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Article 2

The Living-Dead

Rivka Weill*

*Radzyner School of Law

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ARTICLE
THE LIVING-DEAD

*Rivka Weill**

INTRODUCTION	389
I. HISTORY OF ENACTMENT OF CONTINUITY LAW	394
A. Origins of the Continuity Rule	394
B. Enactment of the First Continuity Law.....	395
C. The Current Continuity Law	395
II. THE NORMATIVE CASE FOR CONTINUITY.....	396
A. Efficiency.....	396
B. Caretaker Governments	397
C. Codification Enterprise	398
D. Constitutional Enterprise	399
E. Continuing Body Theory	400
F. Low Turnover in Legislature.....	401
G. Interim Summary	402
III. THE COMPARATIVE CASE AGAINST CONTINUITY.....	402
A. The Relevance of Comparative Law	403
1. The Netherlands Experience	403
2. Great Britain as the Symbol of Discontinuity	404
B. Comparative Law as Reflected in the Archives.....	406

* Associate Professor (tenured), Radzyner School of Law, Interdisciplinary Center (“IDC”), Herzliyah. I thank the participants in the Tel Aviv University (“TAU”) seminar on Parliamentary Law which was held on November 8, 2013 for their comments. I thank Ori Aronson, Aharon Barak, Yishai Blank, Ittai Bar-Siman-Tov, Avihay Dorfman, Alon Harel, Roz Myers, Rick Pildes, Iddo Porat, Amnon Reichman, Amnon Rubinstein, and Yoram Shachar for their important comments on earlier versions of this Article. Special thanks are due to the Legal Advisor to the Knesset Committee, Adv. Arbel Astrachan, and the Vice-Legal Advisor to the Knesset and the Legal Advisor to the Knesset’s Constitution, Law and Justice Committee, Adv. Sigal Kogut for their telephone conversations with me and their comments. This Article builds on my work *Reviewing Continuity in Legislation*, 37 (3) TAU L. REV. (2015), available at www.law.tau.ac.il/Heb/?CategoryID=278 (in Hebrew). Its aim is to contribute to the rare comparative literature on the principle of legislative discontinuity by bringing the Israeli experience to bear upon the subject. My thanks to Joey Lightstone for his dedicated research assistance. It should be noted that Hebrew sources and citations were translated by the Author, unless noted otherwise.

C. The Current Comparative Experience	407
1. Irrelevance of Dutch Law to Israel.....	407
2. Prevalence of the Principle of Discontinuity.....	408
3. The Change in British Law	409
4. Neutralizing the Principle of Discontinuity	410
IV. THE CONSTITUTIONAL CASE AGAINST CONTINUITY..	411
A. Undermining the Mandate Principle.....	412
B. Compromising the Legislative Deliberative Function.....	413
1. Voting Without Debate	414
2. Limiting the Deliberation on an Objection	415
3. Inferiorizing Continuity Vis-à-Vis First Reading	415
i. No debate on the content of bills	415
ii. The resulting damage.....	417
4. Bundling of Different Issues	418
i. Continuity and content of bills.....	418
ii. Omnibus.....	419
5. Compromising Deliberations in the Knesset	
Committees	420
i. A new issue.....	420
ii. Independent judgment of committee	420
iii. Identity of the committee discussing continuity ...	422
6. Is the Curtailment of Debate Inherent to Continuity? ...	422
C. Discriminating Against New MPs	423
D. Violating Minority Rights	424
E. Constraining the Legislative Discretion.....	426
F. Strengthening the Government and Weakening the	
Legislature.....	428
1. A Double Standard in Government-Knesset	
Relations	429
2. The Initiative in Applying Continuity	430
i. Identity of the initiating body	430
ii. Private members' bills	430
3. Objection to the Application of Continuity.....	433
4. Is the Strengthening of the Government Inherent to	
Continuity?.....	433
G. Interim Summary	434
V. THE NORMATIVE CASE AGAINST CONTINUITY.....	435
A. Lack of Efficiency	435

B. Manipulative Use.....	439
1. Submission of Bills by an Outgoing Knesset.....	440
2. Revival of “Old” Bills.....	442
3. Flexibility in Applying Continuity.....	442
4. Leveraging Continuity.....	443
5. Legislation by Reference.....	445
6. Is Strategic Use Inherent to Continuity?	445
C. Enactment of Controversial Laws.....	445
D. Enactment of Basic Laws	447
E. Scrutiny of the Continuing Body Theory.....	447
F. Turnover of MKs.....	450
G. Interim Summary	450
VI. CONSTITUTIONALIZING CONTINUITY	452
A. Codification in a Basic Law	452
B. Enactment by Broad Consensus	454
C. The Proper Content of Basic Law: Continuity	455
CONCLUSION.....	456

INTRODUCTION

The principle of *discontinuity* in the consideration of legislative bills is widely accepted in democratic countries. This principle requires incoming parliaments to begin the work of legislation anew. Bills pending from the previous legislature die due to elections. In contrast, the rule of *continuity* means that, if a bill passed the first reading in an outgoing parliament, the incoming parliament may decide that it will continue the deliberations on the bill at the point where the previous parliament left off. Thus, the incoming parliament will not hold anew a first reading on the pending bill.

In comparative law, legislative discontinuity is the prevailing norm in both presidential and parliamentary systems.¹ Some constitutional systems enable exceptions to the principle of discontinuity, including Austria, Belgium, France, Germany, Ireland, Italy, and Spain. Only a few exceptional constitutional systems adopted the opposite rule of *de facto* continuity, such as the EU parliament, the Netherlands, Switzerland, and Israel. The rare

1. Jan Van Schagen, *The Principle of Discontinuity and the Efficiency of the Legislative Process*, 3 J. LEGAL STUD. 115 (1997).

exceptions to the principle of *discontinuity* often reflect the difficulty of enacting a law during the life of one parliament in a bicameral system. But Israeli law does not fit this comparative rationale. The Israeli legislature (“Knesset”), which is composed of only one house of parliament, employs the rule of continuity on a regular basis.²

Why was the legislative discontinuity principle so widely preferred over its opposite? There is virtually no literature dealing with this principle and its implications have not been rigorously explored.³ One could infer from the dearth of research and interest in the subject that this principle is insignificant.⁴ But this Article argues that this seemingly technical principle should be regarded as one of democracy’s major tenets. Its opposite rule of continuity detracts from the meaning of representative democracy. This Article presents a critical analysis of the Israeli Continuity Law. By doing so, the Article explores the contribution of legislative discontinuity to the democratic world. The Article may contribute to recent US debates regarding whether to treat the Senate as a continuing body,⁵ to recent British endeavors to insert flexibility to their rigid discontinuity principle,⁶ and to attempts to minimize the democratic deficit of the EU Parliament.⁷

Israeli society is accustomed to the phenomenon of continuity in legislative deliberations. However, some of the founding fathers in the 1960s understood the importance of legislative discontinuity and fought vigorously to protect it. Parliament’s debates in those formative years on the subject of continuity are among the most fascinating ever held by the membership on constitutional issues. This Article attempts to convey the “atmosphere” of the discussions on these different perspectives and to reveal the behind-the-scenes dynamics as they emerge from the files in the State’s archives.

2. *See infra* Part III.

3. “We have found that very little research is done in this field. Many constitutional textbooks completely ignore the existence of the principle. If it is mentioned, the effect on the legislative process is hardly ever considered.” Van Schagen, *supra* note 1, at 117, 123. In Israel, there is only one laconic article on the subject. *See* Ora Schmalz, *On the Law of Continuity of Debate on Draft Laws, 1964*, 2 *ISR. L. REV.* 566 (1967).

4. Van Schagen assumes that the discontinuity principle does not raise significant challenges, because the governments in countries in which it applies generally have significant influence over the parliamentary agenda and schedule. Thus, governments can pass legislation despite the discontinuity principle. Van Schagen, *supra* note 1, at 124.

5. *See infra* Part V.E.

6. *See infra* Part III.C.3.

7. *See infra* Part III.C.2.

In fact, the core of the debate was on the nature of the legislature. Continuity supporters sought to ascribe to the legislature perpetuity similar to an artificial body. Their arguments were unintentionally based on an age-old philosophical-religious tradition, which sought to attribute to a king, as sovereign, both the mortal natural body and the eternal artificial body. Upon the death of the natural body, sovereignty passes to the new natural body of the heir, but continuity is maintained because the artificial body is immortal. These ideas were later superimposed on parliament, as the new embodiment of the sovereign. Accordingly, the composition of individual members changes, but the continuity of parliament is preserved.⁸ Therefore, elections should not affect the work of legislation.

The opposite perspective places sovereignty in the hands of the constituents. The essence of democracy is that the continuity of sovereignty rests with the people, not with their representatives. In day-to-day matters, the people's sovereignty is manifested in the real power of constituents to influence the content of laws by breaking the legislative continuity and electing new representatives.

This Article analyzes the arguments for and against continuity. Proponents of continuity have argued that it promotes legislative efficiency and is especially necessary in light of instability of government rule. Continuity diminishes the effects of frequent and lengthy duration of caretaker governments in Israel. Continuity also enables the State to undertake major legislative enterprises, such as codifying law and adopting a Constitution. They view the legislature as a deciding, rather than a deliberative, body. They promote a formalistic perception of democracy based on majority rule.⁹ They thoroughly scour comparative law to find precedents that may support continuity.

This Article discusses three types of arguments against continuity, at times citing Members of Knesset ("MKs") who opposed continuity. A first line of argument is comparative. This Article shows how Israel's precedents in support of continuity paradoxically do not lend such support. This story is fascinating as it reveals how comparative law played an influential role in Israel in the 1960s and affected the political actors' decision regarding continuity.

8. See, e.g., ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957).

9. See *infra* Part II.

A second line of argument is constitutional. It asserts that continuity disproportionately infringes upon constitutional rights.¹⁰ The Article analyzes how continuity diminishes the meaning of elections, since voters' actions do not properly influence the legislative agendas. By preventing members of parliament ("MPs") from enjoying full power to consider bills, continuity deprives them of their right to participate in a proper legislative process. The infringement of members' right of deliberation has the greatest impact on new members and on any minority group that oppose laws to which continuity has been applied. Furthermore, by shackling one legislature to the legislative decisions of its predecessor, continuity results in a prohibited transfer of legislative authority. Moreover, continuity removes or at least weakens the restraints of veto and delay ("veto-gates") that are otherwise available to the minority in parliament. As a result, the power of the government to enact laws increases in tandem with a weakening in the status of individual members, factions, and even legislative committees.¹¹

A third line of argument is normative and essentially posits that Israeli proponents of continuity erred in thinking that it would increase efficiency. They may have opportunistically enacted continuity during the only time parliament's turnover was negligible. They also misled opponents by asserting that continuity would not be applied to controversial laws. They erred as well in considering continuity to be an appropriate means for enacting *Basic Laws*—*i.e.*, Israel's Constitution—or a suitable tool for dealing with the problem of multiple caretaker governments in Israel.¹² In fact, because caretaker governments suffer from severe democratic deficit and agency problems, they should not enjoy enhanced legislative power.

Moreover, continuity is used strategically to leverage governmental power over legislation in Israel. This Article describes the different techniques by which the government may create an artificial majority using continuity to enact laws. These techniques include enacting laws in bundles and by reference, as well as manipulating the date of the bill's submission for the first reading and the date continuity is applied. The government sometimes even attempts to dictate the contents of the bill, by conditioning its consent to continuity, initiated by the Knesset's committees, on the drafting of

10. *See infra* Part IV.

11. *See infra* Part IV.F.

12. *See infra* Part V.

specific provisions. All this is done behind the scenes without the government providing a full account of its actions to the plenum or to the public.¹³ This Article concludes that the harms arising from continuity outweigh the benefits.

The constitutional and the normative lines of argument supplement each other. By highlighting continuity's many infringements on constitutional rights and values, the constitutional argument gives substance to the normative cost-benefit argument against continuity. The normative argument shows that the added benefit to social interests is marginal and thus cannot offset the harm to constitutional rights and values resulting from continuity. As such, the Israeli Continuity Law does not pass the constitutional test of proportionality.¹⁴ Although both lines of argument supplement each other, the normative argument stands on its own. Thus, even if the Continuity Law had been enacted as part of Israel's Constitution, it would have been inappropriate to do so on the normative grounds that the Law's drawbacks outweigh its advantages.

Part One traces the history of the enactment of the Israeli Continuity Law. Part Two analyzes the considerations that favor enacting continuity, as put forward by its proponents. Part Three reveals how comparative law played a major part in Israel's debate over whether to adopt continuity. It shows that comparative law did not and still does not support the adoption of the rule of continuity as the operative norm of a constitutional system, the opinions of Israeli Ministers of Justice notwithstanding. Part Four demonstrates how continuity infringes upon constitutional rights and values. Thus, even assuming that all the many advantages cited in Part Two are correct, Part Four argues that it is doubtful whether continuity passes tests of constitutionality. Part Five presents another line of argument against the enactment of continuity on normative grounds. It suggests that, even disregarding the constitutional objections enumerated in Part Four and taking the arguments of the Law's proponents in their own right, continuity does not withstand scrutiny. Part Six suggests that, if the Knesset is interested in the continued existence of the continuity rule, it must enact the rule as part of Israel's Constitution rather than as an ordinary law. Further, were the Knesset to enact continuity as a

13. See *infra* Part V.B.

14. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, 340-70 (David Dyzenhaus & Adam Tomkins eds., Doron Kalir trans., 2012).

constitutional norm, it should limit its use to consensual laws, as was originally intended.

I. *HISTORY OF ENACTMENT OF CONTINUITY LAW*

Three principal stages can be identified in the development of Israel's rule of continuity. In the first stage (1948-1964), the Knesset consciously rejected this rule and adopted the principle of legislative discontinuity. In the second stage (1964-1979), the Knesset permitted continuity while leaving the principle of legislative discontinuity as the default. During these years, only the government could initiate the application of continuity. Subsequently (1979-present), the Knesset committees were also granted power, along with the government, to initiate the application of continuity, but only in relation to non-government bills.

A. *Origins of the Continuity Rule*

In the First Knesset, MK Nir-Rafalkes proposed the rule of continuity for Knesset debates on bills, but his suggestion was rejected.¹⁵ In the Third Knesset, he teamed up with MK Harari, and together they proposed to amend Basic Law: The Knesset to include continuity. The amendment they presented would have automatically applied continuity to all bills that passed the first reading in the outgoing Knesset unless the incoming Knesset decided otherwise.¹⁶ The Knesset rejected the proposal by a majority of twenty-six to twenty-one MKs.¹⁷

After a failed attempt in the Fourth Knesset,¹⁸ MK Nir-Rafalkes submitted the bill a third time in the Fifth Knesset,¹⁹ and, unlike the two previous occasions, the government embraced the idea of continuity and in 1961 submitted a bill of its own.²⁰

The Fifth Knesset intensely debated MK Nir-Rafalkes' bill and it was ultimately voted down, because some members categorically opposed continuity.²¹ Since Justice Minister Pinchas Rosen tied the success of the government's bill to the success of MK Nir-Rafalkes'

15. 32 DK 116 (1962) (Isr.) (MK Nir-Rafalkes).

16. Explanatory notes to the Bill, 25 DK 1013 (1958) (Isr.).

17. 25 DK 999 (1958) (Isr.).

18. 31 DK 1929 (1961) (Isr.).

19. 32 DK 43 (1962) (Isr.).

20. Continuity of Knesset Debates Bill, 1961, HH 8 (Isr.); 32 DK 106 (1961) (Isr.).

21. 32 DK 147 (1961) (Isr.).

private bill, the Justice Minister simultaneously withdrew the government's bill on the subject.²²

B. *Enactment of the First Continuity Law*

In that same Fifth Knesset, the Government succeeded in initiating and enacting the Continuity of Debate on Bills Law, 1964.²³ This law reflected the following principles: first, only the Government constituted after elections was authorized to initiate the application of continuity, not private MKs or any Knesset committee; second, the Government could initiate the application of continuity to both governmental and private bills; third, in the absence of an objection, continuity would apply without any discussion or vote; and fourth, in case of an objection, discussion of the objection would be limited to one representative of each position, after which a vote would be held on the objection.

Private members proposed an amendment in 1979 intended to expand the authority to initiate the application of continuity. According to the amendment, both Knesset committees and private members who submitted bills would be able to initiate the application of continuity—the latter only with the agreement of the Knesset committee overseeing the bill.²⁴ In practice, the authority to initiate the application of continuity was extended to Knesset committees solely with respect to non-government bills. Private MKs were not given authority to initiate the application of continuity.²⁵

C. *The Current Continuity Law*

In 1993, the Continuity of Debate on Bills Law was enacted at the urging of Ma'arach Party MK Hagai Merom, who was then chairman of the Knesset Committee.²⁶ The law introduced several innovations which are still active today. First, continuity cannot be applied to a private member's bill without the agreement of the bill's sponsor. Hence, at least one consenting sponsor of any private bill has

22. *Id.*; see also Correspondence of the Director of the Legislation Division in the Justice Ministry Dr. U. Yadin to Justice Minister Dov Yosef, May 19, 1963, State Archive GL-21275/12.

23. Continuity of Debate on Bills Law, 1964, SH 2 (Isr.); see also Continuity of Debate on Bills Bill, 1964, HH 88 (Isr.).

24. See Continuity of Debate on Bills Bill (Amendment No. 2), 1979, HH 124 (Isr.).

25. See Continuity of Debate on Bills Law (Amendment No. 2), 1979, SH 116 (Isr.).

26. See Continuity of Debate on Bills Law, 1993, SH 60 (Isr.).

to be a member of the Knesset in which the continuity rule is applied. Second, the law requires a vote to be held on the application of continuity even if no objection was made. Third, the new law requires the committee to give advance notice to the Government of the committee's intention to request continuity, to enable the Government to respond prior to the discussion in the committee. It further grants the Government the right to object to the application of continuity in the Knesset plenum.²⁷ It should be emphasized that, even after the enactment of the Continuity Law, discontinuity remained the default.

II. *THE NORMATIVE CASE FOR CONTINUITY*

In the 1960s, the Knesset intensely debated the principle of legislative discontinuity. This Part presents the normative arguments raised at that time in support of the rule of continuity.

A. *Efficiency*

MKs Nir-Rafalkes and Harari, the authors of the idea of continuity, justified it as a way of saving the Knesset time and work.²⁸ Similarly, in 1964, when the Government proposed the Continuity Law, it explained:

Experience shows that at the end of the term of office of an outgoing Knesset, government bills remain on which deliberations were begun but not completed. In the new Knesset it is necessary to resubmit these bills and to repeat stages of the deliberations that already took place in the outgoing Knesset. In many cases this involves needless repetition.²⁹

The proponents of the law believed that continuity was especially necessary to preserve the work of the committees.³⁰ They argued that the law was justified to avoid “wasting Knesset’s time and to prevent a group of members from sabotaging the committees and dragging out laws endlessly.”³¹ They also asserted that continuity would enable the Knesset to more seriously fulfill its other functions, such as supervising the Government and the budget.³²

27. See Continuity of Debate on Bills Bill, 1993, HH 49 (Isr.).

28. 25 DK 997 (1959) (Isr.).

29. Explanatory notes to Continuity of Debate on Bills Bill, 1964, HH 88 (Isr.); see also 39 DK 1602 (1964) (Isr.).

30. 39 DK 1609 (1964) (MK Baruch Azanya); 39 DK 1616 (MK Yitzhak Klinghoffer).

31. 32 DK 116 (1962) (Isr.) (MK Nir-Rafalkes).

32. 39 DK 1615 (1964) (Isr.) (MK Yitzhak Klinghoffer).

B. Caretaker Governments

Proponents argued that the need for continuity is stronger when the Knesset is dissolved before the end of its term. In such circumstances, the Knesset is unable to plan ahead, to complete the handling of bills pending before it.³³ In fact, the timing of the proposal of the Continuity Law was influenced by the Israeli Governments' instability.³⁴

On October 23, 1961, the same day on which MK Nir-Rafalkes' bill was rejected and the Government bill to adopt continuity was withdrawn, the Knesset considered an amendment to the Transition Law, which, in substance, was intended to limit the time available to a prime ministerial candidate to set up a Government. The amendment required the President of the State to attempt to prevent elections by reaching out to more than one candidate to set up a Government if the first candidate failed in this task.³⁵ MKs Nir-Rafalkes, Yitzhak Klinghoffer, and Moshe Unna, who were the key figures supporting the Continuity Law, were the ones to propose the amendment to the Transition Law.³⁶ These MKs had at that time two central concerns—to offer proper treatment to caretaker governments and to ensure continuity of Knesset debates. The regulation of each was intended to complement the other.

The eleventh Government of Israel enacted the Continuity Law of 1964. This was the second Government to serve during the term of the Fifth Knesset after its predecessor had resigned. One of the first initiatives of this Government was to promote continuity. In response, Religious Affairs Minister Zerach Warhaftig, who was firmly opposed to continuity, wrote to the Government Secretary in July 16, 1963:

I believe that dealing with the matter at the present time is inappropriate in terms of public policy, since consideration of this bill, on an urgent basis, two weeks after the new government was constituted, might give the public the impression that the

33. 39 DK 1603 (1964) (Isr.) (Justice Minister Dov Yosef). Support for this position can be found in Swedish law wherein bills die only when Parliament completes its full term of four years, but not if Parliament is dissolved. See Van Schagen, *supra* note 1, at 118.

34. State Archive GL-21275/12.

35. 32 DK 147-50 (1962) (Isr.).

36. MKs Gross, Riftin, and Shofman initiated the amendment to the Transition Law as well. *Id.*

new government is unsure of its stability and it is preparing the background for new elections.³⁷

Warhaftig saw the Government's failure to put this bill through the usual procedures as an expression of the "pressure" felt by the Government to pass the bill before it fails.³⁸ Warhaftig was justified in his criticism to a certain extent, since one of the last things the eleventh Government managed to do was pass the Continuity Law.³⁹

The initiators of the Continuity Law sought to find a remedy not only to the instability of Israel's Governments, but also to the standing of the Knesset in the last year of its tenure. They argued that it was unthinkable that the Knesset should not be able to submit new bills in the last year of its tenure.⁴⁰ Until the Continuity Law, the Knesset sometimes refrained from tabling bills towards the end of its term of office, when it appeared that the bills would not pass through all the legislative stages and Knesset work would be for naught.⁴¹

C. Codification Enterprise

When MKs Nir-Rafalkes and Harari, and subsequently Justice Minister Pinchas Rosen proposed continuity between 1959 and 1961, they justified it mainly "with respect to technical laws."⁴² By technical laws, they meant laws entailing a great amount of work in the committees.⁴³ They were thinking of bills "that are not subject to factional dispute in the Knesset."⁴⁴

Similarly, Justice Minister Dov Yosef justified the Continuity Law in 1964 by Israel's need for many legal codes that would rejuvenate old laws from the Mandatory and Ottoman periods. As examples, he pointed to three codes that were pending before the Fifth Knesset that might not be finalized before the next election, namely:

37. See State Archive GL-21275/12.

38. See *id.* (correspondence from July 16, 1963). For discussion of the regular legislative process regarding government bills that the government circumvented, see *infra* note 146.

39. The Knesset passed the law on November 10, 1964, and the government's term ended on December 22, 1964. The Fifth Knesset passed the law and this particular Knesset was characterized by government instability, with three governments serving during its four-year tenure. See *Governments since the Establishment of the State*, KNESSET, available at <https://www.knesset.gov.il/govt/heb/memshalot.asp> (last visited Jan. 15, 2015) (in Hebrew).

40. 39 DK 1609 (1964) (Isr.) (MK Yizhar Harari).

41. 39 DK 1615 (1964) (Isr.) (MK Yitzhak Klinghoffer).

42. 25 DK 997 (1959) (Isr.) (MK Yizhar Harari).

43. 32 DK 110 (1962) (Isr.) (MK Yizhar Harari).

44. *Id.*; see also 25 DK 998 (1959) (Isr.) (Justice Minister Pinchas Rosen).

the Building and Planning Law, the Criminal Procedure Law, and the Inheritance Law.⁴⁵ The proponents of the Continuity Law supported it in the belief that the government would not abuse its power to apply continuity.⁴⁶

D. Constitutional Enterprise

MK Harari explained in 1959 that continuity is also required to enable the adoption of a formal Constitution in Israel. In his words:

One of the reasons we have not advanced sufficiently in the *Basic Laws*, which should comprise the State's Constitution, is the fact that, whenever we advance and reach a certain stage, a new Knesset is elected, and everything that was done is erased, and it is necessary to begin everything from the first reading.⁴⁷

Indeed, after the enactment of the Continuity Law, the Knesset applied continuity to enact, *inter alia*, Basic Law: The State Economy,⁴⁸ Basic Law: The Judiciary,⁴⁹ Basic Law: The Government from 2001, and amendments to Basic Law: The President of the State.⁵⁰

Did MK Harari contradict himself? On the one hand, he argued that continuity should only be used for consensual laws. On the other hand, he supported the application of continuity to Basic Laws. It appears that these two positions can be reconciled if we interpret his words to mean that continuity should only be applied to Basic Laws that are consensual.⁵¹ A more cynical view would suggest that MK

45. 39 DK 1603 (1964) (Justice Minister Dov Yosef).

46. See *infra* Part V.C.

47. 25 DK 998 (1959) (Isr.) (MK Yizhar Harari).

48. The Seventh Knesset held the first reading on *Basic Law: The State Economy* (66 DK 2176 (1973) (Isr.)), while the Eighth Knesset held the second and third readings (74 DK 3732 (1975) (Isr.)).

49. 99 DK 1734 (1984) (Isr.).

50. The Fourteenth Knesset held the first reading on *Basic Law: The Government* (DK 1135 (1999) (Isr.)) and the Fifteenth Knesset held the second and third readings (173 DK 2066 (2001) (Isr.)). The Fifteenth Knesset held the first reading on Amendments 6 & 7 (originally Amendments 7 & 8) to *Basic Law: State President*, and the Sixteenth Knesset held the second and third readings. See State Archives G-15640/10.

51. It seems that there was no major division regarding the enactment of *Basic Law: The State Economy* and *Basic Law: The Judiciary*. The Knesset Protocols did not record the majority by which they passed. In contrast, *Basic Law: The Government* passed by a majority of 55 to 32. See Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 469 n.53, 475 n.86 (2012).

Harari was fully aware of the extent to which the enactment of a constitution was controversial, since he is credited with the idea of enacting the Israeli Constitution chapter by chapter through Basic Laws in order to contend with the difficulty of reaching a consensus on it.⁵² According to this approach, at least some of the proponents of continuity never intended to restrict its use to laws supported by a consensus.

E. *Continuing Body Theory*

The proponents of continuity explained that it accords with the Knesset's self-perception as a continuing body. They argued that continuity is already reflected in existing legislation. Thus, for example, Basic Law: The Knesset states explicitly, "[t]he outgoing Knesset shall continue to hold office until the convening of the incoming Knesset."⁵³ Justice Minister Dov Yosef interpreted this provision as adopting the doctrine of organs:

The legislator of the Basic Law: the Knesset thus considered that what is of essence is not the composition of the Knesset, but rather the parliamentary institution, whoever its actual members may be. The parliament abides and continues to act—the participants in the action change.⁵⁴

MK Prof. Klinghoffer explained that an outgoing Knesset is authorized to enact laws until the new Knesset takes office.⁵⁵ He went even further, arguing that, although it has become entrenched practice since the establishment of the State to follow the principle of legislative discontinuity, there is no reason why this practice cannot

52. 5 DK 1743 (1950) (Isr.).

53. Basic Law: The Knesset, Art. 37.

54. Justice Minister Dov Yosef's statement on first reading: 39 DK 1603 (1964).

55. 39 DK 1616 (1964) (MK Yitzhak Klinghoffer). Similarly, proponents argued that the *Second Knesset (Transition) Law, 1951*, also seems to establish continuity between Knesset assemblies. Article 5 of the Transition to the Second Knesset Law (1951) reads: "The Second Knesset and its members shall have all of the authorities, rights and responsibilities that the First Knesset and its members had." Article 10 reads: "This law will apply *mutatis mutandis* to the transition to the Third Knesset and every subsequent Knesset, so long as the Knesset has passed no other law regarding the matters established in this law." See also CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* 49(4) PD 221 [1995] (Isr.) (interpreting this law). In *United Mizrahi*, while President Barak interpreted the Transition Law to mean that all authority, including constitutional authority, transfers from Knesset to Knesset, Justice Cheshin held that the Transition Law means that every Knesset only retains the same legislative authority. *Id.*

be changed, even without an amendment to the law or to the Rules of Procedure.⁵⁶

The proponents of continuity also highlighted various examples showing that the Knesset regards itself as a continuing body. Justice Minister Pinchas Rosen explained that just as the Knesset considers itself bound by the Harari Resolution (passed by the First Knesset) to enact Basic Laws, so too the Knesset is bound by other resolutions passed in previous Knesset assemblies, including resolutions to transfer laws after the first reading to the Knesset committees.⁵⁷ Using the same logic, Justice Minister Dov Yosef explained that, just as political resolutions passed by the Knesset are binding, so too are its resolutions to transfer laws to the committees. “In principle, the fact that one resolution is a *fait accompli* and another resolution is in a matter that is one of a series of additional resolutions is immaterial.”⁵⁸ MKs Harari and Klinghoffer and Justice Minister Dov Yosef also drew an analogy from statutes: if statutes remain in effect from one Knesset to the next, then the same should hold true for bills.⁵⁹ I note that another example could have aided the proponents of the law. The Knesset Rules of Procedure apply automatically from one Knesset to the next, except if a decision has been made to modify them.⁶⁰

F. Low Turnover in Legislature⁶¹

To justify continuity, the proponents downplayed the difference between one Knesset and another, on the grounds that the composition of the Knesset in any case does not change significantly from one election to the next. Justice Minister Dov Yosef explained that, although new MKs are not permitted to speak in the first reading

56. 39 DK 1615 (1964) (Isr.).

57. 32 DK 146 (1962) (Isr.) (Justice Minister Pinchas Rosen).

58. Draft of Justice Minister Dov Yosef’s opening statement to the Knesset, State Archive GL-21275/12.

59. 39 DK 1608 (1964) (Isr.) (MK Yizhar Harari); 39 DK 1616 (MK Yitzhak Klinghoffer); 39 DK 1633 (Justice Minister Dov Yosef). It was also observed that fiscal orders approved by previous Knesset assemblies remain in effect and do not need to be approved anew. *Id.* (MK Klinghoffer).

60. The law’s opponents referred to the Knesset Rules of Procedure. *See* 32 DK 107-08 (1962) (Isr.) (MK Yohanan Bader); *see also Continuity of the Knesset’s Legislative Activity*, DIRECTIVE OF THE KNESSET LEGAL ADVISOR (2009 ed. [2007]) (on file with author). The directive states: “Continuity applies to the Regulations and amendments thereof which have completed the legislative process in the same manner as it applies to statutory legislation which has completed the legislative process.” *Id.* at 8; *see also infra* Part V.E.

61. This argument of the law’s supporters is historically incorrect. *See infra* Part V.F.

against the passage of the law as a result of continuity, this is nevertheless justified, “considering especially that the number of new MKs is approximately 20 percent of the previous Knesset, that is, 80 percent of the MKs had the opportunity to speak, to debate, etc.”⁶² It should be borne in mind that the Continuity Law was enacted in the Fifth Knesset, in an era in which “a majority of the members of the First Knesset still remained members of the Fifth Knesset.”⁶³

G. Interim Summary

The proponents of the Continuity Law thus saw in it many advantages in terms of efficiency, especially given Israel’s special conditions. They believed that the fact that the Knesset perceives itself as a continuing body, whose pre- and post-election composition remains similar, is sufficient to support continuity. The Justice Ministers also emphasized that the Knesset in any case “is *permitted* to continue a debate . . . not obligated to do so.”⁶⁴ The Knesset may reject the Government’s proposal to apply continuity. Also, a new Knesset is not shackled to the deliberations of the old Knesset because it is able to reject the bill in the second and third readings.⁶⁵ Moreover, proponents argued that the law actually demonstrates respect for the Knesset and imparts value to its work, which will not have been for nothing.⁶⁶ Therefore, their conclusion was that the advantages of the law justify its adoption.⁶⁷

III. *THE COMPARATIVE CASE AGAINST CONTINUITY*

This Part shows the dominance of comparative law in the Israeli political actors’ discussions about whether to adopt continuity rule. It reveals that the proponents of continuity self-consciously used comparative precedents in a selective way.

62. See State Archive GL–21275/12.

63. 32 DK 107 (1962) (Isr.) (MK Yohanan Bader).

64. *Id.* (Justice Minister Rosen) (emphasis added).

65. 39 DK 1603 (1964) (Justice Minister Dov Yosef).

66. See handwritten note, State Archive GL–21275/12. Attributed to MK Meridor.

67. 39 DK 1604 (1964) (Isr.) (Justice Minister Dov Yosef).

A. The Relevance of Comparative Law

1. The Netherlands Experience

Although the sponsors of the Continuity Law recognized that comparative law for the most part does not support their proposal, they nevertheless maintained that they were not inventing the wheel, since some democratic countries have adopted continuity. Thus, for example, in a Knesset debate on October 23, 1961, Justice Minister Pinchas Rosen justified continuity, saying:

Although there are not many precedents, and it is true that the accepted parliamentary practice in most countries is not identical to the bills we are debating, nevertheless, precedents do exist, and since this entire debate has become a constitutional symposium of sorts, it is worth pausing here on the precedents.⁶⁸

He cited Dutch, French, Belgian, and Indian experiences in support of his pro-continuity position.⁶⁹ Similarly, in 1964 Justice Minister Dov Yosef cited Dutch and French experiences in support of continuity.⁷⁰

The Netherlands served the Justice Ministers in the 1960s as the most clear-cut example of continuity. They described the Dutch experience as follows: In the Netherlands, until 1917 the principle of discontinuity prevailed, in accordance with the Rules of Procedure of the Dutch Parliament.⁷¹ Subsequently, the Lower House sought to adopt continuity but the Upper House objected. After 17 years of debate, parliament adopted continuity. Underpinning this new approach was the perception that the composition of its members may change, but Parliament remains constant. In the words of Justice Minister Rosen:

And so, we see that the Dutch rule does not hold that upon the dissolution of parliament, the bills that were before the outgoing parliament are voided, and no one would argue that Holland is not a democratic state. Not only those bills, but also the debates

68. 32 DK 145 (1962) (Isr.) (Justice Minister Pinchas Rosen).

69. 32 DK 145-46 (1962) (Isr.) (Justice Minister Pinchas Rosen).

70. 39 DK 1603 (1964) (Isr.) (Justice Minister Dov Yosef).

71. State Archive GL-21275/12.

are not voided, those debates that were already held in the sections and in the committees.⁷²

Seemingly, it was about this Dutch precedent that Dr. Yadin wrote: “This proves once again that there is a precedent for everything, and it is never right to say that ‘such a thing does not exist anywhere else.’”⁷³

2. Great Britain as the Symbol of Discontinuity

Whereas the example of the Netherlands supported continuity, Justice Ministers Rosen and Yosef in the 1960s were forced to contend with the extremely divergent example of Great Britain. The opponents of continuity cited the British law as an example of the absence of continuity even between one parliamentary session and the next. A matter that has not been completed in one session is void, and the debate begins anew in the following session.⁷⁴ They argued against the Mapai party, which was the ruling party in Israel almost continuously from 1948 to 1977, saying that the prime minister “wants us to be like England, except that he wants to choose: what is convenient for him—we too should have; what is inconvenient for him—we should not have.”⁷⁵

Mapai contended with the British example on several levels. First, it argued that the British government did not need continuity, whereas the government in Israel does.⁷⁶ Mapai maintained that no analogy can be drawn from Great Britain, because there the government controls a parliamentary majority and has no need for a coalition.⁷⁷ The British government also controls Parliament’s time with regard to duration of the plenary debates, as well as the proceedings in the committees, which is not the case in Israel. Therefore, the British government has enough time to pass the laws it

72. 32 DK 145 (1962) (Isr.) (Justice Minister Pinchas Rosen); *see also* ERNST VAN RAALTE, *THE PARLIAMENT OF THE KINGDOM OF THE NETHERLANDS* 55-56 (1959); State Archive GL-21275/12.

73. State Archive GL-21275/12.

74. 39 DK 1604 (1964) (Isr.) (MK Yohanan Bader). This practice is sometimes called “Sessional cut-off” in Britain. *See* THE HANSARD SOCIETY COMMISSION, *MAKING THE LAW: A REPORT ON THE LEGISLATIVE PROCESS* 330 (1993).

75. 32 DK 107 (1962) (Isr.) (MK Yohanan Bader).

76. *See* Dr. E. Livneh’s correspondence to the Justice Minister Dov Yosef from April 24, 1964 from State Archive GL-21275/12.

77. 39 DK 1609-10 (1964) (Isr.) (MK Baruch Osania).

favors.⁷⁸ It further argued that the British Parliament sits continuously, day after day, five and sometimes six times a week.⁷⁹ Furthermore, the British government has at its disposal tools such as closure,⁸⁰ the kangaroo,⁸¹ and the guillotine,⁸² which allow it to terminate debates in parliament and bring matters to a vote, thereby saving parliamentary time. Justice Minister Dov Yosef even asserted that he would be willing to do without continuity if such tools would be adopted in Israel.⁸³

Second, the initiators of the Continuity Law argued that the British law does not reflect the democratic principle of legislative discontinuity following elections, since no elections were held between one session and the next, but nevertheless British bills “die” at the end of the session.⁸⁴ Rather, MK Klinghoffer explained, the British law reflects the King’s prerogative to control Parliament by ending a parliamentary session (prorogation) and terminating its legislative work. However, if Parliament itself, and not the King, makes an adjournment, then there is continuity of debate.⁸⁵ In Israel there is no monarchy and there is no reason to maintain the King’s prerogative to terminate parliamentary debate.

Third, MKs explained that in Great Britain there is no express law providing for the transfer of powers by succession from one Parliament to another, such as the Second Knesset (Transition) Law existing in Israel.⁸⁶ Whereas the Israeli Knesset regards itself as a continuing body, the British Parliament perceives itself differently.

Finally, proponents of continuity argued that this is not an accurate description of the British law, because in Britain it is possible to deviate from the principle of discontinuity in exceptional

78. 32 DK 146 (1962) (Isr.) (Justice Minister Pinchas Rosen); 39 DK 1684 (1964) (Isr.) (Justice Minister Dov Yosef).

79. 32 DK 146 (1962) (Isr.) (Justice Minister Pinchas Rosen).

80. It may be decided that the debate in Parliament or the subcommittee will be ended, and the vote will be held without further discussion. *See* SIR IVOR JENNINGS, *PARLIAMENT* 127-28, 235-46 (Cambridge University Press, 2d ed. 1957).

81. It may be decided that certain amendments will not be discussed at all in the Parliament or the subcommittee. *Id.*

82. Time is allotted at the outset, and the debate is ended when the time runs out whether or not the discussion was exhausted. *Id.* at 131.

83. 39 DK 1684 (1964) (Isr.).

84. Draft of Justice Minister Dov Yosef’s opening statement to the Knesset, State Archive GL-21275/12.

85. 39 DK 1615 (1964) (Isr.) (MK Yitzhak Klinghoffer).

86. *Id.*

cases.⁸⁷ Justice Minister Dov Yosef summed up the debate by saying that, in any event, the British experience was unsuccessful and no lesson should be drawn from it.⁸⁸

B. *Comparative Law as Reflected in the Archives*

The opponents of continuity claimed that it runs contrary to the experience of the world's oldest parliaments.⁸⁹ Furthermore, advisors to the Justice Ministers warned in internal correspondence, that comparative law does not support the Continuity Bill. Thus, for example, in a letter dated October 17, 1961, Dr. Livneh wrote to Justice Minister Pinchas Rosen, "I did not find [in the comparative law] a single example of continued handling of laws following new elections."⁹⁰ Similarly, Dr. Livneh prepared for Dov Yosef a review on comparative law and explicitly wrote on April 26, 1964, that "much of the material does not side with the bill."⁹¹

However, Justice Ministers Pinchas Rosen and Dov Yosef relied on Dutch law, French law during the period of the Fourth Republic, Belgian and Indian law in proposing their bill.⁹² Did their sources indeed support the Israeli Continuity Law? The Justice Ministers did not examine whether these countries are a relevant basis for comparison to Israeli law in terms of the structure of the regimes and their legal systems. Also, in observing the material that was available to the Justice Ministers, the Dutch law was virtually the only source that supported their stance.⁹³

The State archival material, on which Justice Ministers Pinchas Rosen and Dov Yosef relied when promoting the Continuity Law, reveal that not even in France during the period of the Fourth Republic did the government control the application of continuity.⁹⁴

87. 39 DK 1683 (1964) (Isr.) (Justice Minister Dov Yosef).

88. *Id.* (Justice Minister Dov Yosef). For example, the United States started with the discontinuity principle between sessions, like Britain. Now, there is only discontinuity between Congresses. Draft of Justice Minister Dov Yosef's opening statement to the Knesset, State Archive GL-21275/12 (Isr.).

89. 32 DK 112 (1962) (Isr.).

90. State Archive GL-21275/12 (Isr.).

91. Correspondence from Dr. Livneh to the Justice Minister from April 26, 1964. State Archive GL-21275/12 (Isr.).

92. *See* 32 DK 145-46 (1962) (Isr.).

93. *See supra* Part III.A.1.

94. Rather, the initiative to apply continuity was assigned to the parliamentary committee or the twenty-five members of the National Assembly. If the initiative came from the committee, then continuity applies by law. If the initiative came from parliament members,

As for Belgium, only bills approved by one house and passed to the other house were carried over.⁹⁵ Apparently, the logic of Belgian law is that, because of the bicameral system, when a bill is passed from one house to the other, the act of legislation is considered complete in the first house. This rationale is not applicable in Israel, where there is only one legislative house.

As for the Indian law, according to the Israeli archives, the only exception to the rule of discontinuity occurs when the bill passes the lower house and the President rules that the bill must be deliberated in a joint session of the lower and upper houses of parliament. In that case, then the bill may be discussed even though the lower house was dissolved.⁹⁶ The underlying logic seems to be that continuity in the upper house merges with the continuing body of the joint session, despite the dissolution of the lower house. This rationale has no bearing on the case in Israel.

C. *The Current Comparative Experience*

When we leave the Archives of the Israeli political bodies and examine the principle of discontinuity with contemporary eyes, we find that comparative law still adheres by and large to the principle of discontinuity.

1. Irrelevance of Dutch Law to Israel

There is very little research on continuity, or lack thereof, in parliaments throughout the world. Interestingly, the research that was found comes from the Netherlands, which is an exception in the comparative landscape on the subject of continuity. The legislative process in the Netherlands calls for both houses of parliament to consent, but continuity applies with no time limit on the legislative process. A bill can remain pending indefinitely.⁹⁷ The discontinuity

this depended on the assembly's uncontested vote. See 32 DK 145 (1962) (Isr.) (referring to Article 33 of the Regulations of the *Assemblée Nationale* from the Fourth Republic in 1949); see also D. W. S. LIDDERDALE, *THE PARLIAMENT OF FRANCE* (1951); see also State Archive GL-21275/12 (Isr.).

95. Relying on translation of "The [Belgium] Law [from 1893] regarding the Effect of Dispersal of Legislatures on Previously Presented Bills." 32 DK 145 (1962) (Isr.); see also State Archive GL-21275/12 (Isr.).

96. See AJITA R. MUKHERJEA, *PARLIAMENTARY PROCEDURE IN INDIA* 45 (1958); INDIA CONST. art. 107, 108, 196; see also State Archive GL-21275/12 (Isr.).

97. See Van Schagen, *supra* note 1, at 117.

principle in the Netherlands was indeed abolished in 1917,⁹⁸ just as Israel's Justice Ministers observed when proposing the Israeli Continuity Law in the 1960s. Although Van Schagen did not state this, it is nevertheless important to emphasize that the Dutch lower house controls its own agenda, and the government cannot dictate parliament's timetables and priorities.⁹⁹ The reality in Israel is completely different, in that the government has a great deal of control over the Knesset, and the Continuity Law further enhanced this control.

2. Prevalence of the Principle of Discontinuity

The Dutch researcher obtained information from the parliaments of fifteen European Union member countries. The study found that, as of 1997, the discontinuity principle existed in thirteen out of fifteen EU member countries. The only exceptions were the Netherlands and Luxembourg.¹⁰⁰ Other research, which studied eighteen Western European countries, demonstrated that bills also survived elections in Sweden and Switzerland, unless they were rejected.¹⁰¹ Another British study reviewing the procedures for enacting laws in thirty-four countries also found that bills continue indefinitely in Cyprus.¹⁰² In these three studies, it emerges that the discontinuity principle prevails in the world's democratic parliaments, whereas continuity is the exception.

What does the discontinuity principle symbolize in western democracies around the world? Studies indicate that in most countries, bills die at the end of a parliament's lifetime.¹⁰³ Thus, the discontinuity principle reflects the democratic notion that elections sever parliamentary continuity.

The opposite is also true. The problematic nature of continuity is also evident in the European Parliament. One of the causes of the democratic deficit of the European Parliament is the fact that it routinely applies continuity to pending bills, and elections do not have

98. *Id.* at 118.

99. See Herbert Döring, *Time as a Scarce Resource: Government Control of the Agenda*, in *PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE* 223-46 (Herbert Döring ed., 1995).

100. See Van Schagen, *supra* note 1, at 118.

101. Döring, *supra* note 99, at 242.

102. J. E. Grey, *Procedure for Passing Legislation*, in *CONSTITUTIONAL AND PARLIAMETARY INFORMATION* 92 (1982).

103. See Van Schagen, *supra* note 1, at 118; Grey, *supra* note 102, at 92.

real impact on Parliament's work.¹⁰⁴ In fact, German Chancellor Angela Merkel, in her maiden speech before the European Parliament as the President of the European Council, in January 2007, proposed using the principle of discontinuity for Parliament's work in view of its democratic importance. In her words: "I am sure that such a democratic cut-off point would lend the elections to the European Parliament even greater importance."¹⁰⁵

3. The Change in British Law

The Dutch study found that the most drastic implications of the discontinuity principle in the comparative landscape existed in Britain, where bills did not survive from one session to the next within the same parliament.¹⁰⁶ The British have changed the law since Van Schagen's study. To improve the quality of legislation and increase scrutiny of the content of bills, there was an attempt, starting in 2002, to allow transferring government bills in the House of Commons from session to session, within one year of the bill's first reading. This attempt was made in the wake of recommendations by the Committee on Modernisation of the House of Commons.¹⁰⁷ Given its success, in 2004 the House of Commons adopted a permanent standing order allowing it to carry over government bills from one session to the next, provided that not more than one session and not more than twelve months have expired since the bill passed a first reading—although the one-year limit can be overcome by resolution.

British law therefore sets a time limit on the application of continuity, unlike Israeli law. The outgoing parliamentary session decides whether to carry over the bill to the next session, but there must be a separate ninety-minute debate on every bill for which

104. See Laszlo Kovats, *Is Discontinuity to Blame? A Quantitative Assessment of Duration and Timing of European Legislation* (unpublished paper, Apr. 2008) (presented at the ECPR Joint Sessions of Workshops in Rennes, France; see also, Laszlo Kovats, *Do Elections Set the Pace? A Quantitative Assessment of the Timing of European Legislation*, 16 J. EUR. PUB. POL'Y 239 (2009); Thomas König, *Discontinuity: Another Source for the EU's Democratic Deficit?* (unpublished, 2007), available at <http://aei.pitt.edu/7941/>. It must be noted that the European Parliament is one of the two houses of the European legislature, and its consent to legislation is not always required.

105. Angela Merkel, Chancellor of the Federal Republic of Germany, Address to the European Parliament in Strasbourg (Jan. 17, 2007), available at http://www.eu2007.de/en/News/Speeches_Interviews/January/Rede_Bundeskanzlerin2.html.

106. See Van Schagen, *supra* note 1, at 120.

107. See Richard Kelly, *Modernisation: Carry-over of Public Bills*, SN/PC/03236, available at <http://www.parliament.uk/briefing-papers/SN03236>.

transfer is sought. Thus, British law requires a separate meaningful discussion of each bill and does not allow the application of continuity in bundles and in haste, as Israel does. A bill cannot be changed as part of a process of applying continuity, thereby restricting the government's ability to use continuity as leverage for dictating the content of the bill, unlike the law in Israel.

The Upper House may also apply continuity in an *ad hoc* decision, from one session to another, to bills on its docket. It is agreed that the authority to transfer bills from session to session should be exercised primarily with respect to complicated bills that are not controversial. At this point, continuity has not yet been applied to a proposal that came from one house and was passed on to the other.¹⁰⁸

Even today, bills cannot be carried over from one parliament to the next in Britain. Elections completely sever parliamentary continuity in Britain. Based on the principle of parliamentary sovereignty, Parliament may not shackle successor parliaments to its decisions. Therefore, despite the flexibility that has been introduced in British law, this does not support the Israeli Continuity Law.

4. Neutralizing the Principle of Discontinuity

The discontinuity principle is applied in Israel as well, except that its influence is routinely neutralized by a Knesset resolution to apply continuity. What is the comparative experience on this issue? Most countries examined in the Dutch study have no way—or a very limited way—of neutralizing the implications of the discontinuity principle.¹⁰⁹ In eight out of the thirteen countries examined, the discontinuity principle could not be neutralized.¹¹⁰

Out of the thirteen countries, only Sweden allows the outgoing parliament to transfer a law to the next by a specific resolution. This procedure is unusual in the comparative landscape, as it places the power of continuity in the hands of a body whose mandate is ending. Three other countries—Belgium, France, and Ireland—allow the

108. See *Carrying over Bills*, OFFICE OF THE PARLIAMENTARY COUNSEL (Dec. 18, 2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79351/carry_over_pamphlet_181212_1.pdf. A similar relaxation of the discontinuity principle between sessions took place in Canadian Law. See Gary Levy, *The Theory and Practice of Prorogation*, 4 J. PARLIAMENT. POL. L. 239 (2010).

109. See Van Schagen, *supra* note 1, at 121.

110. *Id.* at 119.

incoming parliament to apply continuity in defined cases and for specific bills.¹¹¹

Four of the five countries that allow neutralizing the discontinuity principle—Britain, Belgium, France, and Ireland—have two houses of legislature. The exception is Sweden. Italy and Germany, which have special procedures for handling legislation from previous parliaments notwithstanding the discontinuity principle, are countries with two legislative houses.¹¹² In Austria and Spain, for example, additional limited time is given for the upper house to enact a law, so that the discontinuity principle will not lead to unfeasible results.¹¹³

In my opinion, this comparative law reflects the rationale that there is a need to minimize damages of the discontinuity principle, especially where there are two houses of parliament. Bicameral legislative processes are more cumbersome and sometimes more rigid than in one-house parliaments. Therefore, the comparative law, which creates exceptions to the discontinuity principle based on bicameralism, cannot support the creation of exceptions to the discontinuity principle in Israel.

IV. THE CONSTITUTIONAL CASE AGAINST CONTINUITY

Not only does comparative law not support continuity, but it is also not supported by constitutional law. Whereas the proponents of the Continuity Law cited efficiency in support of their position, weighty constitutional considerations provide grounds against its

111. In Belgium, the discontinuity principle is established in law. At the opening of a new parliament, it is customary that the government presents a special law, which contains a list of bills that parliament will continue to discuss from the previous parliament. This law is both subsequent to and more specific than the general law, which establishes the discontinuity principle, and thus it prevails. The effect of the law is not that the Parliament does not restart the legislative process, but rather that the Council of State does not have to resubmit opinions regarding the law. *Id.* at 120. It is estimated that 90% of bills that expire due to the end of parliamentary life are “resurrected” by special legislation. *See id.* at 122. In France, if the bill has already passed its First Reading in both Houses, the discussion continues from the point where it left off. Only the bill’s initiator may resubmit it. *See id.* at 120.

112. In Italy there is a special expedited process for resubmitting bills that were discussed in the previous parliament called *Repêchage*. The procedure is shortened by applying stricter time restraints to debates than are applied to regular bills. It is only applied to uncontroversial bills that would not take too much parliamentary time anyway. In Belgium and Germany, even if the principle of discontinuity is not overcome, previous sub-committee reports can be used to save time. *See id.* at 21-120.

113. *See id.* at 124.

adoption. I argue that the Continuity Law is incompatible with representative democracy and should be rejected.

A. Undermining the Mandate Principle

Many MKs opposed continuity, justifiably, on democratic grounds. They argued that applying continuity diminishes the meaning of elections. Political parties change their opinions from one Knesset to the next, and this is reflected in the election campaign. Sometimes an MK is elected on behalf of one party in one Knesset, and on behalf of another party in another Knesset. It cannot be taken for granted that the opinions of the individual MKs necessarily remain unchanged after elections.¹¹⁴ New factions are created from Knesset to Knesset. Continuity thus infringes upon the voters' right to influence the Knesset's deliberations.¹¹⁵ Even the Attorney General clearly stated in 1963 that the bill is a "concession to the principle that the Knesset can change its composition and trend."¹¹⁶

The concern that continuity might reduce the effect of elections has been realized. Thus, for example, in the Fifth Knesset, which enacted the Continuity Law, a fierce argument erupted over the Land Bill, on the grounds that certain sections of the law would lead to the eviction of the Arab population from land subject to it. When the Sixth Knesset took office, the controversy about the Land Bill and the radically different composition of the Knesset did not prevent the application of continuity to the Land Bill. In the opinion of some MKs, the change in composition mandated a fresh look at the Bill:

We are told that the new government, without the Rafi faction, is a different government. There was a former deputy minister who wrote at the time that Arab ownership of any part of the Land of Israel conflicts with State security. At the present time he is not a member of the government. The new government includes the Mapam faction, whose members fought against the expropriation of land from the Arab Fellaheen, and their position on Wakf ownership differed from that of the previous government. Why is the new government attempting to circumvent, by means of this continuity, any possibility of action by new forces within the government and within the Knesset? There is also no continuity

114. 57 DK 1972 (1970) (Isr.) (MK Shalom Cohen).

115. 39 DK 1611 (1964) (Isr.) (MK Ya'akov Riftin).

116. Summary of the Ministry of Justice, Legislation Department Leadership Discussion (Apr. 4, 1963), State Archive GL-21275/12 (Isr.).

in factions and in parties. There is Ma'arach, which did not appear in the previous Knesset. And there is Mapai without the faction of Knesset Member Ben Gurion.¹¹⁷

Moreover, MKs argued that not even laws that may have been contested in the elections are excluded from the Continuity Law.¹¹⁸

I argue that the democratic significance of elections should be the resetting of the Knesset's agenda. Apart from a referendum, which has never been held in Israel, elections are the only legal mechanism through which the people can offer their representatives feedback on issues that are on the State's political agenda.¹¹⁹ Thus, it is the MKs' duty to reconsider their position on bills following elections. This is the meaning of the principle of representation.

Hanna Pitkin maintains that, for democracy to be considered representative, genuine elections must be held that have an actual influence on the actions of the representative bodies.¹²⁰ Continuity is not faithful to this feature of representative government. In fact, I contend below that continuity severs the link between legislative cycles and election cycles, and thus eviscerates the significance of elections.¹²¹

B. Compromising the Legislative Deliberative Function

In addition to downgrading the significance of elections, the Continuity Law infringes upon the right of MKs to conduct a proper debate on bills. In democratic regimes, a parliament member's right of debate advances a democratic exchange of ideas and opinions; the search for truth through the right to hear and be heard; the principle of persuasion rather than force; compromise achieved through

117. 44 DK 632-633 (1966) (Isr.) (MK Emil Habibi).

118. 32 DK 115 (1962) (Isr.) (MK Hanan Rubin).

119. *See* Basic Law: Referendum (2014 SH 2443 (Isr.)) (requiring holding a referendum in certain cases that contemplate transferring territory currently under Israeli sovereignty); *see also* Law and Governance Procedure Law (Cancellation of the Application of Law, Adjudication, and Administration) 1999, SH 1703 (Isr.).

120. HANNA FENUHEL PITKIN, THE CONCEPT OF REPRESENTATION 232-34 (1967).

121. *See infra* Part V.B.

negotiations among representatives;¹²² and a culture of justification in which it is the duty of the government to justify its actions.¹²³

The principle of representation means that the elected representatives are obligated to account for their actions in parliament through open debate, which encourages transparency. This is the foundation of the regime's legitimacy. "This [right of debate] is a great right, this is the only right of the MKs, to participate in the general debate, to influence the MKs, to influence public opinion, to participate in the committees."¹²⁴

The MKs' rights of debate are constitutional, arising directly from the democratic character of the State¹²⁵ and the rights to vote and be elected.¹²⁶ They flow from the determination that the Knesset is Israel's legislature, its sessions are public, and its decisions are passed by a majority.¹²⁷ They are given concrete expression in the Knesset's Rules of Procedure, which set out MKs' rights of debate.¹²⁸ MKs' rights of debate are recognized in the Israeli case law. While the Supreme Court will not compel MKs to hold a proper debate on a bill, it will protect their right to conduct and participate in a proper debate, should they wish to do so.¹²⁹

How does the Continuity Law infringe upon MKs' rights of debate? Admittedly, the 1993 law has improved the level of debate compared to its predecessor from 1964. Nevertheless, the law from 1993 still severely restricts the possibility of conducting debates on bills, as listed below.

1. Voting Without Debate

The 1993 Continuity Law requires holding a vote on the application of continuity, but in the absence of an objection the vote

122. See generally ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2009). Vermeule argues that parliament's character as a deliberative, representative, and heterogeneous body makes it more suited than the courts to reveal the truth regarding public issues. *Id.*

123. On the culture of justification see, Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 32 (1994).

124. 32 DK 119 (1962) (Isr.) (MK Shlomo Lorenz).

125. See Basic Law: Human Dignity and Liberty, 1992 SH 150, art. 1a (Isr.); Basic Law: Freedom of Occupation, 1994 SH 90 art. 2 (Isr.).

126. See Basic Law: The Knesset, 1958 SH 69 art. 4-6 (Isr.).

127. See Basic Law: The Knesset, 1958 SH 69 art. 1, 25, 27 (Isr.).

128. See, e.g., art. 13, 22, 27, 28, 74-92, 113, 115 of the Knesset Rules of Procedure.

129. HCJ 4885/03 Israeli Poultry Grower Association v. Israeli Government, 59(2) PD 14, 54-55 [2004] (Isr.).

will be held without a debate.¹³⁰ In contrast, in a regular first reading, a bill is debated in the Knesset even in the absence of an objection, and the bill's sponsor is allowed ten minutes in which to present it.¹³¹ The government may respond, so long as it was not the bill's sponsor.¹³² Also, ordinarily, any MK so requesting is allotted three minutes for speaking in a debate.¹³³

2. Limiting the Deliberation on an Objection

Unlike ordinary debate on a first reading, any faction objecting to the application of continuity is entitled to have only one representative to present its position,¹³⁴ and that representative is allowed a mere five minutes to do so.¹³⁵ Following this limited debate, a vote is held on continuity.¹³⁶

3. Inferiorizing Continuity Vis-à-Vis First Reading

i. No debate on the content of bills

Not only do the manner and duration of the debate preceding the vote on continuity deviate from the practice in the first reading of bills, but also the content of these debates differs. The vote on whether to apply continuity was meant to be a “substitute” of sorts for the vote on the bill in the first reading.¹³⁷ But this is not the case. Over the years, Israel's Justice Ministers have made it clear that they are not prepared to debate the content of bills subject to a continuity vote. Instead, they are only willing to discuss whether continuity should be applied to the bill.

Thus, for example, in the words of the Justice Minister Shapira in a speech delivered by him in the Sixth Knesset:

130. Continuity of Debate on Bills Law, 1993, SH 60, art. 6 (Isr.). MK Hagai Merom, who initiated the law, put it this way: “not a discussion, but at least a vote.” 128 DK 2989 (1993) (Isr.); *see also* 128 DK 3055 (1993) (Isr.).

131. Knesset Rules of Procedure Art. 82.

132. *Id.*

133. Knesset Rules of Procedure Art. 28 (b).

134. Continuity of Debate on Bills Law, 1993, SH 60, art. 5 (Isr.).

135. Knesset Rules of Procedure Art. 97(e).

136. An amendment in 2012 of the Knesset Rules of Procedure reversed the practice and made the vote about continuity—and not the objection. It thus made it fairer for opposing factions, who no longer need a majority to overcome continuity. Continuity of Debate on Bills Law, 1993, SH 60, art. 6 (Isr.); *see, e.g.*, 2000 DK 8563 (Isr.); *see also* Knesset Rules of Procedure Art. 97(f) (Isr.).

137. Continuity of Debate on Bills Bill, 1993 HH 49 (Isr.).

According to the [Continuity] Law, the MKs or factions are entitled to give notice of their objection. What is the nature of the objection? Should the objection be to the substance of the law on which continuity is being imposed? That is to say, a speech similar to that in the first reading of that law, or a speech that explains why specifically in this case continuity should or should not be imposed, and the reasons for this. MK Shofman's speech was according to the school of thought, which in my opinion, is correct—he argued regarding the decision *per se* to impose continuity.

I think that MK Avneri's speech could have served as a speech in the first reading, had this law been submitted to the House for the first reading. It is precisely the imposition of continuity that excludes the possibility of speeches such as that of MK Avneri in this stage. He was not a Knesset member in the Fifth Knesset, therefore he did not participate then in the debate, and now there is continuity on this. With the permission of the Chairman, I will thus confine my remarks to debating, or answering, MK Shofman. It is of course impossible for me to hear anew—even without continuity—the honorable MKs who were not elected to this Knesset, just as it was impossible to hear Knesset member Avneri in the Fifth Knesset.¹³⁸

The MKs internalized the message that the continuity debate cannot be utilized for a discussion of the bills on the agenda, which led to the practice of the opposition raising fundamental issues unrelated to either continuity or the bills but rather pertain to general political matters.¹³⁹ This practice became so entrenched that MK Rivlin cynically observed it is viewed as “a far-reaching innovation, and perhaps a dangerous precedent, that a Knesset member should talk to the point [of the bill] when the application of continuity is being considered.”¹⁴⁰ Thus, MKs have two weeks to prepare for a vote on the application of continuity,¹⁴¹ yet debate on the content of the bills subject to a vote on continuity has been stifled.

138. 47 DK 215 (1967) (Isr.) (Justice Minister Shapira).

139. 2000 DK 1610 (Isr.) (MK Rueben Rivlin); *see also* 2000 DK 4592-93 (Isr.) (MK Rueben Rivlin). The same was true for 2006 DK 2518 (Isr.); 2007 DK 2518 (Isr.); and 2007 DK 4676 (Isr.).

140. 2000 DK 4592-93 (Isr.) (MK Rueben Rivlin).

141. Continuity of Debate on Bills Law, 1993, SH 60 art. 5 (Isr.)

ii. The resulting damage

Why is the first reading necessary? As Minister Zerach Warhaftig noted in 1959:

According to our Rules of Procedure, fundamental problems generally can be raised only in the first reading. The second reading is a matter for objections to specific sections . . . Because of a savings of a few hours you want to deny the new Knesset the elementary right to raise fundamental problems?¹⁴²

Moreover, parliamentary debate is hindered, as is public debate. In the words of MK Shlomo Yisrael Ben-Meir from the National Religious Party:

If there were weighty reasons in the outgoing Knesset that prevented this law from being put to the vote, then we will put it to the vote in the new Knesset, without a debate, in the meantime the whole matter has been forgotten, the opinion of the experts who spoke about it has been forgotten, public opinion on the matter has been forgotten. There is public opinion, which also influences both the Knesset and the Government. And when the law is ‘fresh,’ it’s something else entirely.¹⁴³

MK Emile Habibi from the New Communist List expressed himself similarly, “The first reading of a bill sometimes awakens wide interest among the public. Legitimate protest activities begin. This causes entire factions to change their positions. And it happens that the Government is forced to withdraw a law it submitted to the Knesset.”¹⁴⁴ In fact, even MK Nir-Rafalkes, who conceived of the idea of continuity, acknowledged that the general debate in the first reading “influences the street.”¹⁴⁵ This open and general debate is denied by the Continuity Law.¹⁴⁶

142. 25 DK 998 (1959) (Isr.) (Minister Zerach Warhaftig).

143. 32 DK 112 (1962) (Isr.) (MK Israel Shlomo Ben-Meir).

144. 44 DK 632 (1966) (Isr.) (MK Emil Habibi).

145. 32 DK 119 (1962) (Isr.) (MK Nir-Rafalkes).

146. One of the reasons for utilizing the continuity rule is for the government to circumvent the need to present the bill summary anew. Applying continuity makes it unnecessary for the government to prepare and distribute the bill summary via the sponsoring minister, to wait several weeks for comments and reservations, and afterwards to present the summary to the government or the Legislative Council of Ministers for discussion. This is a preliminary step in the preparation of governmental bills. See Article 59 of the Government Rules of Procedure. This Article of the Rules of Procedure is based on *Procedure for Preparing a Bill*, ATTORNEY GENERAL’S DIRECTIVES (Old File) 60.010 (1969). This is, apparently, another violation of the public debate surrounding bills. However, it is worth noting that, even if continuity did not apply, bill summaries remain valid despite the

Moreover, since there is no repeat of the first reading, the Knesset may apply continuity to bills that amend entrenched statutes protected under supermajority requirements without fulfilling these very requirements during the vote on continuity.¹⁴⁷ Yet these requirements for a supermajority in the first reading were intended precisely to raise public awareness about the implications of a bill on constitutional rights or on the budget.

4. Bundling of Different Issues

The debate in the Knesset on the question of the application of continuity is lacking not only in the manner, duration, and content of the discussion but also in scope. It is characterized by the bundling of different issues together in such a manner that it is impossible to isolate a position on a certain bill from the position on continuity per se or even on the standing of other bills subject to a continuity vote.

i. Continuity and content of bills

Continuity forces the Knesset to conduct a combined debate both on the substance of bills and on the substance of continuity. This was aptly expressed by MK Uri Avneri from the Haolam Hazeh-Koach Hadash party in the Seventh Knesset: “We find ourselves in an internal conflict on this issue, because we are in favor of the law for direct elections of mayors, and we are against continuity.”¹⁴⁸

In another kind of bundling of issues, an MK who opposes continuity for reasons other than those cited during the debate on the objection must nevertheless join the objection and support it because a vote on the objection amounts to a vote on continuity. There are no two separate votes.¹⁴⁹

replacement of government if no elections were held if the bill was not yet read on the floor of the previous Knesset. *See Continuity of Legislative Acts with the Establishment of a New Government*, ATTORNEY GENERAL’S DIRECTIVES 2.300 (1984).

147. DIRECTIVE OF THE KNESSET LEGAL ADVISOR, *supra* note 60, at 5-6.

148. 58 DK 2179 (1970) (Isr.) (MK Uri Avneri).

149. *See Continuity of Debate on Bills Law*, 1993 SH 60, Art. 6(b) (Isr.). However, whereas the bundling of issues of the former type is unique to continuity, the bundling of issues of the latter type exists in every vote in the first reading. In every ordinary first reading, MKs can object to a bill for different reasons, but there is only one vote for or against.

ii. Omnibus

Bundling issues also stems from the Knesset's practice of holding a concentrated debate on continuity of numerous bills. At the time the Continuity Law was being considered in the early 1960s, MKs noted that concurrently holding a debate on continuity for several laws would be a "disgrace."¹⁵⁰ There were even those who expressed the belief that "this is worthy of Chelm":¹⁵¹ If a debate is not conducted separately on each law, this violates the right of debate of MKs and of the public. On the other hand, if a debate is held on each law separately, why take an indirect route and not hold a repeat first reading in the plenum?

In practice, MKs' request to conduct a debate on each bill separately was not accepted. The government seeks to apply continuity to a large number of bills without any thematic connection between them. Over the years, many MKs from different parties have repeatedly complained about the pressure to conduct a debate preceding a continuity vote within a very short time, simultaneously covering a large number of bills. Thus, for example, MK Uri Avneri complained in the Sixth Knesset that "the Knesset Committee allotted to me most generously 10 minutes for discussing 14 laws—45 seconds for each law that determines the fate of people and property and which was passed in a Knesset to which we did not belong."¹⁵² Similarly, in 2006, MK Dov Chanin from the Hadash party maintained that this practice of bundling issues in a debate "is inconsistent with our obligation as a Knesset to conduct a pertinent debate on each law separately. Wherefore, I will not relate to any of the 12 laws to which I am supposed to relate in the three and half minutes left to me."¹⁵³

Similarly, on November 4, 2013, under the new Knesset Rules of Procedure, the Knesset conducted a "combined debate" on the government's request to apply continuity to four bills. MK Uri Maklev from Yahadut Hatorah did not understand this and lost his right to object to one of the bills. MK Dov Chanin "went out for two minutes," and he too lost the right to speak in opposition to another

150. 32 DK 108 (1962) (Isr.) (MK Yohanan Bader).

151. 39 DK 1613 (1964) (Isr.).

152. 44 DK 633 (1966) (Isr.) (MK Uri Avneri).

153. 2006 DK 1774 (Isr.) (MK Dov Chanin).

bill.¹⁵⁴ Of course, the vote (unlike the debate) on continuity is in relation to each bill separately.

5. Compromising Deliberations in the Knesset Committees

The Continuity Law not only prevents a repeat first reading of bills, but also undermines debate in Knesset committees, as discussed below.

i. A new issue

A Knesset committee to which a bill has been transferred after the application of continuity may not change the bill fundamentally,¹⁵⁵ because if it did so, this would entitle MKs to contest it on the grounds that a “new issue” was involved.¹⁵⁶ If an issue was not included in the text of the bill that was submitted for the first reading—*i.e.*, a “new issue”—no public debate was held on it, and it therefore must be excluded, according to the Rules of Procedure.¹⁵⁷ It follows that a new Knesset is prevented from holding a first reading on a continuing bill—because of continuity—and from changing it fundamentally in the committees—because of “new issue”. The new Knesset thus loses on both counts in terms of its ability to influence the contents of a bill to which continuity has been applied.¹⁵⁸

ii. Independent judgment of committee

The present version of the law states that the Knesset “may” treat the deliberations of the previous Knesset as if they were its own deliberations.¹⁵⁹ Accordingly, the Knesset’s legal department instructed the Knesset committees to treat any bill as if it had been

154. *See* Knesset Protocol No. 72 of the 19th Knesset, 147 (Nov. 4, 2013) (Isr.), available at http://www.knesset.gov.il/plenum/data/19_ptm_260748.doc (translated by author).

155. 32 DK 114 (1962) (Isr.) (MK Hanan Rubin).

156. *See* Knesset Rules of Procedure, art. 85 (Isr.).

157. *See* HCJ 8238/96 Abu Arar v. Minister of Interior 52(4) PD 26, 36 [1998] (Isr.).

158. This problem is relevant only to private members’ bills, which if not for the continuity rule, would first have passed in the committees. Government bills, on the other hand, reach first reading without the committee being able to influence their wording. But government bills are subject to strict public scrutiny via the summaries stage, as detailed in note 146 and accompanying text.

159. Continuity of Debate on Bills Law, 1993 SH 60, art. 6(b) (Isr.).

approved “in the first reading and nothing more.”¹⁶⁰ This instruction was intended to allow members of the incoming Knesset to submit objections to a bill and not have to vote on objections that were submitted in the previous Knesset. Simultaneously, it was intended to enable the government to update its estimates on the bill’s budgetary implications. Nevertheless, the instruction clarifies that “the foregoing will not prevent the committee in the incoming Knesset that is preparing the bill for the second and third readings from taking into account, if it sees fit, the deliberations and examinations that were conducted in the committee in the outgoing Knesset.”¹⁶¹

How should this instruction be understood? Reference to the work of committees of previous Knesset assemblies could have been made in any case, even without the application of continuity. The practice of the legal advisers and committee managers, who enjoy the status of civil servants and are not affected by elections, is to preserve the institutional memory and bring information from the past before the members of a current committee, even where continuity has not been applied.

What does continuity add? It would seem that the idea of the Continuity Law is, *inter alia*, to save on the committees’ time, as asserted by the sponsors of the law.¹⁶² Hence, the Continuity Law apparently supports the practice of encouraging the committee members to embrace understandings reached in a previous Knesset regarding the articles of a bill. Seemingly, this practice is possible mainly when the debate on the content of bill was nearly completed in a previous Knesset, but the latter did not manage to pass the bill in the second and third readings in the plenum.¹⁶³ This practice compromises MKs’ independent judgment.

Even if the opposite occurs and the committee reopens all the issues, the committee’s members might be preoccupied with dealing with the previous committee’s activities due to the application of

160. See DIRECTIVE OF THE KNESSET LEGAL ADVISOR, *supra* note 60, at 5.

161. *Id.*

162. See *supra* Part II.A.

163. Thus for example the Combating Criminal Organizations Bill of 2002, was ready for its second and third Readings, but did not reach them as elections were called unexpectedly. See 2003 DK 8235 (Isr.). Following the elections, the committee had the same chair, MK Michael Eitan. Some of the members remained the same as they were in the previous Knesset. The Chair gave the members the option of starting the discussions anew, but they opted to adopt the previous committee’s work. See Knesset Protocol No. 29 of the 16th Knesset (June 9, 2003), available at 82.166.33.81/Tql/mark01/h0023016.html#TQL.

continuity. They will be busy formulating an opinion on the positions of the previous committee, instead of approaching the bill as a *tabula rasa* according to their own order of priorities and legislative agenda. This too might compromise MKs' duty to exercise independent judgment.

iii. Identity of the committee discussing continuity

The outgoing Knesset generally determines the identity of the committee of the incoming Knesset that will consider the question of continuity of bills. According to the instructions of the Knesset's legal department:

Towards the end of the Knesset's term of office, the Knesset Committee should give priority as much as possible to considering bills that were approved in the first reading and it was not determined which committee will prepare them for the second reading, or that were transferred to it so that it should decide which of the Knesset committees will be responsible for their preparation as stated—this, among other things, so that following the constitution of a new Knesset it will be clear which committee is competent to request the application of continuity to those bills.¹⁶⁴

Only the government or the assigned committee is authorized to initiate the application of continuity. It is obvious that the type of the committee that discusses continuity greatly influences the law's content. The ability of the new Knesset to influence the content of pending bills is also curtailed in this way by the previous Knesset.

6. Is the Curtailment of Debate Inherent to Continuity?

In my opinion, it is possible to reframe the Continuity Law so as to prevent some of the infringements of MKs' rights of debate; however, the violation of these rights cannot be prevented at its core. A debate could be conducted whenever continuity is applied, even if no objection was raised. A separate debate could be conducted on each bill that is subject to continuity, as is done in Great Britain.¹⁶⁵ But only holding a complete first reading anew would allow the new

164. See DIRECTIVE OF THE KNESSET LEGAL ADVISOR, *supra* note 60, at 6. Theoretically, bills are divided between the committees based on their content. In practice, the outgoing Knesset Committee has a great deal of influence over the distribution of bills to specific committees.

165. See *supra* Part III.

Knesset to truly debate the bill, to reframe the law, and to raise “new issues” in the committees. Such issues would no longer be considered new, because the new Knesset would be able to reformulate the bill for a first reading. However, in this situation, continuity loses its meaning. We would have thus returned to the ordinary rules of debate of the Knesset.

C. Discriminating Against New MPs

If the Continuity Law infringes upon the right of debate of all MKs, it especially infringes upon the right of debate of new MKs. Their right to debate during first reading is conditional on the majority choosing not to apply continuity. Continuity in fact creates two classes of MKs—those who were present in the previous Knesset and were permitted to participate in the debate in the first reading, and new MKs who did not have this right.¹⁶⁶ MK Shlomo Lorenz from the Agudat Israel party expressed himself strongly, saying, “What is this like? As if it would be proposed that new MKs may not enter the portals of the Knesset and participate in debates on certain issues.”¹⁶⁷ MK Nir-Rafalkes recognized the violation of the right of new MKs but maintained that participation in the general debate was “no big deal.”¹⁶⁸

Are there differences between new and old MKs that justify this disparate treatment?¹⁶⁹ Such an argument could be stated this way: New MKs could not have participated in the first reading held during the previous Knesset, which now bears responsibility for the first reading. The current Knesset is responsible only for the second and third readings.

This argument is unpersuasive. The responsibility cannot be split between two Knesset assemblies. Because the previous Knesset did not have the final say on the bill, it does not bear responsibility for it. The new MKs—who are not given equal opportunities to shape the

166. 39 DK 1604-05 (1964) (MK Yohanan Bader); *see also* 57 DK 1972 (1970) (MK Shalom Cohen); 32 DK 118 (1962) (MK Shlomo Lorenz).

167. 32 DK 118 (1962) (Isr.) (MK Shlomo Lorenz).

168. 32 DK 115 (1962) (MK Nir-Rafalkes).

169. There are judges who hold that, if there is a relevant distinction, equality is not infringed at all. Others hold that even if the distinction is relevant, the weight given to it must be proportional. *See e.g.* HCJ 4541/94 Alice Miller v. Minister of Defence 49(4) PD 94 [1995] (Isr.).

law—still bear equal responsibility with incumbent MKs for its adoption.

I submit that this violation of the rights of new MKs contravenes the principle that the Knesset will pass its decisions by a majority of those participating in the vote. This principle protects each MK's equal right to participate in the vote. It is also contrary to the principle of equal elections, since the Continuity Law prevents new MKs from exercising their right to be elected to vote on legislation in the Knesset.¹⁷⁰ Equally, it violates the right of voters to choose new MKs, who in turn have the right to vote on legislation. The Knesset in many instances over the years has attempted to harm the chances of new MKs to be elected to preserve the standing of incumbent MKs and restrict competition against them. Whereas other infringements were put to the constitutional test and often failed,¹⁷¹ the Continuity Law has still not been contested in the Israeli Supreme Court.¹⁷²

D. *Violating Minority Rights*

When countering the argument that the *Continuity Law* harms democratic values, Justice Minister Dov Yosef stated, "This does not involve any injury either to democracy or to the Knesset, which in any case does not operate according to the will of *all* the MKs but according to the will of a *majority* of the MKs."¹⁷³ He maintained that when the new government initiates the application of continuity, a majority of the members of the new Knesset stand behind it.¹⁷⁴

170. According to Art. 4 of *Basic Law: The Knesset*: "The Knesset will be elected by general, national, direct, equal, secret, and proportional elections in accordance with the Knesset Elections Law; This article can only be amended by a majority of the members of the Knesset." It is noteworthy that in *Local Governance Center v. The Knesset*, the judges were divided on the question of whether Article 4 only guaranteed equality between party lists or also between the candidates themselves. See HCJ 7111/95, 50(3) PD 485 [1996] (Isr.). Even if we believe that Art. 4 does not protect candidates, it is clear that Art. 6 guarantees equality between candidates in the right to run for election. See EA 92/03 Mofaz v. 16th CEC Chairman 57(3) PD 793 [2003] (Isr.).

171. See, e.g., HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 [1969] (Isr.); see also HCJ 246/81 Agudat Derech Erez v. Broadcast Agency 35(4) PD 1 [1981] (Isr.); HCJ 141/82 MK Amnon Rubinstein v. Knesset Chairman 37(3) PD 141 [1983] (Isr.); HCJ 142/89 LAOR Movement v. Chairman of the 16th Knesset 44(3) PD 529 [1990] (Isr.) (dealing with the limitation of electoral equality between party lists); Weill, *supra* note 51.

172. See *infra* Part V.G. and Conclusion.

173. Draft of Justice Minister Dov Yosef's address during the First Reading. State Archive GL-21275/12 (Isr.).

174. 39 DK 1603 (1964) (Isr.) (Minister of Justice Dov Yosef).

Justice Minister Dov Yosef's approach expresses a majority-based understanding of democracy. Continuity actually "hamstrings" the rights of the minority.¹⁷⁵ It affects the minority's right to defend its opinions and to try to persuade the majority with new arguments. "If there is no opposition—there is no Knesset, even if there is a majority."¹⁷⁶ The entire point of opposition is the minority's right to propose amendments that the majority should hear with a willing and open mind. "Democracy decides by a majority . . . but it must listen to the opinion of the minority."¹⁷⁷

We must understand that the rights of the minority are an integral part of the division of power in the Knesset. A part of this power structure is reflected in Basic Law: The Knesset and in Basic Law: The Government in issues including the opposition's power to unseat a government, which can arise if it fails to pass the Budget Law or if there is a lack of confidence in it.¹⁷⁸ A lack of confidence can be reflected in fundamental legislative issues. Traditionally, in the democratic world, if a government failed to pass a major item of legislation, this was considered as an expression of no confidence.¹⁷⁹ Today we require a more explicit expression of no confidence.¹⁸⁰ Nonetheless, enabling the minority to express its opinion on legislative initiatives is one of democracy's most fundamental principles.

175. 32 DK 117 (1962) (Isr.) (MK Moshe Sneh).

176. 39 DK 1663 (1964) (Isr.) (MK Moshe Unna).

177. 32 DK 121 (1962) (Isr.) (MK David Bar-Rav-Hay).

178. See Basic Law: The Knesset, 1958 SH 69, Art. 36(a) (Isr.); Basic Law: The Government, 2001 SH 158, Art. 28 (Isr.).

179. See, e.g., ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS 68-75 (1991). According to Heard, if the government fails to pass a key piece of policy in parliament, it should explicitly evaluate whether it still enjoys parliamentary confidence.

180. Also the Knesset's internal work arrangements, some of which are regulated in *Knesset Law* (1994 SH 140 (Isr.)) and some in the Rules of Procedure, are based on a delicate balance between the rights of the majority and the minority in the Knesset. The minority's rights are framed by basic traditions, such as the division of debate time, the structure of the Knesset committees, the identity of committee chairmen, the power to initiate legislation, and the standing of the opposition's leader.

E. *Constraining the Legislative Discretion*¹⁸¹

MKs opposed to continuity also saw it as constraining new Knessets, which, in the words of Religious Affairs Minister Zerach Warhaftig, compromised “an important principle such as the absolute independence of each elected Knesset and its autonomy from its outgoing counterpart.”¹⁸² In one of his letters to the Justice Minister, he wrote:

According to the theories of the primacy of the people’s sovereignty on the one hand, and representative government by elected representatives on the other hand, the elected Knesset does not have to feel any spark of continuity with the outgoing Knesset, and it must feel itself free from any legislative initiative that was begun by the previous Knesset. The Knesset’s commitment as a body, and also of the MKs as individuals, is solely towards the electorate which elected the new Knesset and on whose behalf the members of the new Knesset are acting, and absolutely not towards the previous MKs whose mandate from the people ended with the dissolution of the outgoing Knesset.¹⁸³

In the Seventh Knesset as well, MKs charged that the application of continuity interferes with the democratic process, since it contradicts the principle that “a new Knesset may not be constrained by a previous Knesset.”¹⁸⁴

On the face of it, one could argue that continuity involves “manner and form” restrictions. The Knesset determines for itself which legislative processes are needed to ensure that the legislative enactment should be considered a “law.”¹⁸⁵ However, a closer study

181. It is customary to speak of the Knesset as sovereign, but the legislature is not really sovereign in a constitutional system that has a supreme Constitution protected by judicial review over primary legislation. Diceyan sovereignty requires that no body, not even the courts, have the power to decide that parliamentary legislation is not law. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39 (8th ed. 1915). Even if we hold that the Knesset is not sovereign, it is not allowed to bind its consideration and lose its independence in exercising discretion.

182. Correspondence from Minister of Religious Affairs to Minister of Justice, (Jan. 15, 1964), State Archive GL-21275/12 (Isr.).

183. Correspondence from Minister of Religious Affairs to Minister of Justice, (July 10, 1963), State Archive GL-21275/12 (Isr.). Similarly, S. Rozental, who worked in the Minister of Justice Legislation Department, objected to the Continuity to the Fifth Knesset Bill (1961), for constitutional reasons—primarily that it bound the new Knesset to its predecessor. S. Rozental’s comments on proposed summary of Continuity to the Fifth Knesset Bill, (Sept. 13, 1961), State Archive GL-21275/12 (Isr.).

184. 57 DK 1972 (1970) (Isr.) (MK Shalom Cohen).

185. *United Mizrahi Bank*, *supra* note 55, at 530-64 (Justice Cheshin).

shows that continuity is not a constraint on the legislative process, but a constraint on the results. In fact, the application of continuity obligates the Knesset to accept the results of a first reading to which it was not a party. In addition, the application of continuity detracts from the scope of discretion of the committees of the incoming Knesset, as discussed above.¹⁸⁶

Continuity thus involves a prohibited transfer of the power of legislation and subjects the Knesset to the results of a process that was conducted by another body. This is contrary to the rationale underlying the non-delegation doctrine according to which “fundamental decisions that are material to the life of the citizens must be taken by the body that was elected by the people to take these decisions. The policy of society must be formulated in the legislative body.”¹⁸⁷ The non-delegation doctrine is generally applied in the relations between the Knesset and the executive branch and prohibits the Knesset from transferring or even delegating powers from the Knesset to the executive branch on fundamental issues. This Article argues that the same principle should be applied to the relations between a new Knesset and its predecessor, such that the Knesset will be prohibited to transfer its power in fundamental matters to a previous Knesset.

Can it be argued that the Knesset is only consulting with the previous Knesset when applying continuity and adopting the conclusions of its predecessor as if they were its own? If so, there is no prohibited transfer of legislative power but instead a wholly permissible “consultation.”¹⁸⁸ The final decision is in the hands of the current Knesset in two senses: First, the current Knesset is not obligated to apply continuity. This depends on a positive decision by it. Second, the Knesset may decide to reject the bill in the second and third readings.¹⁸⁹

My answer is that, although the Knesset retains the power to decide whether to apply continuity to a specific bill, it does not retain the full power to frame this bill according to its wishes if it applies continuity. The manner in which the previous Knesset framed the bill

186. See *supra* Part IV.B.5.

187. HCJ 3267/97 Rubinstein v. Minister of Defence 52(5) PD 481, 508 [1998] (Isr.).

188. See HCJ 816/98 Aminof v. Altalef 52(2) PD 769, 806-10 [1998] (Isr.) (discussing the prohibition on binding administrative discretion).

189. These arguments were also raised by the Continuity Bill’s supporters. See *supra* Part II.G.

dictates, to a great extent, the final form the law will take, unless continuity is not applied. The whole idea of continuity is that the debate on issues that were already decided is not reopened, so as to increase the efficiency of the legislative process. The character of the debate actually conducted on the question of the application of continuity shows that the Knesset does not debate anew the contents of the law in question, and it does not exercise independent judgment. Therefore, its act should not be considered an act of pure consultation, but the constraint of its discretion.

One may then ask, does a statute that was enacted by previous Knesset assemblies not constrain the current Knesset to a much greater extent than continuity does? In fact, the proponents of continuity in the 1960s argued that, just as a statute binds a current Knesset, so too does continuity.¹⁹⁰ But this overlooks the fact that a bill differs from a final law in several ways: First, whereas continuity compels the Knesset to allocate time for dealing with bills which it did not frame, the Knesset does not have to deal with completed laws. The latter leaves the domain of the legislative branch and becomes the responsibility of the executive branch. Completed laws do not affect the Knesset's legislative agenda, unless the Knesset at its own initiative seeks to change such a law, in which case the Knesset determines what shape this change will take. In contrast, open bills to which continuity is applied limit the Knesset's priorities and legislative agenda, such that the debate to a great extent will continue from where it left off in the previous Knesset.

Second, where a law was enacted, the previous Knesset decided on it; it is responsible for it. In contrast, in the case of a bill, whose enactment into a law was not completed, responsibility for the bill rests with the Knesset that reaches a decision on the bill. But this Knesset is responsible for the result without having been able to fully shape it because of the continuity rule. This is a situation that is difficult to accept.

F. Strengthening the Government and Weakening the Legislature

Justice Minister Dov Yosef, who was the moving force behind the enactment of the Continuity Law in 1964, stated that it is the government that is "responsible" for the enactment of laws, and not

190. *See supra* Part II.E.

individual MKs, factions, or Knesset committees.¹⁹¹ I argue that the Continuity Laws from 1964 and 1993 both express a clear agenda to strengthen the power of the government to enact laws at the expense of the Knesset, as argued by its opponents.¹⁹² The government had no need for greater power, however, because the Knesset Rules of Procedure in any case accord it significant preference in the enactment of laws over private MKs and Knesset committees. I submit that changing the balance of power between the government and the Knesset institutions infringes upon the constitutional principle that the Knesset is the State's legislature.

1. A Double Standard in Government-Knesset Relations

Justice Minister Dov Yosef held that an incoming government should not be subject to the dictates of its predecessor but should be allowed to choose the cases to which it will apply continuity. For this reason he also rejected the principle of automatic continuity that had been proposed by MK Nir-Rafalkes. However, according to Justice Minister Yosef, the Knesset may not enjoy a similar choice. It did not bother Dov Yosef—and he openly admitted this—that he was thus applying two different standards to the Knesset and the government.¹⁹³

Religious Affairs Minister Zerach Warhaftig complained to the Justice Minister about this double standard, “A new government is not dependent on the previous government, while simultaneously the new Knesset is doubly dependent, both on the previous Knesset and on the absolute will of the new government.”¹⁹⁴

This double standard is expressed both in the power to initiate the application of continuity and in the power to oppose its application. Even under the 1993 Continuity Law, the government enjoys substantial advantages compared to Knesset institutions in its ability to utilize continuity, as explained hereinafter.

191. Draft of Justice Minister Dov Yosef's address during the First Reading, State Archive GL-21275/12 (Isr.); *see also* 39 DK 1686 (1964) (Isr.).

192. 39 DK 1613 (1964) (Isr.) (MK Moshe Sneh).

193. Draft of Justice Minister Dov Yosef's address to the Knesset for the First Reading, State Archive GL-21275/12 (Isr.).

194. Correspondence from Minister of Religious Affairs to Minister of Justice, (Jan. 15, 1964), State Archive GL-21275/12 (Isr.).

2. The Initiative in Applying Continuity

i. Identity of the initiating body

In the original Continuity Law from 1964, only the government was authorized to initiate the application of continuity.¹⁹⁵ The government's position was that, even if the Knesset would want to apply continuity, the government could withdraw the bill if it wanted to. Therefore, there was no point in allowing anyone but the government to initiate the application of continuity.¹⁹⁶ Only at the end of the 1970s did the Knesset amend the Continuity Law to enable the Knesset committees to initiate continuity.¹⁹⁷ Today, under the law from 1993, the government or a Knesset committee within whose purview a bill falls may move to apply continuity to non-governmental bills.¹⁹⁸ On the other hand, only the government may move to initiate continuity to government bills.

The law regarding authority to initiate the application of continuity weakens the standing of the individual MKs, as well as the standing of the factions. Neither can initiate the application of continuity. An MK who initiated a bill cannot initiate the application of continuity on his own. He can only exercise the veto power against the continued handling of the bill.¹⁹⁹

ii. Private members' bills

Moreover, even the government itself cannot apply continuity to private members' bills that underwent only a preliminary reading, not a first reading. However, it is precisely these bills that require continuity. In the words of MK Shalom Cohen from the Haolam Hazeh-Koach Hadash party:

If continuity is decided upon for the sake of work efficiency, why should this continuity not also be applied to private members' bills that were transferred to a committee to prepare them for the first reading? Here continuity is really essential, because these are bills that have not passed even the first reading. It is the practice of the committees to consider government bills first and to leave the initiatives of MKs at the margins of their work. As a

195. Continuity of Debate on Bills Law, 1964 SH 2, art. 1 (Isr.).

196. Handwritten notes, State Archive GL-21275/12 (Isr.).

197. *See supra* Part I.B.

198. Continuity of Debate on Bills Law, 1993, SH 60 (Isr.).

199. *See supra* Part I.

result, most private members' bills are buried. If there is no difference between one Knesset and the next—as the government claims, then the same method should be applied to MKs as well. And speaking of continuity, why should MKs not be allowed to ask the Knesset to apply continuity to their bills?²⁰⁰

One significant fact revealed in a comparative examination is that the majority of government bills are enacted into law, and only a minority lapse because of the principle of discontinuity. For private members' bills, the situation is the opposite.²⁰¹ Thus, for example, in Great Britain, between 1987 and 1992, 95% of government bills were enacted into law. In the same period, only 11% of private members' bills were enacted into law.²⁰² Comparative research thus shows that if any bills should be excluded from the principle of discontinuity, it is the private members' bills that should be excluded, and this is in fact the case in comparative law.²⁰³

In Israel, the law is the reverse: Private members' bills that only managed to pass a preliminary reading do not benefit from continuity, while government bills do benefit from continuity. Do Israel's attributes differ in a manner that justifies the difference in the law? In their study on private legislation, Dana Blander and Eran Klein found interesting trends in Israeli legislation. On the one hand, between the First Knesset and the Fifteenth Knesset, the percentage of private members' laws increased from 1.96% to 45.05% of all laws. On the other hand, the percentage of private members' bills that succeeded in becoming law decreased in those years from 80% to 1.96%. The average rate of success of private members' bills in becoming law is 26.71% versus 85.62% for government bills.²⁰⁴ This data shows that in Israel as well, private members' bills could have benefited from

200. 57 DK 1972 (1970) (Isr.) (MK Shalom Cohen).

201. See Van Schagen, *supra* note 1, at 121-22.

202. See *id.*

203. For example, in Italy, Spain, and Portugal, bills proposed by citizens (initiatives) do not die due to the difficult preconditions for proposing them. See Van Schagen, *supra* note 1, at 119.

204. See DANA BLANDER & ERAN KLEIN, PRIVATE MEMBER'S BILLS 42-44 (David Nachmias ed., 2002); see also Anat Maor, *How Did the Dramatic Growth in Private Legislation in Israel Between the Years 1992-2006 Take Place?*, 12 HAMISHPAT 363 (2007) (indicating that there has been a dramatic rise in the proportion of private bills introduced since the twelfth Knesset, without providing data regarding the percentage of those bills that succeed in becoming law). It must be remembered that continuity is not automatic in Israel, such that, even if it were possible for a private MK to introduce a motion to apply continuity, it would not lead to the resurrection of all private bills.

continuity. Nevertheless, this Article does not argue that private members' bills that underwent a preliminary reading should be exempted from preparation for the first reading or from the first reading itself through the application of continuity. Instead this Article asserts that, if it is right to recognize the rule of continuity in Israel, then the rule should also be applied to private members' bills that only managed to undergo a preliminary reading, so that they do not have to undergo a preliminary reading again.

Obviously, someone who opposes private legislation will be of the opinion that it already accounts for a respectable percentage of all legislation in Israel, and its success should not be strengthened by means of continuity. However, it is worth noting that the reason private members' bills account for a greater proportion of Israeli legislation is not because the government is unable to pass laws.²⁰⁵ This is demonstrated by the fact that the government's success in passing laws, where it chose to initiate legislation, is incomparably higher than the success rate of private MKs.

In addition, I note that, in comparative law, the principle of discontinuity is considered an elegant way of getting rid of government bills without voting against them.²⁰⁶ Why is it preferable to get rid of government bills in this way? I believe the explanation lies in the fact that historically in parliamentary systems, if the government lost the debate on a bill, certainly a key one, this could have been regarded as a vote of no confidence in the government that would lead to early elections.²⁰⁷ The principle of discontinuity makes it unnecessary to vote on government bills for which there is no support, and they die without raising issues of confidence in government. Once again we see that the logic of discontinuity is supposed to apply to government bills rather than to private bills.²⁰⁸

205. *See infra* Part V.B.

206. *See* Van Schagen, *supra* note 1, at 123. In Finland this is the main reason that bills die. *See id.*

207. *See, e.g.,* HEARD, *supra* note 179, at 68-75.

208. The government rejected MK Nir-Rafalkes' recommendation that continuity will be the default rule because were there to be automatic continuity, "the government would withdraw unwanted laws, and that would be less aesthetic." Handwritten notes, State Archive GL-21275/12 (Isr.).

3. Objection to the Application of Continuity

The government has enormous power not only in deciding whether to apply continuity, but also in opposing its application. A committee seeking to apply continuity must notify the government of its intention to do so and enable the government's representatives to appear before the committee to try to dissuade it from doing so.²⁰⁹ In order to confer this right of objection on the government, the law from 1964 was replaced with the law from 1993.²¹⁰

When a Knesset committee moves to apply continuity, the government formulates a position on the motion. Coalition discipline is thus strengthened compared to a situation in which a committee can move to apply continuity directly in the Knesset without a structured procedure that requires the government to formulate a position on the motion. This is because once the government has formulated its position, under the Transition Law, the members of the government are subject to coalition discipline. They cannot vote against or abstain on the issue without the government's prior consent.²¹¹

Moreover, the government uses its power to approve or oppose continuity in order to control the committees' work. The government often makes its agreement to apply continuity conditional on leaving certain draft wording as it is, without any change in the committee, as discussed below.²¹²

4. Is the Strengthening of the Government Inherent to Continuity?

This strengthening of the government's power in the Knesset at the expense of the Knesset institutions could be somewhat limited by reframing the Continuity Law. Thus, for example, the factions and the private members could also be vested with the power to initiate continuity. Continuity could be applied to private members' bills that have undergone a preliminary reading. Private members might even be allowed to revive government bills. In case of continuity initiated by a committee, the government could be required to oppose or to agree to the application of continuity in the plenum alone instead of in the committee.

209. See Continuity of Debate on Bills Law, 1993 SH 60, art. 4-5 (Isr.).

210. See *supra* Part I.

211. See Transition Law, 1949 SH 1, Art. 11(g) (Isr.). The Knesset added this provision as an amendment in 1962; see also AMNON RUBINSTEIN & BARAK MEDINA, THE STATE OF ISRAEL'S CONSTITUTIONAL LAW, 857-63 (6th ed. 2005).

212. See *infra* Part V.B.

However, even such reframing of the Continuity Law would not prevent the inherent difficulty of removal of veto-gates. Continuity, which is easily applied by the government that controls a majority in the Knesset, removes the restraints of veto and delay that are available to the MKs only in the plenum or in the committees. These restraints, in the form of time allocation, agenda setting, power of committee chairmen, session scheduling, and so forth—could have been utilized by the MKs to reach a compromise with the government over the content of the bills.²¹³ Not only are these restraints removed or weakened without a repeat first reading of the bill, but also the government may attempt on occasion to leverage continuity in order to increase its control over the work of the Knesset committees, as shown below.²¹⁴

G. Interim Summary

The discussion in this Part showed that continuity is not a meaningless technicality. Hidden behind its bland façade is a law that fundamentally reshapes the work of the Knesset, the government's relationship with the Knesset, the substance of the rights of debate in the Knesset, and the significance of basic democratic values. The Continuity Law detracts from the meaning of representative democracy. Instead of a debating democracy that takes into consideration minority rights, it promotes a formalistic, majority-based democracy. Instead of establishing the Knesset as the central arena for resolving controversial issues, the center of gravity passes to the executive government. Instead of treating elections as the voters' key tool to determine the political agenda, the Knesset is perceived as an eternally continuing body with elections serving only to shake it up slightly but unable to substantially affect its actions. Even if the Knesset were to amend the Continuity Law, it would not be possible to prevent the core injury to constitutional rights and values. Only a repeat first reading of bills, with all that this implies regarding the rights of MKs to reframe bills and put new issues on the agenda,

213. See, e.g., Gary W. Cox, *The Organization of Democratic Legislatures*, in *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* (Barry Weingast & Donald Wittman eds., 2008); see also Rolf Becker & Thomas Saalfeld, *The Life and Times of Bills*, in *PATTERNS OF PARLIAMENTARY BEHAVIOR: PASSAGE OF LEGISLATION ACROSS WESTERN EUROPE* 57-61 (Herbert Döring & Mark Hallerberg eds., 2004); GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* 103-04 (2002).

214. See *infra* Part V.B.

could prevent this injury. But holding a repeat first reading is the same as emptying the Law of Continuity of meaning.

V. THE NORMATIVE CASE AGAINST CONTINUITY

The previous Part argued that even if we accept the arguments of the Continuity Law's proponents regarding its numerous benefits, it is doubtful whether the law passes constitutional scrutiny. By undermining the arguments of its proponents, this Part shows that the Continuity Law does not pass normative scrutiny.

A. Lack of Efficiency

Since efficiency was the most important reason for continuity, the opponents challenged this in the Knesset. Below, their arguments are presented and bolstered. First, MKs argued that there are other ways of achieving efficiency without violating democratic values. They argued, for instance, that if the government submits bills on time and not at the last minute, there would be no need for continuity.²¹⁵ They also argued that, if the government seeks efficiency, it can ensure that its representatives discuss an old bill briefly during the first reading and expedite committee deliberations, also without a continuity law.²¹⁶

In my opinion, streamlining legislation in this way is not ideal, but does less harm than the Continuity Law, since the ones mostly hurt by it are members of the coalition—not new MKs or the opposition. Moreover, as an *ad hoc* arrangement, streamlining can be negotiated among coalition members. It may serve as the exception, not used on a regular basis.

Second, opponents argued that the Continuity Law will actually result in inefficiency, since the law will make it easy for the Knesset to not complete its work, knowing that the debate can be carried over to the next Knesset.²¹⁷ It is clear that it is easier for the outgoing Knesset to delay legislation if there is a continuity law than in its absence. Thus, continuity eliminates the guillotine effect of legislative deadlines.

In comparative law, the discontinuity principle is positively perceived, since it clears the legislative table from time to time, and

215. 39 DK 1605-06 (1964) (Isr.) (MK Yohanan Bader).

216. 39 DK 1664 (1964) (Isr.) (MK Ya'akov Katz).

217. 39 DK 1605-06 (1964) (Isr.) (MK Yohanan Bader).

thus helps to streamline the work.²¹⁸ Moreover, in the Netherlands, where continuity is the guiding rule, the Dutch Parliament suffers from procrastination and a low-quality legislative process.²¹⁹ The researcher Van Schagen, whom the Dutch parliament assigned with the task of examining the effects of continuity, reached inconclusive results on this question.²²⁰ The Dutch experience does raise doubt about whether efficiency supports the rule of continuity or the reverse.

Third, MKs argued that continuity will hinder the utilization of time by the incoming Knesset. MK Prof. Yitzhak Klinghoffer, who supported the Continuity Law during the term of the Fifth Knesset, complained of its negative effects during the Sixth Knesset. He explained that since the process of putting together a new government is lengthy, this transitional period can be used for resubmitting old bills to the Knesset and passing them in the first reading, and sending them to committees. But the government wanted to apply continuity, and this is something that only a new government, not a caretaker government, can do under the Continuity Law. Consequently, “this Knesset was only slightly occupied during the first few months. My fellow MKs, we then lost a great deal of time that is hard to make up.”²²¹

218. See Van Schagen, *supra* note 1, at 123; see also Grey, *supra* note 102, at 79, 92, 131; THE HANSARD SOCIETY COMMISSION, *supra* note 74, at 330 (Prof. Norton’s remarks); Becker & Saalfeld, *supra* note 213 at 82; see also Peverill Squire, *Membership Turnover and the Efficient Processing of Legislation*, 23 LEGIS. STUD. Q. 23 (1998).

219. There are a number of reasons for the extended legislative time in the Netherlands: First of all, most non-controversial laws are passed within six months of the time they are first introduced to the lower house. Conversely, less than half of the controversial laws are defended in the upper house by the government that introduced them. The long legislative time therefore applies only to controversial laws. Of course, fiscal bills are passed quickly by both houses. Secondly, both houses and the sub-committees set their agendas completely autonomously. Because Ministers cannot be MPs, the government has no official way of affecting the houses’ schedules. Thirdly, the political culture is such that the ruling parties do not force the passage of laws without proper discussion, and opposition parties do not try to extend the discussions unnecessarily. See Van Schagen, *supra* note 1, at 115, 117.

220. Van Schagen claims that only in Britain is discontinuity used to hasten the legislative process. *Id.* It has been claimed that the discontinuity principle makes for lower quality legislation. In the Netherlands, it was claimed during the major debates over continuity at the start of the Twentieth Century both that discontinuity would hasten legislation so that bills would not be lost at the end of Parliament’s life and that it might also slow legislation because bills would not be submitted towards the end of parliament’s life. See *id.* at 124-25. Because of Van Schagen’s research, the Dutch Parliament decided in 1997 to expedite legislative processes in other ways. *Id.*

221. 45 DK 1664 (1964) (Isr.) (MK Yitzhak Klinghoffer).

In my opinion, it is justified to not allow a caretaker government to apply continuity, as it suffers from both a democratic deficit and an agency problem.²²² The solution is not to empower a caretaker government to apply continuity, but to strengthen the standing of the Knesset vis-à-vis the government by revoking the Continuity Law.

Fourth, continuity opponents argued that it is also questionable whether the law would achieve the goal of shortening the work of the Knesset committees. S. Rosenthal remarked that, if in actuality the composition of the committees in both Knesset assemblies remains the same, the members would remember previous debates and would not have to repeat them. On the other hand, if the composition is different, there would be no recourse but to re-debate the new proposal as well.²²³ Thus, depending on the circumstances, the law is either not necessary for shortening the work of the committees or unjustified.²²⁴

Indeed, the Continuity Law was applied in the Sixth Knesset in a way that did not save committee time. As testified by MK Eliyahu Meridor from Gahal, “among these 14 laws [to which we sought to apply continuity], there is only one law, to the best of my knowledge, which one of the Knesset committees started to discuss. The committee debate on the rest of the laws never even started.”²²⁵ Moreover, the composition of committee members sometimes changes from one Knesset to the next in a way that makes it impossible to apply the rule of continuity. Thus, for example, Chairman of the Knesset Constitution, Law, and Justice Committee, MK Moshe Unna, testified in the Knesset in the context of the Land

222. See Rivka Weill, *Twilight Time: On the Authority of Caretaker Governments*, 13 L. & GOV. 167, 173-82 (2010); Rivka Weill, *Constitutional Transitions: The Role of Lameducks and Caretakers*, UTAH L. REV. 1087 (2011).

223. See S. Rosenthal’s Comments on the Continuity to the Fifth Knesset Bill, 1961, State Archive GL-21275/12 (Isr.).

224. In fact, in a draft in the state archive, the Justice Minister acknowledges this reality: MK Riftin noted that at times a Knesset committee discussing a bill will vote on an article, and nevertheless agree to come back and discuss the article again or to hold a re-vote. I do not believe that our bill will prevent this. This is because we stated that the discussion will continue from the point that it left off, but in the same manner that the discussion would have been held in the committee had the Knesset not been dispersed before the discussion was completed, and so far as the custom is as MK Riftin described, I do not think that there would be anything to prevent it after the bill is passed.

Draft of Justice Minister Dov Yosef’s opening statement to the Knesset, State Archive GL-21275/12 (Isr.).

225. 44 DK 627 (1966) (Isr.) (MK Eliyahu Meridor).

Law that, not only did the Continuity Law not save time of the committee, but on the contrary, it required the committee to discuss the reservations of members of the previous Knesset, who were no longer members of the Knesset deliberating the bill.²²⁶ A similar situation occurred in later Knesset assemblies.²²⁷

Fifth, the opponents claimed that not only should legislation not be expedited by continuity, but the Knesset should also put the brakes on the legislative process to avoid hasty legislation. To quote Warhaftig:

It seems to me that the pace of legislation is fast, and sometimes too fast to the point of being hasty. It is a fact that, according to statistics, laws are enacted in the Knesset virtually every four days. If we probe into the matter, we will see that many laws introduce amendments into laws which were enacted since the establishment of the State. The numerous amendments proposed are a sign of certain rashness in our passing of laws, without in-depth and basic study.²²⁸

Warhaftig believed that since Israel does not have two houses of parliament and the President does not have a right to veto legislation, Israel does not need to speed up the legislative process any more, but instead it needs to do the opposite.²²⁹ He was of the opinion that the Knesset shows disregard for its legislative process, and this leads to public's apathy and disinterest in legislative processes.²³⁰

Finally, MKs argued that it is unjustified to adopt continuity, since bills do not pass because the Knesset lacks the desire to enact them, not because of time constraints.²³¹

Thus, the fact that a bill was not enacted by an outgoing Knesset shows that it is controversial and problematic, and therefore should be reconsidered. The opposite is also true to a certain degree: If the Knesset wishes to pass a law, it usually manages to do so during one

226. 55 DK 3756 (1969) (Isr.) (MK Moshe Unna).

227. Thus, for example, the Tenth Knesset applied the rule of continuity on the National Health Insurance Law by a majority of forty-three to forty-one. However, because there was a special committee dedicated to the bill in the previous Knesset, and it no longer existed, the bill was moved to the Knesset Committee to decide which committee should complete the work. 92 DK 356 (1982) (Isr.).

228. Correspondence from Minister of Religious Affairs to Minister of Justice, from (Jan. 15, 1964), State Archive GL-21275/12 (Isr.).

229. 32 DK 122 (1962) (Isr.) (Minister of Religious Affairs Zerach Warhaftig).

230. *Id.*

231. 39 DK 1611 (1964) (Isr.) (MK Ya'akov Riftin); *id.* at 1614 (MK Moshe Sneh); *see also* 32 DK 116 (1962) (Isr.) (MK Yisrael Yishayahu-Sharabi).

Knesset term. Thus, for example, all three legal codes mentioned by Justice Minister Dov Yosef as grounds for the enactment of the Continuity Law did not need continuity. The debate on them ended in the Fifth Knesset.²³² The Knesset does not have an inefficiency problem that needs to be overcome by applying continuity. A lack of consensus cannot be resolved by taking short cuts. Yet, the Continuity Law seeks to propose such a short cut.

I should emphasize that, when a bill is passed in a first reading in one Knesset and last readings in another Knesset, this cannot be likened to a case where a law is fully enacted in three readings and twice in two Knesset assemblies. Legislation of the latter kind is characteristic of constitutional amendments. This latter process may indicate the existence of a stable, consistent and long-term majority for constitutional change.²³³ In contrast, legislation of the first type is characteristic of a situation where there is no consistent, long-term majority in even one Knesset assembly, *a fortiori* in two, which can garner support for the enactment of even an ordinary law.²³⁴

B. Manipulative Use

The proponents of continuity claimed that it was justified as a way to minimize the damages of governmental instability. Although continuity will not prevent instability, it will at least create continuity in the actions of governments, despite the turnover of power. In my opinion, precisely because of the frequency and lengthy duration of caretaker governments in Israel, one should avoid continuity, as it intensifies the inherent ills of caretaker governments—which are the agency problem and democratic deficit.²³⁵ While caretaker governments cannot apply continuity, they can submit a bill for a first reading at the end of the term of an outgoing Knesset, as discussed below. Moreover, the instability of governments raises serious concerns that continuity will be used to artificially obtain a majority for the enactment of laws.

One of the most acute problems of continuity is that it gives the government many tools to obtain a plurality for passing laws, which

232. Planning and Building Law, 1965 SH 307 (Isr.); Criminal Procedure Law, 1965 SH 161 (Isr.); Inheritance Law, 1965 SH 63 (Isr.).

233. Rivka Weill, *Shouldn't We Seek the People's Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel's Constitution*, 10 LAW & GOV. 449 (2007).

234. See *infra* Part V.B (discussing attaining an artificial majority).

235. Weill, *Twilight Time*, *supra* note 222.

perhaps could not have been passed if it weren't for the application of continuity. This turns continuity from a tool designed to streamline the Knesset's work into a tool that allows manipulation in enacting laws, without anyone being clearly accountable and without all MKs or the public being fully aware of the tactics employed to secure a majority for the law. We have already talked about the tactic of bundling together many issues for a joint debate.²³⁶ Below I describe other techniques used.

1. Submission of Bills by an Outgoing Knesset

Sometimes the government takes advantage of the last weeks of the term of an outgoing Knesset to submit many bills.²³⁷ For example, the Knesset enacted the Dissolution of the Eighteenth Knesset Law on October 15, 2012.²³⁸ This fact did not prevent the government from publishing thirteen new bills a day before the dissolution—including the Knesset Dissolution bill. Even after dissolution and before elections were held, the government issued another nine bills.²³⁹

The government submitted many of these bills when it was clear that they would only pass a first reading in the outgoing Knesset because there wasn't a majority to support them in the second and third readings or because there was insufficient time to prepare them for these readings. The government tabled these bills in the hope of applying continuity to them in the next Knesset.

But, this is a flawed mode of conduct. After all, MKs assumed these proposals would only pass a first reading in the outgoing Knesset due to the approaching election date. Many MKs were thus absent from the debate in the first reading, instead focusing on their election campaigns.²⁴⁰ Application of continuity denies these bills a

236. *See supra* Part IV.B.

237. 39 DK1662 (1964) (Isr.) (MK Moshe Unna).

238. The Dissolution of the 18th Knesset Law, 2012 SH 2383 (Isr.).

239. *See* MINISTRY OF JUSTICE, <http://www.justice.gov.il/MOJHeb/Reshumot/Hok/2013> (last visited Jan. 15, 2015).

240. Can we assume that MKs are aware of the Continuity Law and take it into consideration when they are absent from First Readings in an outgoing Knesset? In my opinion, in a world of limited resources, MKs prefer short-term over long-term considerations. So far as they are concerned, the important issue is the reelection campaign. The bill is perceived as an issue that can be put off. Its fate is dependent on unknown contingencies, such as the makeup of the Knesset and the government after the elections. Further, they may assume that maybe the bill was presented merely as a means to make a stand and generate publicity on the eve of the elections, and there is no intention of continuing with the legislation following the elections.

first reading also in the incoming Knesset. It therefore emerges that these bills are not ever given a meaningful first reading. Submitting bills in this way denotes a desire to “steal” the first reading and wait for a plurality in the coming Knesset assembly.

Another problem is that, at this point, the Knesset is already an outgoing Knesset. It has lost public legitimacy. Considerations of an outgoing Knesset are likely to be driven by election concerns.²⁴¹ Even if these bills had passed all stages of legislation in the outgoing Knesset, it is questionable whether this is the way to enact laws.

Wholesale submission of bills during an election period shows that continuity has eroded the significance of elections. In democratic countries, it is customary to see correlation between legislation cycles and election cycles, wherein a government submits many bills at the beginning of its term of office and a few at the end. Democratic governments do not usually submit numerous bills at the end of the term of office, as they will be “penalized” for this in the elections. These are bills that do not have much of a chance to complete the legislative process before elections and, without the application of continuity, die at the end of the parliamentary term. Submitting them undermines the goodwill of government in the eyes of the voting public.²⁴² Yet, in Israel, continuity has created a situation where the government has no qualms about submitting numerous bills at the end of its term. The connection between the elections cycle and the legislation cycle has been harmed by continuity.

Individual MKs are also trying their hand during an election period to enact laws or at least to pass them in a first reading, thinking that the coalition discipline had slackened.²⁴³ Thus, both the government and the opposition are taking advantage of continuity in a way that undermines the significance of elections. In fact, the

241. On the special position of outgoing legislatures, see Weill, *Constitutional Transitions*, *supra* note 222; BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005); BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (1999); *cf.* Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707 (2012).

242. *See* Kovats, *Do Elections Set the Pace?*, *supra* note 104, at 239-41 (providing a great deal of literature which supports the existence of cycles of legislation which are synced up with cycles of elections throughout the democratic world).

243. Thus private MKs presented twenty private bills on October 15, 2012, parallel to government bills presented on the same day. *See* Knesset Protocol No. 381 of the Eighteenth Knesset, KNESSET (Oct. 15, 2012), http://www.knesset.gov.il/plenum/heb/plenum_search.aspx.

government sought to amend the Continuity Law in the 1990s in order to bolster its right to oppose initiatives of Knesset committees to apply continuity. The rationale was “that before Knesset elections, MKs often submit bills to the Knesset, and in many cases the Government does not have the time to examine them thoroughly.”²⁴⁴

2. Revival of “Old” Bills

The mirror image of applying continuity to old bills is also very problematic. Continuity may only be applied to bills that have passed a first reading in the outgoing Knesset.²⁴⁵ But there is no limit on the amount of time that has passed since the date on which the bill was originally submitted and read the first time and the date on which continuity is applied. There is also no requirement that continuity be applied within a limited time frame from the time a new government takes office. Therefore, theoretically a span of about eight years could pass from the time the bill passed a first reading and the time continuity is applied to it. This could occur if a bill passed a first reading at the beginning of the outgoing Knesset and continuity was applied towards the end of the term of the incoming Knesset.

Applying continuity in such circumstances creates a situation where there is no aggregate concurrent consent for the law.²⁴⁶ It is doubtful whether the majority of the first reading may be joined to the majority of the second and third readings, and, on that basis, claim that the law has enjoyed steady and continuous support of MKs. The passage of time may indicate that the opposite is true.

3. Flexibility in Applying Continuity

The Continuity Law does not set a limit on the number of times the government can apply continuity in one term. Israel’s

244. See State Archive G-9055/16 (Isr.).

245. Continuity of Debate on Bills Law, 1993 SH 60, art. 1 (Isr.). This is the position of the Attorney General and the legal advisor of the Knesset in their interpretation of the law. See *Continuity of Legislative Acts with the Establishment of a New Government*, ATTORNEY GENERAL’S DIRECTIVES 2.300, *supra* note 146; DIRECTIVE OF THE KNESSET LEGAL ADVISOR, *supra* note 60, at 3.

246. Thus, for example, it is unclear whether there was a concurrent majority for the Twenty-Seventh Amendment of the US Constitution. Some states ratified this amendment with a gap of almost a hundred years between them. It is difficult to combine the agreement of the various states and argue that their agreement amounts to a concurrent majority required for constitutional amendment. See Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMM. 102 (1994).

governments thus apply continuity multiple times throughout the term of the new Knesset.²⁴⁷ The great flexibility granted to the government gives it a powerful tool to maximize its control of the Knesset. The government is not required to disclose in advance its full legislative agenda, but it may adopt a piecemeal method. It has an enormous framing power to determine whether to apply continuity to a single bill, a small group of bills, or a large group of bills.

4. Leveraging Continuity

Under the 1993 Continuity Law, the Knesset committees must notify the government twenty-one days in advance of their intention to apply continuity. The government may take advantage of this advance notice to influence the content of the law. Sometimes the government agrees to continuity, provided that the wording of the bill is changed.²⁴⁸ This is quite baffling; if the wording of the bill changes, how can it be said that continuity has been applied? Sometimes the government stipulates its consent on there being no change in the wording of the bill before it is presented for a second and third readings.²⁴⁹ In such cases, not only does the Continuity Law prevent a repeat first reading of a bill, but the government also gives its consent to continuity with a condition forbidding discussion of the bill by a committee or in second and third readings. Sometimes the government makes its consent to continuity contingent on not promoting the bill for which its consent was granted, so that a competing government bill drafted on the same subject may succeed.²⁵⁰ Sometimes the government makes its consent to

247. See 44 DK 474 (1966) (Isr.); 44 DK 553 (1966) (Isr.); 44 DK 737 (1966) (Isr.) (exhibiting the Government's multiple notifications on different dates of its intent to apply continuity to various bills already in the Sixth Knesset).

248. Thus, for example, the National Insurance Bill (Amendment 7) of 2002 passed the first reading in the outgoing Knesset. Agreement to apply continuity in the incoming Knesset was contingent upon rephrasing the bill in a way that would significantly limit the budgetary ramifications. See State Archive G-15640/11 (Isr.).

249. Thus, for example, the government agreed to apply continuity to the 1996 Local Municipalities Bill (Legal Advice) (Amendment No. 3) on the condition: "that the bill's wording as it was submitted by the Justice Ministry and discussed by the Committee for Internal and Environmental Issues will be the version that will be submitted for the Second and Third Reading in the Knesset." *Id.* A similar decision was made regarding the government's agreement to apply continuity to the 1995 Local Municipalities Bill (Legal Advice) (Amendment No. 2). State Archive G-13098/2 (Isr.).

250. Thus, the government agreed to apply continuity to the 1996 Prohibition of Driving on the Beach Bill on the condition: "that the version of the bill which will be promoted in the

continuity contingent on delaying deliberations of the bill by a committee, thereby enabling the government to formulate new courses of action, such as setting up a public committee to study the matter.²⁵¹ Alternatively, the government may ask the committee to delay deliberations, so as not to force it to oppose continuity.²⁵²

All this is done behind the scenes, without all the MKs being fully aware of all these courses of action.²⁵³ The government could not have conducted itself in this way had the bill been submitted again for a first reading; the government would then have been forced to state its position clearly to all MKs and the public. It is not only the government but also interested parties who act behind the scenes to thwart or promote the application of continuity, without the public being aware of it and without being accountable for these actions.²⁵⁴

These government tactics are arguably not unique to continuity. Rather the government can apply these tactics to all private bills that have to pass a preliminary reading. These bills are referred to a Knesset committee to prepare them for a first reading. The government may make its approval of these bills conditional. The problem with this comparison is that, in applying continuity, it is assumed that no normative change in the status of the bill has occurred—when in fact consent conditioned on meeting the new government's demands amounts to discontinuity. At the very least, the Knesset plenum must be made aware of these conditions.

discussions of the Committee for Internal and Environmental Issues is that which the government presented in its proposal to the Knesset." State Archive G-13908/1 (Isr.).

251. Thus, the government resisted applying continuity to 1996 Freedom of Information Bill, unless the discussion of the bill was delayed until the government submitted its own bill on the issue and both could be discussed together. *Id.* A similar tactic was employed regarding 1996 Criminal Code Bill (Amendment No. 57) (Punishments for Sex Crimes). *Id.*

252. Thus, for example, the government requested that the Education and Culture Committee delay the discussion regarding continuity for The 2002 Rights of Children with Learning Disabilities in the Regular Education System Bill, under the claim that they had not yet found a source of funding for it. *See* State Archive G-15640/10 (Isr.).

253. The decisions are generally made by the Ministers Committee for Legislation, which meets behind closed doors and does not publicize its full transcripts.

254. Thus, for example, the Coordinating Bureau of Economic Organizations sent a letter on October 13, 1996, to resist applying continuity to 1995 Minimum Wage Bill (Amendment 2), which led the government to act accordingly. *See* State Archives G-13098/1 (Isr.).

5. Legislation by Reference

Legislation by reference is another problem associated with continuity.²⁵⁵ When the government or the committee requests the application of continuity, it also submits a list of bills to which continuity should be applied. Any Knesset member wishing to know the content of the bills or to peruse the related debates from the previous Knesset's sittings must take that burden on himself. The Knesset debate is thus also impaired, creating a serious problem of transparency and even accountability for these bills.

6. Is Strategic Use Inherent to Continuity?

The government leverages continuity to obtain an artificial majority for laws. Could the Continuity Law be redrafted in a way that would prevent its abuse by the government? The law could have prohibited the application of continuity to bills presented for a first reading after the Knesset becomes an outgoing body. The law could have confined continuity to a limited period after a new government takes office. The government could have been prohibited from leveraging its consent in order to silence debate on the contents of the law. Whenever continuity could have been applied, the law could have required that all material be presented to MKs prior to the continuity debate. All these requirements would have substantially bolstered the Knesset's standing. But they could not have addressed the inevitable consequence that the government's standing was strengthened by the removal or weakening of barriers of veto and delay.

C. *Enactment of Controversial Laws*

The proponents of continuity in the 1960s recognized that continuity should not be applied to controversial laws. Also, in comparative law it is customary to limit the implications of the discontinuity principle only with respect to consensual laws.²⁵⁶ In effect, continuity is applied differently in Israel and is inconsistent with the proponents' original undertaking.

Two salient examples from the years shortly following the adoption of the Continuity Law are the Land Law and sections of the

255. On the serious problems of legislation by reference, see also Weill *supra*, note 51.

256. See *supra* note 112 and accompanying text (explaining the Italian Rule).

Population Registration Law. Both pieces of legislation were highly controversial at the time, but nevertheless were enacted by applying continuity. We have already discussed the Land Law.²⁵⁷ As for the Population Registration Law, MKs argued in the Sixth Knesset that:

Had a university lecturer discussed the Continuity Law, he would have presented the case of the Government resolution on the Population Registration Law as a classic example when not to employ the Continuity Law When the Population Registration Law was put forward in the Knesset, there was opposition nearly across the board to three of its 51 sections The opposition was so strong that the Knesset Constitution, Law and Justice Committee could not reach consensus on these three sections and motioned for the Knesset to allow the Constitution, Law and Justice Committee to submit the Population Registration Law without these three controversial sections. Now the Government is asking us to agree to continuity with respect to these three sections.²⁵⁸

A recent example is the use of continuity to enact the Biometric Database Law even though the law is at the center of extreme public controversy.²⁵⁹

The problem with the application of continuity to controversial laws is that it creates a sense of underhanded opportunism among MKs opposing the law. Controversial laws call for greater clarification and deliberation, giving MKs the opportunity to persuade and be persuaded. One should not establish facts on the ground, as is done by using continuity.

The application of continuity to controversial laws not only undermines the intention of the Continuity Law's proponents, but it realizes the concerns of the law's opponents.²⁶⁰ There would not have been opponents to continuity—or at least there would have been

257. *See supra* Part IV.A.

258. 47 DK 213-14 (1967) (Isr.). For the debates in the third reading, *see* 49 DK 2960-67 (1967) (Isr.).

259. Inclusion of Biometric Methods of Identification and Biometric Identification Data in Identification Papers and Databases Law, 2009 SH 418 (Isr.) (passing the first reading on October 29, 2008, continuity was applied on May 6, 2009); *see also* KNESSET, http://www.knesset.gov.il/committees/heb/docs/mada_18.pdf (last visited Jan. 15, 2015); Nitzan Lebovic & Avner Pinchuk, *The State of Israel and the Biometric Database Law: Political Centrism and the Post-Democratic State*, THE ISRAELI DEMOCRACY INSTITUTE (June 10, 2010).

260. *See* 47 DK 213 (1967) (Isr.) (MK Yoseph Shufman).

fewer opponents—had continuity been assiduously confined to technical laws, such as legal codes.²⁶¹

This difficulty could have been overcome by redrafting the Continuity Law, so that the application of continuity would have been made contingent on the consent of a special majority of MKs. This would have guaranteed that the principle would only be applied to laws for which there is broad consensus.²⁶²

D. *Enactment of Basic Laws*

MK Harari supported the Continuity Law to make it easier to enact a Constitution. However, the fact that the Continuity Law makes legislation possible by artificially obtaining a majority in an opportunistic way demonstrates that the Continuity Law should not be a vehicle for the enactment of Israel's Basic Laws. That some Basic Laws were enacted under continuity testifies to the flawed manner in which they were enacted.

E. *Scrutiny of the Continuing Body Theory*

While the proponents of the Continuity Law claimed that the Knesset sees itself as a continuing body, the opponents maintained that each parliament is born anew.²⁶³ The fact that MKs do not have a permanent status and seniority rights shows that the Knesset does not perceive itself as a continuing body.²⁶⁴ Moreover, there is no continuity on agenda proposals, interrogatories, committee summaries, actions of the Finance Committee concerning a discussion of bills, and recommendations relating to the State Comptroller's Report.²⁶⁵ MKs argued that, although the Knesset's Rules of Procedure automatically apply unless the Knesset decides to amend

261. In Germany, for example, the solution to the discontinuity principle is breaking up complex legislation into several individual bills so that they can be presented in several consecutive parliaments. See Van Schagen, *supra* note 1, at 122.

262. It should be mentioned that when a law or a Basic Law requires a special majority for the Knesset to make a decision, it is not an entrenchment. The Knesset may overcome this requirement by turning to a path of amendment (of the law which includes this demand) by regular majorities, but will "pay" a political price for it. See HCJ 07/1169 Dr. Reves v. The Knesset (Feb. 6, 2007), Nevo Legal Database (by subscription) (Isr.).

263. Correspondence from the Minister of Religious Affairs to the Justice Minister from July 10, 1963, State Archive GL-21275/12 (Isr.).

264. 39 DK 1604 (1964) (Isr.) (MK Yohanan Bader).

265. 39 DK 1611 (1964) (Isr.) (MK Ya'akov Riftin); *id.* at 1667 (MK Yoseph Kushnir).

them, “the Rules of Procedure do not impose obligations on citizens.”²⁶⁶

In fact, the core of the disagreement between proponents and opponents of the Continuity Law centered on the nature of the Knesset. Continuity supporters sought to ascribe to the Knesset perpetuity and continuity similar to an artificial body, like a corporation. Their arguments were unintentionally based on an age-old philosophical-religious tradition, which sought to attribute to a king as sovereign in the kingdom both the mortal natural body and the eternal artificial body. Upon the death of the natural body, sovereignty is passed to the new natural body of the heir, but continuity is maintained because the artificial body is immortal. These notions were later implemented in parliament, in its role as the new embodiment of sovereignty. Accordingly, the composition of individual members changes, but the continuity of parliament is preserved. Therefore, elections should not affect the work of legislation.²⁶⁷

The opposite notion is that the entire essence of democracy, unlike a monarchy or theocracy, is that sovereignty is in the hands of the constituents. The continuity of sovereignty rests with the people, not with their representatives. In day-to-day matters, the People’s sovereignty is manifested in the real power of constituents to influence the content of laws by breaking the legislative continuity and electing new representatives.

In my opinion, not only does the view of the Knesset as a continuing body contradict the principle of democracy and the essence of elections, as discussed above, but the Knesset did not and does not regard itself as a continuing body. The Knesset’s view of itself has a concrete effect on the rule of recognition of the system.²⁶⁸ Until the Continuity Law, the Knesset conducted itself from one parliament term to the next according to the discontinuity principle. A law had to be passed to change this practice. Even after enacting the law, the default is discontinuity, unless the Knesset decides otherwise.

Additionally, the 1993 Continuity Law prohibits the application of continuity to private bills for which the initiator is not presently an MK or did not agree to the application of continuity.²⁶⁹ The sponsor

266. 32 DK 108 (1962) (Isr.) (MK Yohanan Bader).

267. See, e.g., KANTOROWICZ, *supra* note 8.

268. H. L. A. HART, *THE CONCEPT OF LAW* 100-23, (2d ed. 1994).

269. Continuity of Debate on Bills Law, 1993 SH 60, art. 3 (Isr.).

of the law offered the following reasons for this position: One, to prevent a piggyback phenomenon, in which the initiator of a bill no longer supports it but others exploit the fact that it was submitted.²⁷⁰ Two, if the MK who initiated the bill is presently a cabinet member but continuity lacks government's consent, this would violate the shared responsibility principle.²⁷¹ Three, it deals with bills proposed from a certain "position"; perhaps the initiator submitted a bill when he was a cabinet member and now he is in the opposition or vice versa.²⁷²

The present law holds the stick at both ends. On the one hand, it allows the Knesset to pass a resolution to apply continuity, even though MKs who were present at the first reading and sat on the Knesset committees are not members of the current Knesset. On the other hand, it makes the application of continuity dependent on the position of an individual MK who initiated the law. According to the latter approach, the Knesset should not be regarded as a continuing body, but rather is dependent on the specific composition of its members, and each Knesset is different from its predecessor.

The US Senate is considered a continuing body, in the sense that its Rules of Procedure continue to apply, unless modified by a supermajority according to prescribed rules. But the Senate's continuity rests in the regulated turnover of its members; only one-third are up for reelection every two years, and the rest continue to hold office.²⁷³ In Israel, as all members of the Knesset are up for reelection in all elections, it is pointless to discuss continuity in terms of the US Senate.²⁷⁴ Furthermore, even in the US Senate, the principle of discontinuity of the legislative process applies, as bills that do not become law within two years are dead.²⁷⁵

270. 128 DK 2989 (1993) (Isr.).

271. Continuity of Debate on Bills Bill 1993 HH 49 (Isr.).

272. 128 DK 2989 (1993) (Isr.) (MK Hagai Merom).

273. On the fierce debate regarding the continuity of the US Senate, see Aaron-Andrew P. Bruhl, *Burying the 'Continuing Body' Theory of the Senate*, 95 IOWA L. REV. 1401 (2009-2010). The biggest difficulty in changing the Senate Standing Rules is the filibuster, which provides the minority the power to control the majority's work, and there is no way to override the filibuster without the supermajority required to change the Standing Rules.

274. The Knesset Rules of Procedure, while they continue to apply from Knesset to Knesset, can be changed by a regular majority and are therefore dissimilar to the Senate Rules. It is interesting to note that the Knesset Rules of Procedure have no provision determining their continuity. Rather, this is the interpretation of the Knesset Legal Advisor. See DIRECTIVE OF THE KNESSET LEGAL ADVISOR, *supra* note 60.

275. See Bruhl, *supra* note 273, at 1445, 1447-48.

F. *Turnover of MKs*

Justice Ministers Rosen and Yosef justified continuity, *inter alia*, with the rationale that the composition of the Knesset hardly changes from one round of elections to another. However, the assumption that the composition of the Knesset does not change was not true then, nor is it true today. Actually, the only time parliament's changed composition was negligible occurred during the Fifth Knesset, which enacted the Continuity Law, when only nine new MKs were elected out of 120. Between 1951 and 1996—except for the Fifth Knesset—the Israeli Democracy Institute found that the number of new MKs ranged between thirty-one and fifty MKs.²⁷⁶ An average of one-quarter of the house members changed from one election to another during those years.

According to these figures, one may wonder whether the proponents of the Continuity Law were aware of the anomaly of the Fifth Knesset, passing the Continuity Law at the time of the lowest turnover of MKs. This concern is magnified in light of the proponents' knowledge of the instability of Israeli governments. It seems they took advantage of the opportunity to pass the Continuity Law. Even if it weren't for the fact that Israel has a traditionally high turnover of parliament members, a small change in the composition of the Knesset can also change the political balance.²⁷⁷ Therefore, the claim that supposedly the small turnover in the Knesset composition justifies continuity does not stand the test of scrutiny.

G. *Interim Summary*

The previous Part raised arguments against the Continuity Law stemming from constitutional considerations. This Part sought to show that the considerations that led proponents to support it do not stand the test of scrutiny. In fact, the proponents' justifications for enacting it should have supported its rejection. Considerations of efficiency, frequency of caretaker governments, and Knesset turnover may serve as arguments against continuity.

In view of the Continuity Law's dramatic infringements of rights and constitutional values, and its far-reaching effect of weakening the Knesset and strengthening the government in the legislative

276. See MK Overtun, http://www.idi.org.il/media/767479/parliament_12_1996.pdf (last visited Jan. 1, 2015).

277. 32 DK 123 (1962) (Isr.) (Minister Zerach Warhaftig)

enterprise, I posit that it should be repealed. The Law as presently worded does not pass constitutional scrutiny.²⁷⁸

The Continuity Law minimizes the significance of elections and infringes upon MKs' rights of deliberation and their rights to enjoy equal voting power in the Knesset. In the same vein, the law severely infringes upon the right of voters to elect MKs who have an equal right to vote in the Knesset. These constitutional rights to vote and be elected are protected in Sections Four to Six of the Basic Law: The Knesset.²⁷⁹ Section Four requires that any infringement of its provisions be done by a majority of sixty-one MKs or by meeting the requirements of the judicial limitation clause or both, something that is not clear from the current case law on the subject.²⁸⁰ Furthermore, the Continuity Law's infringement upon the democratic nature of the State, as guaranteed by Basic Law: Human Dignity and Liberty, requires too that it will meet the requirements of the judicial limitation clause.²⁸¹ This also applies to the Continuity Law's infringements upon the status of the Knesset as the legislature of the State.²⁸²

It is doubtful whether the Continuity Law can pass these tests. The law was not enacted by a majority of sixty-one MKs. The harm it causes outweighs its benefit, as follows from Parts IV and V, and as such the law does not meet the third test of proportionality, which is a cost-benefit balancing test.

278. The *Continuity Law* does not enjoy the Preservation of Laws Clause, which prevents the courts from declaring statutes invalid if they were enacted prior to the enactment of Basic Law: Human Dignity and Liberty. See Basic Law, *supra* note 114. The current law was passed in 1993, subsequent to the enactment of Basic Law: Human Dignity and Liberty. See generally H CJ 6055/95 Tzemach v. Minister of Security 53(5) PD 241 [1999] (Isr.).

279. The constitutional revolution also encompasses Basic Laws, which were enacted prior to the *United Mizrahi Bank* decision. See, e.g., H CJ 212/03 Herut National Movement v. CEC Chairman 57(1) PD 750 [2003] (Isr.). Thus, the Court may exercise judicial review based on these Basic Laws, and not only based on the Basic Laws dealing with individual rights from 1992.

280. See EA 92/03 Mofaz v. 16th CEC Chairman 57(3) PD 793 [2003] (Isr.); see also Rivka Weill, *Did the Lawmaker Shoot a Cannon to Hit a Fly? On Proportionality in Law*, 15 LAW & BUS. 337 (2012).

281. The criteria of the express Limitations Clause in art. 8 of Basic Law: Human Dignity and Liberty only need to be met in cases of limitations of rights. However, in my opinion, limitation of values established in the Basic Law requires meeting the criteria of an implied (judicial) Limitations Clause. The requirements of the implied (judicial) Limitations Clause are similar to those of the express Limitations Clause and include the need to have a proper purpose and meet proportionality tests.

282. For support of this view, see, e.g., H CJ 2605/05 Human Rights Division v. Finance Minister 63(2) PD 545, 731 [2009] (Isr.) (Levi J.).

VI. *CONSTITUTIONALIZING CONTINUITY*

This Part argues that if the Knesset elects to preserve continuity, it should be reshaped in a way that preserves the benefit and minimizes the harm. This is possible if use of the Continuity Law is confined to complex, professional legal codes, which are not controversial.²⁸³ Therefore, the application of the Continuity Law should be stipulated on obtaining the consent of a greater majority than sixty-one MKs. The Continuity Law should be further formalized as a Basic Law rather than be codified by ordinary legislation.

A. *Codification in a Basic Law*

When MK Nir-Rafalkes proposed adopting continuity, he drafted it as an amendment to Section Thirty-Eight of Basic Law: The Knesset.²⁸⁴ Section Thirty-Eight formalizes the extended validity of enactments that are due to expire toward the end of the Knesset's term.²⁸⁵ MK Nir-Rafalkes wanted to formalize the extended validity of bills in addition to the extended validity of enactments.

The Knesset held a debate on the question of whether the Continuity Law should be formalized as part of the Basic Laws.²⁸⁶ Justice Minister Dov Yosef certainly recognized the constitutional importance of the Law. Thus, for example, when he tried to convince MK Moshe Unna, Chairman of the Constitution, Law and Justice Committee, to expedite the handling of the Law, he wrote, "It seems to me that since this law could impact the fate of many other laws, it should take precedence over any other law on the agenda."²⁸⁷ Dov Yosef also rejected the idea of Dr. Uri Yadin, the first director of the Legislation Department of the Ministry of Justice, to adopt continuity

283. For example, the *Corporations Law* (1990) passed its first reading in the Thirteenth Knesset and was passed into law towards the end of the Fourteenth Knesset, and there was great concern that if the law was not passed, all the work would be for naught. If there is any place for the *Continuity Law*, then it is the *Corporations Law* that justifies continuity. I owe this example to Uriel Procaccia.

284. *See supra* Part I.

285. "Enactments" are either law or bylaw. Interpretation Law, DMI 1, Art. 1.

286. 39 DK 1662 (1964) (Isr.) (MK Moshe Unna); *id.* at 1668 (MK Michael Hazani); *see also* DK 112 (1962) (Isr.) (MK Yisrael Shlomo Ben-Meir).

287. *See* Correspondence between Justice Minister Dov Yosef and Chairman of the Constitution, Law and Justice committee, MK Moshe Unna (May 19, 1964), State Archive GL-21275/12 (Isr.).

in the Rules of Procedure, and not in a statute.²⁸⁸ He explained, “I do not opine that such an important change should be introduced in constitutional processes of the Knesset by amending the Knesset Rules of Procedure, but by a law.”²⁸⁹ Similarly, his predecessor, Justice Minister Rosen, explained that he thought that continuity should be enacted in a law, as this is a matter of “major constitutional importance.”²⁹⁰

Why then was the Continuity Law enacted as an ordinary law? The overt answer of Justice Minister Dov Yosef was that it was perhaps preferable to enact it as a Basic Law. However, this could be postponed to a time when various matters regulated in the Rules of Procedure would be formalized in a Basic Law.²⁹¹

It seems that the unstated answer was apparently related to the huge debate within the government on continuity. When Minister of Religious Affairs Zerach Warhaftig opposed the Continuity Bill, he also opposed the enforcement of coalition discipline with respect to it:

Clearly the [coalition] agreement assumes that the form of government will be preserved, except for various changes on which there is express consent. This, in my opinion, applies to this bill. I view it as undermining the authority of the Knesset and a fundamental change in its essence, and therefore the coalition agreement does not apply.²⁹²

Naturally, the Justice Minister objected and asserted that coalition discipline applies to this bill.²⁹³ Clearly, if the Continuity Law had been enacted as a Basic Law rather than as an ordinary law, the Minister of Religious Affairs’ argument that coalition discipline should not be applied would have been further reinforced, and this

288. Yadin recommended this for tactical purposes. He reasoned that this was an easier way to adopt the *Continuity Law*. See Correspondence between Dr. U. Yadin and Justice Minister Dov Yosef (May 19, 1963), State Archive GL-21275/12 (Isr.).

289. Correspondence between Justice Minister Dov Yosef and Dr. U. Yadin (May 21, 1963), State Archive GL-21275/12 (Isr.).

290. 32 DK 146 (1962) (Isr.) (Minister of Justice Rosen). In 1959, Justice Minister Rosen’s opinion was different. In his response to the continuity bill proposed by MKs Nir-Rafalkes and Harari, he opined that there was no need to pass a law in order to apply continuity. Discontinuity is based on custom. Thus, it can be changed through the Knesset Rules of Procedure. 25 DK 998 (1959) (Isr.) (Minister of Justice Rosen).

291. 39 DK 1687 (1964) (Isr.).

292. Correspondence from Minister of Religious Affairs to Minister of Justice (July 10, 1963), State Archive GL-21275/12 (Isr.); see also Correspondence from Minister of Religious Affairs to Minister of Justice (Jan. 15, 1964), State Archive GL-21275/12 (Isr.).

293. Correspondence from the Justice Minister to the Minister of Religious Affairs (Dec. 24, 1963), State Archive GL-21275/12 (Isr.).

would have negatively affected the Continuity Law.²⁹⁴ Actually, the longstanding practice of Israel's governments is not to apply coalition discipline to amendments of Basic Laws.²⁹⁵

What are the implications of enacting the Continuity Law as an ordinary law and not as a Basic Law? In my view, the Continuity Law's severe infringements of constitutional rights and values do not pass constitutional scrutiny. Furthermore, some of the violations are tantamount to a modification of the Basic Law: The Knesset which requires an amendment of the Basic Law itself.²⁹⁶ The fact that legislative processes are primarily regulated today in the Knesset's Rules of Procedure, and not in the Basic Laws, does not help the Continuity Law. As long as these legislative processes do not clash with constitutional rights and values, they do not raise the constitutional problem that the Continuity Law raises.

B. Enactment by Broad Consensus

Not only should the Continuity Law have been enacted as part of the Basic Laws, it also should have been enacted by a broad consensus, and this was not the case. The Knesset conducted heated debates in 1961 and 1964 on continuity. The government eventually passed the law at a time of political instability. The opponents accused the government of passing the law without a mandate.²⁹⁷

During the Thirteenth Knesset, the Knesset replaced the 1964 Continuity Law with a new law.²⁹⁸ What is interesting is that, although the Ma'arach ("Alignment") controlled the Government, headed by Yitzhak Rabin, MK Hagai Merom from the Ma'arach proposed the bill as an individual MK. There were apparently two reasons for this: First, Rabin's government was preoccupied with the Oslo agreements during this period. Second, the government discovered in 1992 the power of private legislation, by which the 1992 Basic Laws dealing with individual rights were enacted. It took advantage of private legislation to pass its initiatives.²⁹⁹

294. The discontinuity principle is codified in various ways around the world. It may be established in the constitution, custom, internal parliamentary rules of procedure, or, even less frequently, in law. See Van Schagen, *supra* note 1, at 118-19.

295. See Weill, *supra* note 233.

296. *United Mizrahi Bank*, *supra* note 55, at 324.

297. See *supra* Part II.B.

298. 128 DK 2989 (1993) (Isr.).

299. See Maor, *supra* note 204, at 375.

The Knesset held a debate on the first reading on February 1, 1993, and all five MKs present endorsed the bill.³⁰⁰ The text of the proposal was passed verbatim, without any change, in the second and third readings within two days of the first reading, and all seventeen MKs present backed the bill.³⁰¹ This was a hasty process supported by only a few MKs. One of the MKs, David Magen from the Likud, complained that if it were not for the rushed process, he would have been happy to expand the application of continuity to all bills, even those that only passed a preliminary reading.³⁰² It is doubtful whether this legislative history points to a broad and stable consensus on continuity.

C. The Proper Content of Basic Law: Continuity

Should the Knesset decide to enact the Continuity Law as a Basic Law, the contents of the Continuity Law should be reshaped to minimize its harm. The application of continuity should be made contingent on obtaining broad consensus of MKs, which would guarantee that it is only applied to non-controversial, technical, professional laws. In addition, a debate should be conducted whenever continuity is applied, even if no opposition is raised. It should also be mandatory to conduct a separate debate on each bill to which the application of continuity is sought. There is room to strengthen the standing of factions and individual MKs on the question of the initiation of the application of continuity in order to balance the government's power in the Knesset. There is room to require the government to respond to continuity application initiatives in the plenum, rather than in the Knesset committees.

The application of continuity to bills presented for a first reading after a Knesset becomes an outgoing Knesset should be prohibited. A time limit should be set on the use of the continuity law after the new government takes office. The government should be prohibited from leveraging its consent to silence a debate on the contents of the law. Whenever continuity is applied, all material must be presented to the MKs before deliberating on the application of continuity. The incoming Knesset committee should decide which committees are authorized to initiate continuity. All these conditions are meant to

300. 128 DK 2989 (1993) (Isr.).

301. 128 DK 3055 (1993) (Isr.).

302. *Id.*

limit the use of continuity, so that it becomes the exception, not the rule, in the enactment of laws.

CONCLUSION

The study of continuity in legislative processes has been neglected worldwide. It is apparently viewed as marginal, technical, non-influential, and mainly, uninteresting. Yet, hidden behind the technical façade of procedural law are decisions that shape the face of the nation. This Article argues that the principle of discontinuity should be regarded as one of democracy's major tenets. By studying the effects of continuity on the Israeli legislature, the Article reveals the importance of the discontinuity principle prevalent in democratic countries. The Article is especially relevant to US debates about whether to treat the Senate as a continuing body, to British recent endeavors to insert flexibility to their rigid discontinuity principle, and to attempts to minimize the democratic deficit of the EU Parliament.

The Article revealed discussions on the subject in the Knesset in the 1960s, which were among the most fascinating ever held by the Knesset on constitutional issues. The cautions of the Continuity Law's opponents were eventually realized in the problems Israel now confronts. In this Article, I asserted that Israel's rule of continuity does not stand the test of constitutional scrutiny and should be repealed. Continuity erodes core democratic values by reducing the influence of elections on legislation. It shackles one legislature to the legislative decisions of its predecessor. It expresses a majoritarian view of democracy that prejudices the rights of the minority. It grants precedence to longstanding MKs over new members in their power to vote on laws. It strengthens the power of the government in the legislature, while weakening the legislative committees and factions. Against these pivotal violations, I concluded that the arguments of the proponents of continuity do not stand up to scrutiny. Just the opposite: Their arguments point to still other reasons why continuity should be rejected. It is therefore my conclusion that the harms stemming from continuity outweigh its benefits. Had it been subject to judicial review, it should have been repealed. The Israeli experience with continuity should serve as a cautionary tale to any country that either operates under a rule of continuity or is seriously considering a relaxation of its discontinuity principle.