree, which the legislature approves through a short procedure and in a single vote, and doubtful whether it is based on a complete picture of the data” (*Galon v. Attorney General* (2012) Levi par. [33]). Such extension mechanisms undermine one of the justifications of temporary legislation: its ability to serve as tool for effective legislative oversight of the executive (Chafetz 2012, 2015; Lyons & Freeman 1984). Apart from constitutional concerns, these extension mechanisms are troubling from a better-regulation perspective as well, because they often lack the minimal features that would enable informed decisions on whether to extend temporary legislation.

Finally, it is difficult to glean from the findings a discernable general, systematic policy on the optimal duration of the validity of sunset clauses. We have found significant variations, from three and a half months to five years. But the finding that sunset clauses in experimental legislation had, on average, a longer duration than other types of temporary laws is consistent with the prescriptive scholarship.

Future research can extend this study to non-original temporary laws, where I expect the gap between normative scholarship on the adequate design of temporary legislation and the situation in practice to be even greater. Future explanatory studies could investigate the reasons for this gap between the normative scholarship and reality. At present, suffice it to present two possible tentative explanations, which are largely complementary of each other. The first is that this gap may indicate, as mentioned above, that experimental and better-regulation motivations are not a major reason for enacting temporary legislation in Israel. That is, the findings about the actual design of temporary laws, which reveal that most temporary laws lack the requisite tools for better-lawmaking and evidence-based lawmaking, bolster the conclusions from the findings about the stated purposes of the temporary laws. Together, these findings cast serious doubt on whether the growth in temporary legislation in Israel can be linked to a better-lawmaking or experimentalist agenda. The second tentative explanation is that legisprudence and the

ideas and tools of better-lawmaking are still undeveloped in Israel (as mentioned in sections 3.3 and 6.2).

Future studies could extend this study to other countries, and examine, *inter alia*, whether the gap between proper design and reality is smaller in countries that have a long tradition of legisprudence and established better-lawmaking programs. There are at least some anecdotal and descriptive indications in the current literature (e.g., Ranchordás 2014; Veit & Jantz 2012) that suggest that the Knesset is certainly not alone in inadequate design of temporary legislation, and I therefore expect that these studies will find gaps between normative scholarship and reality in other countries as well. Yet, I expect that the gap might be less dramatic in countries with established legisprudence and better-lawmaking cultures.

Even before such further research, however, this study's findings already have important ramifications for the current theoretical scholarship. They clearly challenge the link between temporary legislation and its supposed benefits in the theoretical scholarship and prescriptive manuals (discussed in section 2), which praise temporary legislation as a key tool for better, evidence-based and experimental legislation. To clarify, these findings do not mean, of course, that temporary legislation cannot be an effective tool for better regulation and experimental governance; nor do they necessarily mean that the link between temporary legislation and better regulation and experimental governance is necessarily so tenuous in all jurisdictions. Rather, they prove this article's central argument that the link between temporary legislation and better regulation and experimental governance (and between temporary legislation and its supposed theoretical benefits) needs to be empirically examined rather than taken for granted. Until proven empirically, experimentalist and better-regulation justifications for temporary legislation should be viewed as plausible, but contingent, justifications.

## **6.5 The Fate of Temporary Legislation**

Analysis of the fate of the 68 original temporary laws produces a mixed picture. My hypothesis that temporary legislation is repeatedly extended was only partially

confirmed, with most temporary laws contrasting this assumption, while others confirm it.

On one hand, we did not find wholesale recurring extensions of temporary laws. Most of the 68 original temporary laws (58.82%) were not extended. Only 6 (8.82%) of the 68 temporary laws were extended more than five times. The majority (79.41%) of laws that were originally enacted as temporary legislation expired and are no longer in force. The average life of the 68 temporary laws, including extensions, was 5 years.

These findings challenge the common assumption in the scholarship (discussed in section 3.4.) that the sun rarely sets on sunset legislation, and that most temporary laws are repeatedly extended. These findings suggest, moreover, that temporary legislation may indeed be an effective tool for policy termination, which is an important finding for the literatures on policy termination and policy dismantling (Jordan *et al.* 2013; Veit & Jantz 2012). These findings are, therefore, generally in line with the normative scholarship on temporary legislation cited in section 3.4.

Our findings suggest, moreover, that experimental laws show a greater propensity to be replaced by permanent legislation than temporary laws enacted for other purposes. Of the laws enacted with an experimental purpose 50% (6 out of 12) were replaced by permanent legislation, as opposed to 7.1% (4 out of 56) of the laws enacted as temporary for non-experimental purposes. Although temporary legislation with a stated experimental purpose constituted only 17.6% of the 68 original temporary laws, experimental laws represented 60% of all original temporary laws that were replaced by permanent laws. These findings agree with the theoretical claim that a distinguishing feature of experimental legislation is that it serves as a step toward permanent legislation, whereas other temporary laws are intended to expire (Van Gestel & Van Dijck 2011). These findings suggest that, in general, the gap between practice and normative theory is smaller in the fate than in the design of temporary legislation.

On the other hand, we also found cases that demonstrate (and seem to confirm) the fear of temporary legislation. Some laws justify the criticism that the temporary becomes *de facto* permanent, including one “temporary law” that has remained in force for 52 years. The Citizenship and Entry into Israel Law (Temporary Provision) stands out

in particular, having been extended 16 times. This is particularly noteworthy, because the temporary nature of this law, which raises serious constitutional concerns, was central in the decision of the Attorney General and the Supreme Court that it should not be invalidated (*Adalah v. Minister of Interior* (2006), Levi; Cheshin, par. [118]; *Galon v. Attorney General* (2012), Levi par. [33]).

Another example of reason for concern, from a different angle, is the Law for Protection of Literature and Authors, in which the experiment was cut short before its original expiration date, contrary to the recommendation of the expert committee and while trying to conceal its report. This law stands out because it was closest to meeting the criteria for experimental legislation, both in its stated purposes and in its design. Even without opining on the substantive merits of this controversial policy decision, this example suggests that even the best designed experiment cannot achieve its purpose if lawmakers are unwilling to wait to see the results of the experiment before deciding its fate.

Future studies can engage in more in-depth exploration of the types of temporary legislation that are more likely to lead to policy termination and the various factors that influence the likelihood of extension of temporary legislation (Oh 2015). The data accumulated in the current study about the fate of the 68 original temporary laws can serve as a good first-step for such studies about the types of temporary legislation that are more likely to lead to policy termination. A follow-up study could also extend this study to non-original temporary laws, to see whether original laws are unique in largely defying common assumptions about the fate of temporary legislation. Future case studies, moreover, could examine in-depth the reauthorization or extension stages of experimental legislation. The 12 original temporary laws identified in this study as having a stated experimentalist purpose would be good candidates for such case studies.

Another finding that merits further inquiry concerns the differences between the results of our examination of the current validity of temporary laws, vis-à-vis the NLD and Nevo results. This inconsistency attests to the lack of clarity resulting from the fact that temporary laws, even after they expire, remain in the statute book. A common argument in the literature against temporary legislation is that it jeopardizes legal

certainty and predictability, which require stable, durable laws (Ranchordás 2014). Our findings suggest that temporary legislation can create problems of legal clarity in the more basic sense of not knowing which laws are *currently* in force. This finding requires attention, especially given the growing acceptance of the idea that people have a right to be easily informed about the valid laws governing their lives (Roznai & Mordechay 2015). I do not think, however, that this in itself is a fatal argument against temporary legislation. Rather, it emphasizes the importance of enacting repeal legislation, which can be done by general legislation that would clean the statute book from expired (and obsolete) legislation every few years (Xanthaki 2014).

## **6.6 Normative Recommendations**

From a normative standpoint, contrary to some of the scholarship about temporary legislation, I do not believe that the growth in temporary legislation is necessarily good or bad in itself; its merit depends on how it is used. However, precisely for this reason, I disagree with the view that sunset provisions should “be inserted in legislation as standard, allowing for exceptions only where the possibility of a lack of legislative regulation, if the legislation dies unintentionally, may create regulatory chaos or unease” (Xanthaki 2014, p. 189). Excessive use of temporary legislation will not allow meaningful *ex post* evaluation and parliamentary deliberation over it, and may lead to thoughtless wholesale extensions of temporary laws (Veit & Jantz 2012). The experience from other countries suggests that “a selective application of sunset legislation seems more promising than a comprehensive sunset regime,” and that “if used systematically for selected laws, sunset legislation can be a feasible instrument to support better business regulation” (Veit & Jantz 2012, p. 281; Kearney, 1990; cf. Easterbrook *et al.* 2012).

I therefore recommend judicious, rather than extensive, use of temporary legislation. Consequently, the Knesset should develop more structured and principled policies on when and how to employ temporary legislation (Gersen 2007; Ranchordás 2014; Veit & Jantz 2012), and legislators should be required to explain, in the explanatory notes, the reasons for choosing temporary rather than permanent legislation.

As this study revealed that the greatest gap between legislative practice and the normative and theoretical scholarship on temporary legislation has been in the area of adequate design of temporary legislation, my recommendations will focus on this aspect.

First, *ex post* evaluation mechanisms are the area where there is the greatest room for improvement and for bridging the gap between practice and theory. As explained in greater detail in section 3.3, *ex post* evaluation mechanisms are an important tool for better lawmaking and better regulation, and an absolutely necessary feature for experimental legislation. I therefore suggest that all temporary laws that are not enacted for the specific purpose of regulating a single event – and, at minimum, all temporary laws with experimental or better-lawmaking purposes – have an *ex-post* evaluation clause. The design and drafting of evaluation clauses should also be improved, according to the guidelines outlined in section 3.3 (and in the legisprudential scholarship cited therein). Finally, proper design of evaluation clauses should be accompanied with better institutionalization of evaluation procedures, including the establishment of special units responsible for the evaluation of legislation, preferably as professional independent bodies (Veit & Jantz 2012).

Another major area for improvement is extension mechanisms. As explained in section 6.4, extension mechanisms that essentially leave the extension decision of temporary laws to government, without meaningful legislative oversight, are highly problematic from separation-of-powers, legislative oversight and democratic legitimacy perspectives, as well as from a better-lawmaking perspective. Hence, extension mechanisms should require full parliamentary approval, which includes the complete three readings and detailed committee discussion process (McGarrity *et al.* 2012).

Moreover, extension mechanisms should be explicitly tied to a learning mechanism. The clause stipulating the extension mechanism should condition the decision to extend on evidence concerning the effects of the law, and create a process that fosters evidence-based decision making. For example, the government should be explicitly required to provide the evaluation report to the Knesset sufficiently in advance of the committee hearing; the report should be made public; and the legislative committee

should be required to discuss the report before voting on whether to extend the law, amend it, replace it with permanent legislation, or let it expire.

Finally, the Knesset should adopt a more principled approach for determining the duration in sunset clauses. The duration of the initial sunset period should be determined in light of the objectives of the law and the purpose for enacting it as a temporary measure rather than a permanent law (cf. McGarrity *et al.* 2012). When a temporary law is enacted for experimental purposes, the duration should be sufficient to ensure that the experiment produces meaningful results, and it should be defined according to the experiment's objectives and the characteristics of the regulated sector (in some areas, the response to new laws is faster than in others). For example, Ranchordás (2014) suggests that laws aimed at affecting social change usually require a longer experimental period than laws regulating fast-adapting markets, such as the telecommunication market. Moreover, in general (and unlike the experience with Law for Protection of Literature and Authors), experiments should not be cut short before their initial duration expires, unless early results clearly show negative consequences that must be stopped (Ranchordás 2014).

## 7 Conclusion

This study provides rich new empirical data in an area that sorely needs more empirical research. Its findings challenge several conventional wisdoms in the scholarship. It reveals that temporary legislation is not a rarely-used legislative oddity, and that temporary legislation is in fact becoming increasingly prevalent. It also reveals that contrary to the common assumption that the sun rarely sets on sunset legislation, most temporary laws in the study in fact expired, suggesting that temporary legislation may be a useful tool for policy termination. Finally, and most importantly, it challenges the link between temporary legislation and better regulation and experimental regulation. Indeed, this is the area in which the study reveals the most significant gap between theoretical scholarship and legislative reality.

Yet, this study should not be read as making the case against temporary legislation. Instead, it suggests that although temporary legislation can be a promising

and important tool for advancing experimental regulation and better lawmaking, the experimentalist and better-regulation justification of temporary legislation should be contingent upon how temporary legislation is designed and used. Hopefully, this study would help improve the use of temporary legislation and bridge the gap between current practice and the normative ideal. I also hope that this study will lead to additional empirical and comparative studies about temporary legislation. In the meantime, it is a first step in empirically informing the theoretical and normative scholarships on temporary legislation, experimentalist governance, and better regulation.

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## Annex on the Study's Methodology

### **1. Case selection: Israel as a Case Study for Examining How Temporary Legislation is Employed in Practice**

Israel is a promising case study for a number of reasons. First and foremost, while the common wisdom is that temporary legislation is rarely used, Israel provides a great case for studying temporary legislation and how it is used in practice, simply because it is a place where temporary legislation is in fact used quite often. To give but a brief example: from 2000 to October 2015, the Knesset enacted 281 temporary laws, with the last (19<sup>th</sup>) Knesset enacting 15.41% of its laws as temporary legislation. Moreover, the Knesset has employed temporary legislation as a means to deal with regulatory challenges in a wide range of regulatory areas: counterterrorism measures; human cloning; immigration; fiscal legislation and dealing with economic crisis; the recent housing crisis; the literary market; transitioning from an annual to a biannual budget; and increasing the conscription and participation in the labor market of ultra-orthodox Jews, to mention just a few examples. Indeed, it seems that many of the major (and most controversial) legislative initiatives in recent years have been enacted through temporary legislation.

Second, Israel is particularly suited for examining how temporary legislation and experimental regulation is used outside jurisdictions that are considered as the classic, “robust” examples of experimentalist governance, such as the U.S. and EU (Sabel & Zeitlin 2012a).

Finally, and relatedly, this article contributes to the growing cognizance that the study of legislatures has traditionally focused too much on the U.S. Congress (or, at best, on North American and Western European legislatures), and that shifting the focus to other legislatures constitute one of the most promising avenues for future research (Alemán 2013; Arter 2006b; Briffault 2003; Martin *et al.* 2014). Focusing on other legislatures can be particularly helpful in examining common wisdoms and theories that were constructed based on American and Western European experiences (Alemán 2013; Arter 2006b).

Of course, the focus on Israel, like any case study, requires discussion on the relevance of the findings for other jurisdictions. This is discussed in section 6.

## **2. Method for Identifying Temporary Legislation**

I identified temporary laws by searching for the words “Temporary Provision(s)” in the title. I chose this method for substantive and methodological reasons. First, the method has high external validity because the government and the Knesset also use it to identify temporary legislation. The official drafting manuals of the Ministry of Justice and the Knesset stipulate that all temporary laws, whether new laws or amendments of existing legislation, should be distinguished from ordinary law by adding “(Temporary Provision)” to the name of the law.

Second, the method ensures high reliability, because the words “Temporary Provision” in the name of the law serve as an objective and easily-observable indicator, avoiding coder reliability problems. Finally, to validate the method, I compared it with basic content analysis of the entire corpus of laws in Nevo, searching for laws containing terms that indicate temporal validity. This alternative method produced many false-positives, whereas the title search method produced none (that is, all laws with the title “(Temporary Provision)” indeed contained temporary statutory provisions, sometimes alongside permeant provisions). The title method did produce some false-negatives, due to laws containing provisions that can be characterized as temporary although their name did not contain the words “(Temporary Provision),” but these were very few, typically involving laws that were mostly permanent, with small temporary parts.

Inquiries with officials in charge of legislative drafting in Israel confirmed that my method was probably the best available, producing, in the worst case, conservative and cautious conclusions about the extent of temporary legislation (strengthening my claim that temporary legislation is increasingly prevalent in Israel).

### Appendix 1: Enactment of Temporary Legislation per Knesset

Knesset	Length of Term (months)	Laws Passed	Of these, Temporary Laws	Ratio of Temporary Laws	Monthly Average of Temporary Laws Passed
1	30	172	6	3.49%	0.2
2	48	245	10	4.08%	0.21
3	51	283	16	5.65%	0.31
4	21	123	6	4.88%	0.29
5	51	283	5	1.77%	0.10
6	48	257	9	3.50%	0.19
7	50	348	12	3.45%	0.24
8	41	376	24	6.38%	0.59
9	49	434	28	6.45%	0.57
10	37	206	28	13.59%	0.76
11	51	314	40	12.74%	0.78
12	44	350	33	9.43%	0.75
13	47	500	47	9.40%	1.00
14	36	320	28	8.75%	0.78
15	44	478	59	12.34%	1.34
16	38	446	50	11.21%	1.32
17	35	462	54	11.69%	1.54
18	46	627	67	10.69%	1.46
19	23	266	41	15.41%	1.78
Total		6490	563		

## Appendix 2: Enactment of Temporary Legislation by Year<sup>19</sup>

<b>Years</b>	<b>Laws Passed</b>	<b>Of these, Temporary Laws</b>	<b>Ratio of Temporary Laws</b>	<b>Five- year Average</b>	<b>Ten- year Average</b>
1949-1954	396	12	3.03%	2.4	3.2
1955-1959	330	20	6.06%	4	
1960-1964	327	11	3.36%	2.2	2
1965-1969	341	9	2.64%	1.8	
1970-1974	428	21	4.91%	4.2	5.3
1975-1979	509	32	6.29%	6.4	
1980-1984	433	40	9.24%	8	8.7
1985-1989	386	47	12.18%	9.4	
1990-1994	504	55	10.91%	11	10.1
1995-1999	595	46	7.73%	9.2	
2000-2004	694	90	12.97%	18	17.6
2005-2009	750	86	11.47%	17.2	
2010-2015	851	105	12.34%	21	
Total	6544	574			

<sup>19</sup> The total number of laws and of temporary laws enacted is greater than in the previous table, because this table includes laws enacted recently by the current, 20<sup>th</sup> Knesset (it includes findings up to October 20, 2015, as opposed to December 2014, when the 19<sup>th</sup> Knesset was dissolved).