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Rights Constitutionalism and the Challenge of Belonging: An Empirical Inquiry into the Israeli Case

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Rights constitutionalism faces a global crisis of legitimacy, and recent years have seen a surge in scholarship on the crisis. The vast majority of analyses focus on broad structural factors and processes. This article takes a different approach: sociological and bottom up. I use qualitative discourse analysis to examine how social actors in Israel justified their antagonism toward rights constitutionalism in three cases where judicial intervention for human rights encountered exceptional public opposition and political backlash. The analysis reveals that social actors used discourses of belonging—both liberal and non-liberal—to challenge rights constitutionalism as a constraint on democratic politics, when they perceived rights protection as conflicting with or undervaluing boundaries of collective identity. Based on these findings, I introduce a new concept—the challenge of belonging—that expresses the normative tension between individual rights and collective belonging. By highlighting the ethical dimension of social opposition to rights constitutionalism, the sociological approach allows a nuanced understanding of such opposition. The challenge of belonging can account for mixed attitudes in the same polity and even in the same social group on rights-oriented judicial intervention, and it points to a common normative thread linking attacks on liberal constitutionalism in vastly different sociopolitical settings.

> And it really doesn't matter if I'm wrong, I'm right
> Where I belong, I'm right
> Where I belong
>
> — John Lennon and Paul McCartney, *Fixing a Hole*, 1967

INTRODUCTION

Recent years have seen a global surge in writing on the crisis of liberal constitutionalism: describing it, conceptualizing it, explaining its causes.[1] This rich and varied scholarship analyzes developments on the global, regional, and domestic levels that account for the rising challenges facing rights constitutionalism. While sociological approaches to the study of constitutions and constitutionalism are on the rise

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1. For surveys of this scholarship, see Ginsburg, Huq, and Versteeg 2018; Graber, Levinson, and Tushnet 2018; Daly 2019.

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(Thornhill 2017; Madsen, forthcoming), sociological methodology, especially at the micro level, is rarely applied to understanding the crisis of legitimacy facing liberal constitutionalism. In this article, I demonstrate how a qualitative empirical approach can enhance and deepen our understanding of the crisis. This approach zooms in from the macro level to look at how social actors justify their antagonism toward rights constitutionalism and its agents in concrete situations. Using three case studies from Israel, I show how qualitative, context-specific research can provide a rich and nuanced account of the circumstances in which social actors oppose liberal constitutionalism and of the ethical underpinnings of their opposition, much as such research has done regarding related phenomena: support for right-wing populism (Cramer 2016; Hochschild 2016; Wuthnow 2018); hostility to immigrants and minorities in urban neighborhoods (Mepschen 2019); and antagonism to human rights discourse and activism (Mizrachi 2016; Mizrachi and Weiss 2020).

I studied three legal human rights struggles conducted in Israel between 2000 and 2015 that dealt with different issues and groups. Judicial intervention for human rights in each of these cases encountered widespread public opposition and political backlash. The reaction was unusual in the Israeli context, since judicial intervention on rights grounds, in both policy and legislation, is generally accepted, if grudgingly and amidst public protest, even in highly sensitive and contested issues. The case studies thus appeared to delineate the limits of public consent to rights constitutionalism as a constraint on majoritarian politics. To understand what it was about these rights campaigns that evoked such exceptional public and political resistance, I analyzed the public debate over each case, looking especially at discourses that disputed the legitimacy of judicial intervention.

The findings reveal profound disagreement between supporters and opponents of the rights campaigns over the meaning of collective belonging and identity and over their value *vis-à-vis* human rights. In two of the cases, this disagreement was internal to the liberal camp itself, dividing it between supporters and opponents of rights protection in these specific contexts. The common pattern that emerged from the various oppositional discourses was reliance on an ethic of belonging, which considers boundaries of collective identity as no less valuable and worthy of protection than individual rights. This ethic was posited against the rights ethic that accords normative precedence to the protection of human rights. The disparity between the ethics was reflected in social disagreement inside and outside the liberal camp, both on the substantive positions regarding each case and on the legitimacy of judicial intervention that prioritized rights.

The bottom-up analysis of oppositional discourse highlights the ethical dimension of the crisis of rights constitutionalism, a dimension largely missing from the literature. Study of this crisis, dominated by legal scholars and political scientists, focuses mostly on top-down structural and institutional analyses. Some scholars have noted the shortage of empirically based knowledge about negative social attitudes toward rights constitutionalism and stressed the need for social scientific methods to better understand the sources of the crisis.[2] The research presented here contributes to filling this void.

2. Jean Cohen (2019, 8) notes the shortage of ethnographic research on popular attitudes toward liberal constitutionalism and its rival, authoritarian populism. Jacques Hartmann and Samuel White (2020)

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The use of qualitative empirical methodology to examine social attitudes toward liberal constitutionalism—an approach that has been termed sociological constitutionalism (Blokker and Thornhill 2017)—reveals the normative underpinnings of democratic backsliding. This approach has been demonstrated in studies of social opposition to liberal constitutionalism in new democracies such as Hungary and Poland (Scheppele 2017; Blokker 2019) and is confirmed by my research on Israel.

The central insight arising from my empirical findings is the concept I call the challenge of belonging. This term captures the ethical dimension of the challenge to liberal constitutionalism in social and political discourse, when rights protection appears to conflict with or undervalue the preservation of collective identity. I propose the challenge of belonging as an addition to the bazaar of concepts used to analyze the crisis of liberal constitutionalism (Daly 2019). As an analytical tool, this concept enriches theory by adding a normative layer that stresses the deep conflict of ethical grammars involved in this crisis. Without detracting from the role of factors external to rights constitutionalism, the challenge of belonging highlights the role played by the ethical grammar of rights constitutionalism itself in its crisis of legitimacy.[3] By examining how social actors justify their opposition, the sociological approach allows us to identify those aspects internal to liberal constitutionalism that arouse antagonism and contribute to its declining social legitimacy.

This approach to the crisis of rights constitutionalism, and the concept of the challenge of belonging that emerges from the Israeli case, advances scholarly discussion on the crisis in several ways. First, the focus on how social actors justify their opposition to liberal constitutionalism in specific contexts provides a nuanced appreciation of this opposition. What might look like an all-out offensive against rights constitutionalism and its agents can thus be unpacked and understood as a more differentiated, context-dependent, and specific challenge. Second, the challenge of belonging shifts the focus from environmental conditions to the ethical underpinnings of opposition to rights constitutionalism. In doing so, it highlights a common normative thread—the clash between the ethics of rights and belonging—underlying such opposition in varied contexts and circumstances. The challenge of belonging can thus connect between vastly different settings and manifestations of the crisis of liberal constitutionalism—from established to newer democracies and from the global North to the global South.

Third, and most importantly, the challenge of belonging allows us to view social opposition based on discourses of belonging as reflecting not only a temporary, circumstantial challenge to rights protection but also a constant concern that is intrinsic to liberal constitutionalism and potentially threatens its social legitimacy. The profound ethical dimension of this challenge connects to theoretical critiques leveled at rights liberalism from its inception, regarding its inherently problematic treatment of collective belonging, identity, and boundaries. These critiques, both internal and external to

emphasize the lack of empirical data supporting the general claim regarding populist backlash against human rights. See also Tarunabh Khaitan (2021) on the need for a social scientific approach to studying the rise of populism. Pippa Norris and Ronald Inglehart (2019) analyze the rise of authoritarian populism based on large-scale, quantitative empirical research.

3. For a similar theoretical move, drawing attention to inherent characteristics of the rights ethic as relevant to the sociological challenge to rights constitutionalism, see Fagan 2019; Moyn 2019.

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the liberal tradition, help explain why a universal and individualist rights discourse is ill-equipped to address claims resting on the value of particular, collective belonging.

This article thus brings two different literatures into conversation: contemporary analyses of the crisis of rights constitutionalism and theoretical critiques of human rights. These critiques point out the tension between the moral logics of rights and belonging. When this usually latent tension comes to the sociopolitical surface as a perceived conflict between rights protection and collective belonging, the consensual status of liberal constitutionalism faces a powerful discursive challenge. Viewed in this light, opposition to liberal constitutionalism across the globe, based on discourses of belonging, can be seen as more than just a product of unfortunate circumstances. Rather, this opposition can be understood as reflecting a problem inherent to the liberal ethic—its deficient treatment of collective belonging—that needs to be recognized and addressed by liberal actors.

The article will proceed as follows: First, I briefly map out the external and internal explanations of the crisis of liberal constitutionalism in the literature in order to place the approach proposed here in context. I then present my empirical research on the Israeli case studies. Analysis of these cases reveals three types of social discourse opposing judicial intervention for human rights on the basis of an ethic of belonging: a nationalist discourse, a community discourse, and a local-nativist discourse. In the next section, I discuss these findings through the concept I introduce: the challenge of belonging. I first describe how this new concept contributes to existing theory on the crisis of rights constitutionalism and then present the philosophical critiques of rights liberalism that explain the power and ethical depth of the challenge of belonging. I conclude with a short summary and invitation for further research.

EXPLAINING THE CRISIS OF LIBERAL CONSTITUTIONALISM: FROM EXTERNAL FACTORS TO A CONFLICT OF ETHICS

As noted above, most literature on the global decline of liberal constitutionalism looks at factors in its sociopolitical environment. The approach proposed here, in contrast, focuses on the ethical dimension of social opposition reacting to aspects of rights constitutionalism itself. These are different perspectives on the same phenomenon, as various environmental conditions might cause the tension between the ethics of rights and belonging to surface in the form of actual political disagreement. To put the challenge of belonging in its wider context, I will briefly sketch the external factors that existing analyses cite to explain receding public support for liberal constitutionalism. These factors generally fall into one or more of three categories.

One category is increasing social and political polarization due to socioeconomic gaps, cultural-ideological differences, or both, which takes its toll on the consensual position of liberal constitutionalism. Polarization often manifests itself in the rise of populist politics that pit liberal, cosmopolitan elites against "the people." Thus, the identification of liberal constitutionalism as a locus of power serving the rival social group, defined by populist rhetoric as the elite, makes it a target of popular animosity. Liberal

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constitutionalism, under this type of explanation, falls victim to political polarization of which it is not the direct cause.[4]

A second category of factors commonly explaining the liberal crisis, especially in Western democracies, involves social, political, and economic developments such as mass migration, transnational terrorism, globalization, and regional integration. These macro processes have created new threats to personal, economic, national, and cultural security, which human rights constitutionalism, aimed at protecting individuals and minorities from state power, does not adequately address or even exacerbates.[5] Explanations of this type can account for public opposition that is not directed against liberal constitutionalism in itself, especially insofar as it protects the rights of majority groups, but is rather limited to those aspects related to perceived threats to security, like the protection of immigrants or minorities (Pappas 2016; Brubaker 2017; Hartmann and White 2020).

A third set of factors cited in the literature is widespread disagreement with the substantive, rights-oriented positions of liberal constitutionalism. Contrary to the other two types of explanations, this type brings normative disagreement to the fore as the primary source of receding social consensus on liberal constitutionalism. This explanation is less common for established liberal democracies in the West, though it does appear together with the other types of explanations—for example, when political polarization is along cultural-ideological lines or when pluralist, cosmopolitan values are portrayed as threatening the integrity of cultural identity (Hirschl and Shachar 2018; Mounk 2018; Norris and Inglehart 2019).

For non-Western democracies, scholars often attribute widespread public disagreement with the values and positions of liberal constitutionalism to the existence of an underlying and pervasive non-liberal political culture that political developments bring to the surface.[6] Social disagreement with liberal values can be broad, as in Poland and Hungary, where a non-liberal political culture that preceded the transition to democracy produces alternative "constitutional narratives" that are at odds with normative assumptions of liberal constitutionalism (Blokker 2017; Dowdle and Wilkinson 2017). In other cases, normative disagreement might be focused on certain issues. In the case of Israel, for example, religion-state relations (Hirschl 2004; Lerner 2011; Mautner 2016; Shinar, Medina, and Stopler 2020) and the Israeli-Palestinian conflict (Navot and Peled 2009; Shinar, Medina, and Stopler 2020) are two central questions on which disagreement with liberal positions is often cited as a source of social conflict over liberal constitutionalism.

Most explanations of the crisis of liberal constitutionalism, then, point to various combinations of factors, all involving the social, political, and economic environment. Far less common is the view that declining public support for rights constitutionalism

4. For explanations of this type, see, for example, Levitsky and Ziblatt 2018; Cohen 2019; Fagan 2019; Koskenniemi 2019; Pappas 2019; see also the references in Ginsburg, Huq, and Versteeg 2018, nn. 32–33.

5. See, for example, Alston 2017; Brubaker 2017; Gauchet 2017; Inglehart and Norris 2017; Mounk 2018; Sandel 2018; van der Walt 2019; see also the references in Ginsburg, Huq, and Versteeg 2018, nn. 38–48.

6. See, for example, on South Asia: Tushnet and Khosla 2015; on Hungary and Poland: Rupnik 2018; Blokker 2019; Halmai 2019; on Israel: Hirschl 2014, 43–68; Mordechay and Roznai 2017; Roznai 2018; on Brazil: Daly 2020; on seven states, in the context of constitution drafting: Bâli and Lerner 2016.

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might be connected to inherent shortcomings of the liberal rights ethic itself, increasingly exposed by these environmental conditions. A prominent representative of this view is Marcel Gauchet, the French political philosopher and historian. In his massive volume on the contemporary crisis of Western European democracies, Gauchet (2017) interprets the crisis as a manifestation of the internal contradiction at the heart of rights liberalism: its dependence on the nation-state. He offers a meticulous analysis of how globalization driven by neoliberal ideology has undermined the collective political framework necessary to sustain the liberal rights regime, undoing liberal democracy from within.[7] Some constitutional scholars, who like Gauchet refrain from attributing all the blame for the crisis to changing external conditions, have made observations along similar lines: J.H.H. Weiler (2018) with respect to European democracy; Sanford Levinson (2018) and Bertrand Mathieu (2020) on the crisis of liberal constitutionalism more generally. These scholars point to the innate tension between the universal, individualist rights ethic of liberal constitutionalism and the particularistic, collectivist and republican ethic of national self-rule on which the democratic legitimacy of liberal constitutionalism rests.

My research, presented in the next section, provides empirical support for this strand of analysis. A close study of social discourse on specific rights struggles reveals this tension between the universalistic rights ethic and the particularistic ethic of belonging as central to understanding public controversy over the legitimacy of liberal constitutionalism. Moreover, findings from my research suggest that an ethic of belonging challenges liberal constitutionalism not only from outside the liberal ethos but from within it as well, reinforcing the description of the tension between the moral logics as internal to liberalism (compare Bellamy 1999, 3). In two of the three Israeli case studies, when faced with what was perceived as a conflict between human rights and the protection of collective identity, the liberal camp itself—generally supportive of liberal constitutionalism and conversant in rights discourse—split between those preferring rights and those preferring collective identity. The ethic of belonging thus emerges as a challenge to rights constitutionalism that cuts across liberal and non-liberal worldviews alike.

CASE STUDIES: WHO OPPOSED JUDICIAL INTERVENTION FOR HUMAN RIGHTS AND ON WHAT GROUNDS?

To explain the choice of case studies, some background on Israeli constitutionalism is in order. Generally, Israel can be described as a hybrid case, as its constitutional regime does not fall easily into any one category. While various indices characterize Israel as a liberal democracy (Alizada et al. 2021; Freedom House 2021), it is a deeply flawed one. First and foremost, this is due to the ongoing, institutionalized military control of the Palestinian civilian population in the Occupied Territories, which has created a reality of apartheid.[8] Israel can therefore be considered a liberal democracy only by somewhat artificially disconnecting between the regime within its recognized borders

7. See also Manent 2014; Seligman and Montgomery 2019; Traub 2019.
8. On Israel as a "semi-liberal" democracy, for this and other reasons, see Stopler 2019.

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and that in the Occupied Territories. Moreover, Israel's political culture cannot generally be characterized as liberal. Unlike established, mostly Western liberal democracies, liberal-democratic values in Israel are neither organic to a local majority culture nor do they enjoy hegemonic status (Hirschl 2014, 43–68; Mordechay and Roznai 2017; Roznai 2018).

The position of liberal constitutionalism in Israel is similarly mixed. On the one hand, it does not face general onslaught as in states undergoing dramatic democratic backsliding, such as Hungary, Poland, Brazil, or India. Initiatives for institutional reforms that would limit judicial powers and independence have yet to receive the political support that is needed for them to be implemented. Moreover, human rights discourse is considered legitimate and effective and is used by all parts of the political spectrum, as is recourse to the constitutional arena for claimed rights violations (Gordon and Berkovitch 2007; Dudai 2017; Fischer 2017). Judicial intervention to protect human rights usually meets with public and political acquiescence and is not reversed. This is the case even in politically charged and controversial issues, such as security policy, the Occupied Territories, the Palestinian-Arab minority in Israel, and lesbian, gay, bisexual, and transgender (LGBT) rights.[9] On the other hand, the past two decades have witnessed increasing public rhetoric in Israel, including from high-level public figures, against agents of liberal constitutionalism, especially the High Court of Justice (HCJ) and human rights organizations. There have also been numerous parliamentary initiatives to limit their influence. The most recent culmination of this trend was the enactment of the Basic Law: Israel as the Nation-State of the Jewish People,[10] with the express purpose of shifting the constitutional balance between Israel's Jewish and democratic foundational elements (Shinar, Medina, and Stopler 2020).

Against this background, I chose three case studies that seem to represent the limits of public consent to rights constitutionalism as a constraint on democratic politics. First, judicial intervention in these cases aroused wide public opposition that was not limited to minority sectors often opposed to liberal jurisprudence, such as religious groups, settlers, or the extreme right. Opposition to intervention in these cases came from mainstream publics at the center of the political spectrum. This in itself was not unusual, as liberal rulings on controversial issues are often highly unpopular. Second, and what was exceptional about these cases, the political system rejected judicial intervention in favor of human rights by clarifying, through parliamentary threats and repeated legislation, that such intervention was unacceptable. The three legal campaigns that served as case studies were the only ones in which judicial intervention met with both widespread public opposition and political rejection. As a result, the policies or legislation challenged as violating human rights remained in force despite judicial

9. On judicial intervention regarding the Occupied Territories, see, for example, Golan and Orr 2012; Montell 2016; Kretzmer and Ronen 2021; regarding the Palestinian minority in Israel, see Saban 2008; regarding lesbian, gay, bisexual, and transgender rights, see Dotan 2015; Gross 2015; and on judicial intervention for human rights more generally, see Shinar, Medina, and Stopler 2020. Political acceptance of judicial intervention does not necessarily guarantee its efficacy or implementation on the ground, of course, but this is already a different issue.

10. Basic Law: Israel as the Nation-State of the Jewish People, 5778-2018, SH 898.

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pronouncements of their unconstitutionality.[11] I analyzed these cases to understand why the social controversy that they generated was not contained as "ordinary politics" within the framework of constitutional adjudication (Levinson and Balkin 2009, 711). Why were these cases, in contrast to others dealing with no less controversial issues and groups, widely regarded and effectively challenged as overstepping the legitimate boundaries of rights constitutionalism?

I used qualitative discourse analysis to examine the disagreement surrounding each case. As the public debates were extensively documented, I preferred for the sake of authenticity to rely on texts reflecting what was said and written at the time rather than on *ex post facto* interviews. The materials analyzed included Knesset (Israeli parliament) plenary and committee protocols, statements and interviews in the press, editorials, media coverage of protests (slogans at demonstrations, petitions, manifestos, and so on), Internet sites and publications of citizen groups and non-governmental organizations (NGOs), explanatory notes of draft bills submitted in response to court interventions, and legal arguments. The various texts represented different types of social actors —activists (both elite and non-elite), politicians, lawyers, journalists, academics, and ordinary people—expressing themselves in diverse contexts. I could thus obtain a comprehensive and exhaustive picture of the public debates on each of the cases and identify the main discourses that challenged the rights discourse.

I should stress that discourse analysis does not aim to uncover the "real" positions behind what people say or write, nor does it purport to access social actors' mental dispositions or motivations. Rather, the object of analysis is discourse itself, based on the constructivist premise regarding the central role of language in constructing the social world. The assumption is that one can learn enough about speakers' views from the language they use, without additional inquiry into what lies "behind" it. My analysis focused on the rhetorical aspect of discourse: how social actors presented and justified their positions on the issue at hand, how they responded to adversary positions, and what characterized their normative terminology. This type of discourse analysis aims to shed light on the interpretive and justificatory dimensions of speech. It focuses on how social actors understand the issue about which they speak, on the organizing concepts of their speech, and on the moral logic with which they approach the discussion.[12]

As I will present in detail below, the findings reveal three distinct oppositional discourses. Each evoked a collective identity to which the rights struggle was perceived as antagonistic: a nationalist discourse, emphasizing the need to protect Israel's national identity as a Jewish state; a community discourse, stressing the value of residential communities with shared social identity; and a local nativist discourse, focusing on the need to protect neighborhoods from being overwhelmed and culturally transformed by migrants. The nationalist and community discourses were heard from within the liberal camp as well, dividing it between supporters and opponents of the rights campaigns.

11. Israel has no formal constitution but, rather, judge-made constitutional principles as well as a series of basic laws that serve as a *de facto* constitution. See Sapir, Barak-Erez, and Barak 2013.

12. On these aspects of discourse analysis, see Gill 2000; Fairclough 2003, 206; Hajer 2014.

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Family Unification for Palestinians: An External Threat to National Identity

In 2003, the Knesset passed a temporary amendment to the Citizenship Law[13] that barred Palestinians from the Occupied Territories who were spouses and children of Israeli citizens from initiating or continuing naturalization procedures in Israel.[14] It was a time of frequent and deadly terror attacks, and the amendment was presented as necessary on security grounds. Given the difficulty of predicting who, of the thousands requesting family unification, might pose a security threat, the amendment's proponents claimed that it was needed to prevent potential terrorists from exploiting family ties to obtain civil status and freedom of movement in Israel. Alongside the security justification, however, the amendment was defended in the public debate on demographic grounds as well, as being necessary to preserve Israel's character as a Jewish state and to prevent Palestinians from creating a *de facto* right of return through marriage to Israeli citizens.[15]

The amendment was challenged by Israeli human rights organizations as violating the constitutional rights of citizens, predominantly of the Palestinian Arab minority in Israel, to equality and a family life. The HCJ heard the case before an exceptionally large panel of eleven judges. In its 2006 ruling in *Adalah v. Minister of Interior*,[16] a slim majority of six judges to five were of the opinion that the amendment was unconstitutional: It denied the right of citizens to live with their noncitizen family members based on a generalization branding all Palestinians residing in the Occupied Territories as a potential security threat.[17] One of these judges, however, ruled that, since the amendment was temporary and would expire of itself, the court should not nullify it but, rather, clarify that it could not be extended without remedying its constitutional flaws. The amendment was reenacted, without the necessary changes, and a renewed constitutional challenge was filed against it in 2007. The HCJ heard the second case amidst explicit parliamentary threats, including draft bills that enjoyed wide political support proposing to restrict the HCJ's powers if it intervened in the new amendment. Finally, in 2012, changes in the panel of judges formed a new six-to-five majority, ruling this time that the amendment passed the test of constitutionality (*Gal'on v. Attorney General)*.[18]

The public debate over the amendment brought two discourses to a head-on collision: a rights discourse and a nationalist discourse. The legal defense of the amendment justified it within the constitutional rights discourse on security grounds only, arguing that, given the security risk posed by Palestinians from the Occupied Territories, the right to life of Israelis at large—potential terror victims—outweighed the rights of certain citizens (belonging to the Palestinian minority) to family life

13. Law of Citizenship and Entry into Israel (Temporary Provision), 2003, 5763 -2003, SH 1901.

14. This procedure is relevant to non-Jews only. Jews can obtain citizenship based on the Law of Return, so their naturalization does not depend on family ties with Israeli citizens.

15. Due to extensive familial ties between Palestinian citizens of Israel and Palestinians in the Occupied Territories that predate Israel's establishment, marriage between the populations is common.

16. *Adalah v. Interior Minister*, HCJ 7052/03, 61(2) PD 202 (2006). For an analysis of this decision, see Jacobsohn 2010, 276–322.

17. A later amendment expanded the prohibition to spouses from Arab states.

18. *Gal'on v. Attorney General*, HCJ 466/07, 65(2) PD 1 (2012). The "temporary" law is in force to this day, having been routinely renewed almost every year.

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and equality. In the public debate, however, the dominant justification for the amendment was based on a nationalist discourse, presenting the restriction of family unification for Palestinians as a necessary demographic measure to preserve the Jewish nature of the state.

A few examples will illustrate. The prime minister at the time, Ariel Sharon, said about the amendment: "There is no need to hide behind security arguments. A Jewish state is essential" (Ben and Yoaz 2005).[19] And, on another occasion, he explained: "The Jews have one small state, Israel, and all must be done to ensure that this state remain a Jewish state . . . . There is no intent to harm anyone, but there is a correct and important intention that Israel be a Jewish state, with a massive Jewish majority" (Ben 2005). Tsipi Livni, then minister of justice from the centrist Kadima Party, stated: "We are waging a difficult struggle over Israel's survival as a national home for the Jewish people, and the number of Jews living here is of great importance. In my view, the consideration of Israel's existence as a Jewish state is relevant and not racist. It certainly justifies limiting the naturalization of spouses of Israelis" (Ilan 2005). Ruth Gavison (2003), a renowned professor of constitutional law and former chairperson of the largest human rights organization in Israel, wrote in an editorial: "I don't think the Law should be justified only in neutral terms of 'security.' It is justified as part of the effort to sustain Israel as a state where the Jewish people exercises its right to self-determination, given the conditions existing in the region."

Some speakers of the nationalist discourse, like Livni above, expressly contrasted its particularistic nature with the universalism of rights discourse and justified their preference for the former over the latter. Member of the Knesset (MK) Moshe Kahlon (2004) was very explicit: "Albert Camus said—if I must choose between justice and my mother, I choose my mother. Let no one have any illusions: The Palestinians chose their mother a long time ago. We, under the left, have not yet decided." Responding to the claim made by rights activists and leftist politicians that the demographic argument was racist, Avraham Tal (2006), columnist for the liberal *Haaretz* newspaper, wrote: "It should be said without hesitation: An effective barrier must be placed against the flooding of the State by foreigners, especially Palestinians, who might threaten its character as a national home for the Jewish people."

Other more apologetic speakers of the nationalist discourse justified its priority over the rights discourse in liberal terms, relying on norms of international law. Thus, Amnon Rubinstein (2005), a constitutional expert and former MK from a liberal pro-rights party, stated:

> International law recognizes the right of peoples to self-determination. This is the basis of nation-states of which Israel is one. This recognition includes acknowledging the right of such a people to protect this right, that is, to be a majority in its own state . . . . Israel, like any democracy, must be of limited sovereignty and subject to human rights law. But nothing in this law requires a people to lose its right to self-determination.

19. All quotations from primary sources are originally in Hebrew; translations to English are mine.

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The two rival discourses in the public debate—the rights discourse and the nationalist discourse—diverged in their approach to national identity and belonging and reflected different moral logics. First, the nationalist discourse placed the national collective at its center, emphasizing the protection of the state's borders, demographic make-up and national identity, whereas the rights discourse revolved around individuals and their rights. Group generalization, condemned by rights discourse as "profiling" and "racism," was fundamental to nationalist discourse.

Second, for the nationalist discourse, the state's collective identity was not just another public interest to be measured against rights according to balancing formulas of constitutional law. This identity was constitutive and non-negotiable. For rights discourse, on the other hand, once a rights violation was identified, it required justification by a legitimate and overriding public interest. Each discourse thus had a different starting point. For the rights discourse, universal human rights preceded the state, which was regarded as an instrument for their protection. The nationalist discourse, on the contrary, gave precedence to state sovereignty: it is the bounded state with its particular national identity that grants rights to the individuals within it.

Third, each discourse framed the issue at hand differently. Nationalist discourse framed family unification with noncitizens as an immigration issue, involving national sovereignty to protect borders and identity. As one columnist wrote, "[t]here is no state in the world that allows immigration from enemy states, whose aim is to destroy the constitutive ethos of that state" (Yemini 2009). The rights discourse, on the other hand, framed the amendment as raising a question of domestic constitutional law involving conflicting rights and interests and their proper balance. This discourse thus focused on the rights violations of Israel's Arab citizens who were prevented from living in Israel with their family members. The amendment was described as an apartheid law and as a threat to democracy due to its generalized discrimination against Arab citizens—the only citizens effectively influenced by it. The clash between the different framings was made explicit in both legal and public debate. The rights-oriented perspective that ignored the potential effect of Palestinian immigration was described in the media as utopian and detached from the local reality of national conflict (Dankner 2005; Taub 2005). In the legal sphere, Justice Aharon Barak's opinion in the *Adalah* decision represented the domestic constitutional framing and Justice Mishael Heshin's opinion the immigration framing. As one judge wrote, in agreement with Justice Heshin: "I, too, am of the opinion that the constitutional question cannot be laid bare from its dress of reality. The question should not be placed in a non-existent world—in another planet. The constitutional question is under discussion now and here—in an aching state existing on a burning piece of land."[20]

As indicated above, despite its toll on the rights of Israeli (Arab) citizens, the amendment was justified by nationalist discourse from within the liberal camp as well by academics, politicians, and media commentators generally supportive of rights discourse and constitutionalism. The conflict between rights and collective identity as internal to the liberal ethos was clearly put by the liberal constitutional scholar

20. *Adalah*, Justice Rivlin's opinion, para. 8; see also Justice Heshin's opinion, para. 1, explicitly criticizing Justice Barak's framing as utopian. On the inherent tension between collective sovereignty and individual human rights as reflected in the *Adalah* decision, see also Bilsky 2009.

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Amnon Rubinstein (2005) in an editorial piece: "The claim that human rights entail Israel's suicide—since without a Jewish majority there is no Israel—endangers the status of human rights, whose real protection is so important especially in this period."

The dominant strategy of rights proponents in the public debate was to ignore the competing logic and framing of the nationalist discourse and to adhere to the rights discourse. No real effort was made to contend with the alternative framing of the issue, as one of immigration and protection of national boundaries. When this claim was addressed by speakers of the rights discourse, they explained that immigration policy was subject to domestic constitutional law and warned of the slippery slope of applying demographic considerations to the rights of Israeli citizens.[21] No real attempt was made by proponents of the rights campaign in the public debate to engage with the collective logic of national sovereignty and belonging that enjoyed widespread support, including in the liberal camp.[22]

Selection Committees in Community Settlements: Protecting National and Social Identity

The legal struggle against committees that screen applicants to "community settlements" on state-owned land began with a petition filed by a leading human rights organization, the Association for Civil Rights in Israel (ACRI), on behalf of an Arab couple —the Ka'adans—following the refusal to allocate them a plot in the town of Katzir. This case aimed to challenge the long-standing policy of establishing settlements for Jews only, implemented by granting powers of land allocation to non-state parties like the Jewish Agency. After failed attempts to settle the case outside of court, the HCJ ruled in 2000, in the precedent-setting decision *Ka'adan v. Israel Lands Administration*, that when allocating public land by itself or through a third party, the state could not discriminate on the basis of national identity.[23] In justifying its decision, the court referred, *inter alia*, to American jurisprudence rejecting the doctrine of "separate but equal." The dramatic ruling enjoyed little public or political support. Its implementation was effectively thwarted by official bodies, and efforts to anchor the legality of selection committees in legislation began soon after the ruling.

These efforts finally bore fruit in 2011, with the enactment of an amendment known as the "Selection Committees Law."[24] While formally forbidding group discrimination, the amendment granted selection committees wide discretion to reject applicants "unsuitable" to the social-cultural character of the community. The new law was challenged immediately by human rights NGOs as an unconstitutional violation of human rights, primarily of the right to equality. In a majority ruling in *Sabah v.*

21. See, for example, Carmi 2005; Jabareen 2005; Stopler 2006.

22. More serious attempts to respond to the nationalist discourse were made in academic writing by supporters of the human rights camp. See Davidov et al. 2005; Gans 2005; Ben Shemesh 2006; Gross 2008; Medina and Saban 2009. These too, however, rested on the normative assumption that human rights precede and override state sovereignty. Other academic commentators recognized the inevitable clash between the logics. See Carmi 2007; Bilsky 2009.

23. *Ka'adan v. Israel Lands Administration*, HCJ 6698/95, 54(1) PD 258 (2000).

24. Amendment to the Cooperative Societies Ordinance, 2011, No. 8, 5771-2011, SH 683.

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Knesset in 2014, the HCJ rejected the petitions as unripe for adjudication, and the law remains in force to this day.[25]

The main oppositional discourse following the *Ka'adan* ruling was a nationalist discourse, and, like in the debate over family unification, it was voiced from within the liberal camp as well. Selection committees were justified by the centrality of Jewish rural settlement in Zionism and the need to fortify Jewish territorial sovereignty in face of persisting national conflict.[26] Speakers of the nationalist discourse in parliament, in the media, and in academia stressed the constitutive significance of Israel's character as a Jewish state. The hierarchy between the state's attributes was laid out clearly by Minister Danny Naveh, with the Jewish element as constitutive and the democratic element as contingent:

> When the Jewish people returned to its land, the Land of Israel, and built its national home here . . . it is first and foremost a national home for the Jewish people . . . . The U.N. made its historic decision which means that a state will be established in the Land of Israel as the national home for the Jewish people; not a state of all its citizens . . . . We, according to our moral standards, first of all as Jews, defined our state and determined it as democratic.[27]

The nationalist discourse on the HCJ's decision stressed the disparity between the Jewish and liberal-democratic elements of the state, rejecting Justice Barak's interpretation in *Ka'adan* that viewed these values as being consistent. Some speakers explicitly stated that, when in conflict, the preservation of Israel's Jewish character should take precedence over equality and individual rights.[28]

Several years later, during the public debate over legislation of the Selection Committees Law, the nationalist discourse disappeared almost completely, except on the extreme right, making way for what I call a community discourse.[29] This discourse also dealt with collective identity, but on the social level, of the different group identities existing among citizens. While the nationalist discourse presented Jewish settlements as a means to realize national goals, the community discourse highlighted the communal nature of settlements as a value in itself. As explained by one of the MKs who proposed the amendment (Shai Hermesh, of the centrist Kadima Party), "[t]he purpose is the community settlement, the purpose is social cohesion, the purpose is the homogeneity of a small community settlement . . . . The land is a means."[30] In response to petitions filed against the amendment, organizations representing rural

25. *Sabah v. Knesset*, HCJ 2311/11 (September 17, 2014), Nevo Legal Database (by subscription, in Hebrew).

26. One-fifth of Israel's citizens are Palestinian Arabs.

27. Knesset plenum, July 15, 2002, DK (2002) 29, 62 (in Hebrew), http://fs.knesset.gov.il/15/Plenum/15_ptm_533064.docx.

28. See, for example, MK Shalom Simhon, Knesset plenum, March 28, 2000, DK (2000) 8, 31 (in Hebrew), http://fs.knesset.gov.il/15/Plenum/15_ptm_532784.docx; Steinberg 2001, 31; Shetreet 2003, 65.

29. The near disappearance of nationalist discourse from the debate can be explained both due to the draft bill itself, which ostensibly forbade national discrimination and purported to comply with the *Ka'adan* decision, and due to changes in the political climate.

30. Constitution, Law and Justice Committee, June 8, 2010, 22 (in Hebrew), http://fs.knesset.gov.il/18/Committees/18_ptv_140562.doc.

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settlements argued that at the heart of the disagreement lie "the values of community" and that the rival parties differ between "a pure liberal worldview that applauds the rights of the individual and places him (alone) at the center" and the "principles of social commitment and responsibility of the individual toward his community."[31]

The community discourse rejected the view that separation between different communities reflects racism or discrimination. It denied the relevance to the Israeli context of American jurisprudence on "separate but equal," stressing that many sectors in Israel, and the minority Arab sector in particular, prefer living in their own communities. Shared national, religious, or cultural identity and even homogeneity were portrayed as key to healthy and harmonious communal life. As stated by representatives of rural settlements in their legal brief, the practice of screening "creates a mechanism that allows social homogeneity, so that a community can live in harmony, and with less friction between its individual members."[32] Speakers of the community discourse made frequent use of rights language in justifying selection committees. They cited, *inter alia*, the right of residents to autonomy and freedom of association, the right to develop one's personality in a communal framework, and the right to choose one's way of life and residential environment. Thus, for example, one of the amendment's initiators (MK David Rotem) argued in the Knesset: "One of the basic rights in a democratic society that you are always shouting about is a person's right to decide on his living space, on his friends . . . . And so when a group comes together to create a residential community, it is entitled to decide who will be its members and its neighbors."[33] Rights-based arguments supporting the community discourse, supplied by scholarly articles following the *Ka'adan* ruling,[34] were thus adopted by political and social actors in the public debate on the amendment in order to defend in liberal terms the legalization of screening.

Alongside skepticism regarding the value of community as the real motivation behind selection committees, the human rights camp's response to the community discourse was to present a different vision of community. In the alternative conception, a community is not based on the shared identity of its members but, rather, on their choice and contribution to communal life. As stated in the legal brief of one of the petitioning NGOs, "[t]here is no causal relation between social-cultural homogeneity and cohesion in a small community. A community can be homogenous and divided or pluralist and united."[35] The idea of discrete, homogenous communities was condemned as destructive: separation between residential communities would legitimize the exclusion of minorities and marginalized groups, would widen socioeconomic gaps, and would produce a society divided into alienated sectors. A leftist MK, Dov Henin, warned that screening "will turn Israeli society into a piece-meal system of closed, selective communities, and that's the surest way to damage this society—not just

31. Response of Center of Regional Councils and Moshavim Movement in *Sabah*, para. 43 (in Hebrew), https://law.acri.org.il/he/wp-content/uploads/2011/06/tguva-4-5-2504.pdf.

32. Response of Center of Regional Councils, para. 89.

33. Knesset plenum, December 9, 2009, 77 (in Hebrew), http://fs.knesset.gov.il/18/Plenum/18_ptm_185364.doc.

34. For example, see Gavison 2001; Zilbershats 2001.

35. *Sabah* petition, para. 123 (in Hebrew), https://law.acri.org.il/he/wp-content/uploads/2011/03/hit2311.pdf.

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the minority, but the whole social fabric."[36] The alternative social vision was pluralistic and multicultural, as presented by another leftist MK, Daniel Ben-Simon: "The strength of Israeli society is in its complexity, in joining rather than separating . . . . Ways need to be found to draw groups nearer each other, whether Arabs, Jews, immigrants from the Soviet Union, religious, ultra-orthodox . . . . Any separation will damage the very special fabric of Israeli society."[37]

This integrationist vision was clearly a minority view, supported mostly by NGOs promoting Jewish-Arab coexistence and by a few Jewish politicians on the left. It was not endorsed by representatives of the Arab public in the Knesset or in civil society, who repeatedly stressed the general preference of Arabs in Israel to live in their own towns and villages. Their central demand was equality for Arab municipalities on the collective level.[38] Adalah, a leading NGO specializing in Arab minority rights, did file a petition against the constitutionality of the Selection Committees Law, with NGOs representing other marginalized groups (Jews of Middle Eastern and North African descent; LGBT). However, unlike the petition filed by ACRI, the general human rights organization behind the earlier *Ka'adan* case, which challenged the very vision of separate, homogenous communities, Adalah's petition challenged the law based on its violation of individual rights only.

Detention of African Asylum Seekers: Encountering a Local-Nativist Discourse

The third case involved government policy toward the approximately fifty thousand African asylum seekers living and working in Israel. Mainly from Eritrea and Sudan, they had entered across the Egyptian border and could not be deported to their home countries. Most of them lived in the poor southern neighborhoods of Tel Aviv. In 2012, the Knesset passed an amendment to the Infiltration Law[39] providing for their unlimited detention in a remote desert facility near the Egyptian border. Human rights NGOs challenged the law as an unconstitutional breach of rights, and the HCJ ruled unanimously in favor of the petition. A new amendment was passed, with certain changes, and was again ruled unconstitutional by the HCJ. Three such rounds of legislation and constitutional challenge occurred between 2012 and 2015, alongside widespread public opposition to the HCJ's intervention and political threats, including legislative proceedings, to curb its powers. The third time that the amendment was brought before the HCJ it declared, contrary to its own precedent, that detention of non-deportable undocumented migrants was permissible, ruling only the length of the detention period as disproportional. The purpose of detention approved by the court

36. Knesset plenum, December 9, 2009, 83.

37. Constitution, Law and Justice Committee, February 10, 2010, 19–20 (in Hebrew), http://fs.knesset.gov.il/18/Committees/18_ptv_139968.doc.

38. See, for example, all the Arab members of the Knesset (MKs) who spoke in the Knesset plenum, July 15, 2002; Jabareen 2001.

39. Prevention of Infiltration (Offences and Jurisdiction) Law (Amendment no. 3 and Temporary Provision), 5772-2012, SH 2332.

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was alleviating the situation in city centers with a high concentration of migrants, specifically in south Tel Aviv.

As in the case of Palestinian family unification, some of the public opposition to the legal challenge was voiced in terms of a nationalist discourse. Immigration from Africa was portrayed as an existential threat to Israel as a Jewish state, given the potential of millions more coming if Israel were to present a "liberal" policy toward the migrants already present. This discourse was heard especially from right-wing politicians and NGOs.[40] However, following the construction of a physical barrier along the Egyptian border that brought new entries to a virtual stop, it became difficult to depict some fifty thousand Eritreans and Sudanese already living and working in Israel as a threat to its national identity.

A different oppositional discourse focused on the situation in the poor neighborhoods of South Tel Aviv, where African migrants had effectively doubled the population. This was a local-nativist or autochthonous discourse led by activists from South Tel Aviv (Betz 2007; Mepschen 2019). At its center was the need to protect the neighborhoods from the massive presence and influence of migrants. This discourse enjoyed high visibility in the Knesset due to the patronage granted to South Tel Aviv activists by the head of the Interior Committee, where amendments to the Infiltration Law were debated and prepared. This local-nativist discourse thus resonated extensively in the political sphere and in the media and finally won out in the legal sphere, when the HCJ confirmed the detention of migrants to protect the native residents of South Tel Aviv.

The nativist discourse was one of difference, of "us" and "them." It posited clear boundaries of identity—cultural, religious, national, and social—between two defined groups: veteran Jewish Israeli residents with an attachment of belonging and proprietorship to the neighborhoods, and the foreign migrants. Metaphors of conquest and occupation were in frequent use. The migrants were portrayed as invaders who had occupied neighborhoods and turned their original inhabitants into strangers in their own home. These are some of the statements in this spirit made by South Tel Aviv activists in the Knesset and in the media: "The neighborhoods in South Tel Aviv have been taken from their residents and have become a foreign land" (Goren 2014); "There's a feeling in the Neve Sha'anan neighborhood that they own the neighborhood. It's their city with their rules";[41] "We've become an ethnic minority. Totally";[42] "I'm a refugee in my own neighborhood."[43]

40. See, for example, Interior Minister Gideon Sa'ar: "According to official UN estimates, in Africa there are over 30 million Africans wandering around the continent, outside their state of origin, searching for a state to which to immigrate . . . . If Israel decides to be the liberal marker in the West on illegal infiltrators, the equation is simple and harsh . . . . We will bring upon ourselves the demise of the only Jewish state." Knesset plenum, November 25, 2013, DK (2013) 87, 88–89 (in Hebrew), http://fs.knesset.gov.il/19/Plenum/19_ptm_262855.doc. On this type of discourse around the issue of asylum seekers, see also Paz 2011; Kalir 2015; Duman 2015.

41. Dan Pe'er, Internal Affairs Committee, March 26, 2014, 25 (in Hebrew), http://fs.knesset.gov.il/19/Committees/19_ptv_277596.doc.

42. Unidentified speaker, Internal Affairs Committee, October 6, 2014, 16 (in Hebrew), http://fs.knesset.gov.il/19/Committees/19_ptv_302237.doc.

43. Emmanuel Dudai, Internal Affairs Committee, December 2, 2014 (first session), 35 (in Hebrew), http://fs.knesset.gov.il/19/Committees/19_ptv_304663.doc.

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Contrary to the nationalist discourse, the local-nativist discourse did not deal with a symbolic or potential threat to the state's Jewish nature. Rather, it stressed the local and concrete threat to the character of the neighborhoods, as expressed in daily life in tangible, visible ways. As one local resident responded to a journalist who asked how the neighborhood had changed: "Once it was an observant neighborhood. Many synagogues. Now there are many Sudanese, Ethiopians, Eritreans" (Smit 2012). Or: "Whole neighborhoods have lost their uniqueness, have lost their character. It's obvious to anyone who walks around Hatikva or Shapira neighborhoods."[44] Residents complained of migrants not respecting local customs, on Yom Kippur, for example,[45] of shops being open on Saturdays ("I don't feel like this is a Jewish place"),[46] of shop signs not being in Hebrew.[47]

The complaints were not limited to changes in the character and social-cultural identity of the neighborhoods. The heavy burden placed on the infrastructure and services in the already poor and neglected neighborhoods, and the (at least subjective) feeling of insecurity and rising crime due to the migrants' presence, were also common complaints. However, the foreign identity of the migrants, their "otherness," was a dominant theme in the oppositional discourse, inseparable from the material complaints regarding their presence. This discourse of difference contrasted sharply with the rights discourse that emphasized common humanity. Rights activists and their supporters went to great lengths to portray the individuality and subjectivity of African asylum seekers as having ambitions and desires beyond the physical needs met in a detention center. In all spheres—legal, parliamentary, media—asylum seekers were brought to the fore as individuals with life stories arousing empathy and identification that transcend cultural difference.

An additional boundary that the nativist discourse drew between "us" and "them" was ethical. When comparing the duty of concern toward migrants versus veteran Israeli residents, the nativist discourse stressed the latter's priority in light of obligations of in-group solidarity and loyalty. This ethic was often expressed through the Talmudic directive: "[T]he poor of your city take precedence." For example, MK Miri Regev, head of the Knesset Internal Affairs Committee and a leading figure opposing the rights campaign, said to representatives of human rights NGOs at a committee hearing: "We are not different from you, from human rights organizations. We believe everyone should live in their place in peace and dignity. But in the end what guides us is 'the poor of your city take precedence,' what to do?"[48] And on another occasion: "The universal rights of migrant workers are important, but no less important are the rights of South Tel Aviv residents, of loyal citizens who do military service and pay taxes."[49] Again, the contrast

44. Arnon Giladi, Internal Affairs Committee, November 27, 2013, 24 (in Hebrew), http://fs.knesset.gov.il/19/Committees/19_ptv_264233.doc.

45. Arnon Giladi, Internal Affairs Committee, September 17, 2013, 4 (in Hebrew), http://fs.knesset.gov.il/19/Committees/19_ptv_258405.doc; Oved Hougi, Internal Affairs Committee, September 17, 2013, 33.

46. Resident interviewed, cited in Arad 2014.

47. Response of Eitan Organization (representing South Tel Aviv activists) in *Gavriselasi v. Knesset*, HCJ 8425/13, para. 39 (in Hebrew), https://law.acri.org.il/he/wp-content/uploads/2014/03/hit8425eitan.pdf.

48. Internal Affairs Committee, December 2, 2013, 52 (in Hebrew), http://fs.knesset.gov.il/19/Committees/19_ptv_268322.doc.

49. Internal Affairs Committee, September 17, 2013, 36.

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of this ethic with the universalist rights discourse was stark, the latter stressing the increased duty of concern to those whose otherness marginalized them and rendered them politically powerless and defenseless. While in the other two cases, as described above, opposition to the legal challenge came from within the liberal camp as well and was couched in rights terms, oppositional discourse in this case was expressed in non-liberal, traditional-communitarian terms that stressed the moral value attached to boundaries of identity and concern (Fischer 2016; Mizrachi 2016; Mizrachi and Weiss 2020).

The human rights camp, in response, did not contend with the central claim of the local-nativist discourse, which enjoyed wide public sympathy—namely, that the poor neighborhoods of South Tel Aviv, lacking the socioeconomic barriers that shielded more affluent areas, were entitled to protection from being transformed by the massive influx of migrants. The symbolic harm expressed by South Tel Aviv activists and residents—of losing their feeling of ownership and belonging in their neighborhoods and of being "taken over" by foreigners—was not registered by the human rights camp. The latter acknowledged only the material harm caused by the sharp rise in the neighborhood's population—irrespective of the newcomers' identity—and demanded that the government invest in these neighborhoods to improve their services and infrastructure. South Tel Aviv activists rejected this reading of the situation. When an MK said that, regardless of the migrant issue, the government should address poverty in South Tel Aviv and improve services there, including educational services; activists rejoined: "What education? Our school has been taken over"; "First give us back our school, give us back our public space."[50]

Rather than contending with the identitarian claim made by the nativist discourse, speakers from the human rights camp often labeled opposition to the migrants' presence as racist, xenophobic, and even "evil" (Levy 2012). The connection claimed between the dire situation in South Tel Aviv and the presence of African migrants was sometimes attributed to incitement by opportunistic right-wing politicians, given that these neighborhoods had already been poor and neglected prior to the migrants' arrival. Few voices from the human rights camp explicitly addressed the issue of identitarian boundaries and criticized the aspiration to separate between native Israeli residents and African migrants, expressing an inclusive and pluralist social vision.[51] Thus, for example, the liberal *Haaretz* (2013) daily wrote in an editorial: "In our dream: Gabriel from Sudan and Miriam from Eritrea go to school, get an education, their parents work, and together they become part of the diverse social fabric of Israel."

In the public arena, rights activists did call for policies that would reduce the concentration of migrants in South Tel Aviv, but this call was not backed by legal action.[52] The legal challenge was directed only against the detention of asylum seekers, leaving unaddressed the problem of their disproportionate presence in South Tel Aviv. This

50. Internal Affairs Committee, December 2, 2014 (first session), 52–53.

51. See, for example, the petition filed in *Gavriselasi*, para. 119, https://law.acri.org.il/he/wp-content/uploads/2013/12/hit8425.pdf.

52. In fact, human rights non-governmental organizations had challenged the constitutionality of a regulation aimed at the geographic dispersal of asylum seekers, leading to its cancellation. *African Refugee Development Center v. Interior Minister*, HCJ 5616/09, https://law.acri.org.il/pdf/petitions/hit5616.pdf.

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very issue, however, was in the end the basis for the HCJ's departure from its own precedent that prohibited detention of non-deportable migrants. The wording of its third decision in *Desta v. Knesset* highlights how far the HCJ strayed from the individualistic logic of rights constitutionalism and adopted the collective logic of belonging, identity and boundaries exemplified by the nativist discourse:

> I come back to the main purpose of the Law ... to prevent settling down in city centers. This purpose is not focused on the *individual* infiltrator or on the danger he poses to society; it has to do with the need to alleviate the *general* burden on the city centers and particularly on their inhabitants. I believe that to fulfill this purpose there is no need to keep any *specific* infiltrator in the detention facility. It suffices to keep a group of *various* infiltrators in the detention center .... It is enough that at any given moment part of the population of infiltrators ... is distanced from the city centers.[53]

The nativist discourse, which places collective identity above equal individual rights in determining entitlement to state protection, thus finally defeated the rights discourse not only in the political sphere but also in the legal sphere.

The Institutional Challenge to the Priority of Rights Constitutionalism over Democratic Politics

In all three cases, it was not only the substantive positions of the human rights camp that met public opposition but also the attempt to impose them coercively through legal action. The legitimacy of liberal constitutionalism as a counter-majoritarian institution was expressly challenged regarding the issues at stake in these legal campaigns. This challenge was what made these cases stand out among many others, no less sensitive and politically controversial, in which public disagreement over judicial intervention for human rights did not lead to denial of its legitimacy or to political backlash.[54]

Following the *Ka'adan* ruling on selection committees, which addressed the meaning of Israel's character as a Jewish state and supported Jewish-Arab integration, critics of the ruling portrayed the HCJ as representing a radical, "post-Zionist" view and as detached from local reality. This depiction of the *Ka'adan* ruling was not exclusive to an extremist minority but reflected a widely held view. In the words of MK Shalom Simhon from the center-left Labor Party:

> The HCJ ruling on Katzir would have been appropriate had it come at the right time, that is, in fifty years. We want to resemble the most enlightened of

53. *Desta v. Knesset*, HCJ 8665/14 (August 11, 2015), Nevo Legal Database, Justice Naor's opinion, para. 100 (by subscription, in Hebrew) (emphasis in original). Justice Naor's opinion, quoted in the text, was the central opinion for the majority. One of the concurring judges, Justice Fogelman, explicitly expressed his concern (para. 18 of his opinion) regarding the collectivist logic of separating one group of residents from another, hinting at its inconsistency with the individualist logic of liberal constitutionalism.

54. See note 9 above and accompanying text.

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> states that harbor equality, freedom and democracy, but they too achieved that after hundreds of years during which they consolidated their national character, and even today they compromise principles when necessary for the sake of national goals . . . . Our state is still struggling to establish its image and borders as the state of the Jews, and we haven't yet arrived at the longed-for peace. Important as this ruling may be and as exalted its intentions, to my mind it preceded its time.[55]

The issue of Palestinian family unification was portrayed by oppositional discourse as falling squarely within state sovereignty to protect its national identity and borders and as inappropriate for judicial intervention. The constitutional scholar Ruth Gavison (2008), for example, wrote in an editorial following an interim court decision: "This issue clearly raises the question of the proper scope of judicial review over legislation and of who should have the final word on such issues at the root of Israeli society's security and identity." A columnist in the liberal *Haaretz* daily explained the need for preventing court intervention in the Citizenship Law: "A basic law should be legislated declaring the existence of a national home for the Jewish people in the Land of Israel and the preservation of its Jewish majority as a fundamental principle, according to which any statutory or administrative action is to be measured" (Tal 2006).

Critics of the legal campaign to protect the rights of African asylum seekers viewed it as ignoring the Israeli residents of South Tel Aviv affected by the substantial presence of migrants in their neighborhoods. During one of the court sessions, a call was heard from South Tel Aviv residents attending the hearing: "We're not transparent—you don't see our suffering!" (Lior 2013). At a session of the Knesset Interior Committee, an activist from South Tel Aviv said: "It [the HCJ] doesn't protect us. When in all of its ruling did it agree with us even once? . . . It abandons us in its ruling."[56] The HCJ was portrayed as an elitist, non-representative body detached from local lived experience and values. "The Court was appointed to do justice, not only universal justice, also justice with the citizens of this state, who pay taxes, who do military service."[57] Human rights NGOs acting to protect migrants' rights were described as hypocritical in their indifference to the suffering of their compatriots. As one South Tel Aviv activist was quoted at a protest: "All those bleeding hearts preaching to us—I want to say you are hypocritical, there's no way that my son and my daughter can't go outside and the Sudanese have rights" (Lior 2010). A legal brief submitted on behalf of South Tel Aviv residents accused human rights NGOs of trying to silence the residents of South Tel Aviv, intentionally omitting their suffering from the arguments presented in court.[58]

Opponents of the rights campaigns depicted agents of rights constitutionalism—the HCJ and human rights organizations—as committed primarily to the liberal, universal logic of human rights and as lacking similar commitment to a local and particular ethic that values collective belonging. In the oppositional discourses, the HCJ did not appear as a professional, neutral, and consensual body above political controversy.

55. Knesset plenum, March 28, 2000, 31.
56. Internal Affairs Committee, October 6, 2014, 10.
57. Internal Affairs Committee, September 17, 2013, 3, MK Miri Regev.
58. Response of Eitan organization (representing South Tel Aviv activists) in *Desta*, paras. 4, 34.

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Rather, it was identified with a partisan—and minority—position. Bringing questions of collective identity and social boundaries to constitutional adjudication was described as an illegitimate bypass of the political field and as an attempt to use the force of law to impose a liberal worldview far removed from the mainstream and certainly not consensual.

THE CHALLENGE OF BELONGING

What emerges from the above findings, then, is that judicial intervention for human rights was successfully challenged by discourses that attached higher value to collective belonging than to the protection of human rights. Although the issues involved varied as did the oppositional discourses, what the public controversy surrounding the three cases had in common was a perceived conflict between rights and collective belonging and an ensuing clash between two ethics: an inclusionary rights ethic prioritizing the protection of individual human rights and an exclusionary ethic of belonging prioritizing the protection of collective identity and boundaries. I propose to conceptualize this type of challenge to liberal constitutionalism as a distinctive discursive challenge: the challenge of belonging. In this section, I will first describe this concept and its contribution to theory on the crisis of liberal constitutionalism. I will then expand on the connection between the challenge of belonging and philosophical critiques of rights liberalism, which helps explain the power of this challenge.

Conceptualizing the Challenge of Belonging

As a tool for analyzing social controversy over rights constitutionalism, the challenge of belonging highlights two aspects. The first is the circumstantial factor that evokes disagreement: a publicly perceived conflict between the protection of rights and the protection of collective identity. The second aspect is the normative basis for opposition: an ethic of belonging that rejects the prioritization of universal rights over particular, collective belonging. This concept thus captures a distinctive type of challenge to rights constitutionalism, which is not recognized in existing explanations of its crisis of legitimacy. Two features of the challenge of belonging—both apparent in the case studies above—enhance its contribution to understanding this crisis: first, it is internal to liberal ethos and discourse; and second, it is a challenge to a certain aspect of rights constitutionalism and not to the institution as such. I will expand on each.

In two of the three case studies—that of Palestinian family unification and that of selection committees—discourses of belonging that justified rights violations were voiced from within the liberal camp and in rights terms. The nationalist discourse used in both cases claimed priority for protecting Israel's identity as a Jewish state, citing the collective right to national self-determination. The community discourse that justified selection committees invoked various individual rights, including freedom of association and the right to community. The conflict between human rights and collective identity was thus an intra-liberal conflict that divided the liberal camp—generally

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supportive of human rights and constitutionalism—between those who supported judicial intervention in these cases and those who opposed it.

The challenge of belonging as emanating from within the liberal ethos might be especially useful for understanding the crisis that liberal constitutionalism faces in Western democracies characterized by a deep-rooted liberal political culture. Diminishing social support for rights constitutionalism cannot be attributed in these settings to an enduring non-liberal political culture, as it can in newer and non-Western democracies. When one recognizes collective identity as a value existing inside the liberal worldview, albeit in tension with individual rights, one might better understand why the challenge of belonging can arise even in predominantly liberal settings.

Indeed, the key to understanding growing attraction to anti-liberal movements and ideologies in Western democracies, according to some analyses, is the erosion of collective frameworks. These are structures—national or social—that grant people a sense of belonging and security in face of various forces threatening the stability of their world. Scholars of Western Europe emphasize the weakening of the nation-state due to globalization, European integration, and immigration (Gauchet 2017; Weiler 2018). Research on the United States points to a loosening sense of social and national belonging in light of perceived threats to traditional values of (white, Christian) American identity coming from minorities, immigrants, and a liberal elite championing their rights (Hochschild 2016; Wuthnow 2018; Traub 2019; on Europe, see also Brubaker 2017). In either case, when collective frameworks are perceived as insecure, the need to preserve them and fortify their boundaries is liable to take priority even for rights-espousing liberals, rendering the preeminence of human rights—on which liberal constitutionalism rests—difficult to justify in the sociopolitical sphere.

The second feature of the challenge of belonging helps explain why in some of its manifestations, what appears to be a general crisis of liberal constitutionalism is in effect a more limited challenge. As some researchers have observed regarding Western and Northern Europe, for example, deeper empirical examination shows that popular or populist attitudes are in fact not directed against human rights or liberal values and institutions as such. Rather, popular discontent focuses on those aspects—especially concerning immigrants and cultural minorities—perceived as creating a civilizational, identitarian threat (Brubaker 2017) or a security threat (Hartmann and White 2020). A challenge of belonging will give rise to differential and selective public opposition to rights constitutionalism. Such opposition does not reject the values or institutions of rights constitutionalism as a whole but only the prioritization of rights over boundaries of collective identity. In those many contexts where rights protection is not viewed as conflicting with collective identity, liberal constitutionalism may continue to enjoy wide support and social legitimacy.

As an analytical tool, the challenge of belonging can thus shed light on mixed social attitudes toward liberal constitutionalism. Unlike analyses that connect social opposition to environmental factors, the challenge of belonging cannot be directly attributed to general sociopolitical characteristics or conditions of a polity, such as the persistence of non-liberal political culture or political polarization. Rather, it emerges in specific contexts where the usually latent tension between rights and collective belonging surfaces as a political conflict that demands prioritizing one over the other. Whether or not the tension between rights and belonging in these situations

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indeed develops into overt political conflict, and how this tension might be maneuvered by "political entrepreneurs" to do so (De Vries and Hobolt 2020), are questions highly dependent on the sociopolitical environment.[59] The challenge of belonging never stands alone but, rather, appears in interaction with various environmental conditions. Hence, its usefulness to explain selective opposition to liberal constitutionalism must always be examined in light of existing conditions in particular settings. However, recognizing the challenge of belonging allows us to identify those situations that are conducive to arousing conflict over the tension between rights and belonging and that might account for the selective nature of opposition to rights constitutionalism.

One such situation stood out in the case studies above: when rights protection is perceived as threatening boundaries of collective identity and cohesion. Another is when the question of political identity (Taylor 2007) comes up for political or judicial settlement in face of deep societal division over the substance of this identity (Jacobsohn 2010, 271–73; Rosenfeld 2010; Lerner 2011). The conflict between a rights ethic, tending to a liberal, inclusionary definition of political identity, and an ethic of belonging favoring a more substantive, exclusionary definition, might then manifest itself under the appropriate conditions. Though this conflict is usually discussed in the context of constitution drafting (Lerner 2011; Lawoti 2015; Bâli and Lerner 2016), it can also arise when cases involving political identity are brought for constitutional adjudication (Lerner 2018). Judicial adoption of a contested liberal definition is then likely to be denounced by discourses of belonging, challenging the neutral, consensual status of liberal constitutionalism. This was in fact the public reaction to Justice Barak's universalistic interpretation in the *Ka'adan* case of Israel's identity as a Jewish state (on India, compare Tushnet and Bugaric 2020, 28–29).

The challenge of belonging is particularly relevant to understanding cases such as Israel, where the sociological legitimacy of liberal constitutionalism is ambiguous. Judicial intervention on behalf of some of the same groups involved in the case studies, such as the Palestinian Arab minority in Israel and foreign migrants, is normally accepted and not reversed even if highly unpopular. This seems to indicate general public agreement on rights constitutionalism as a constraint on democratic politics. The challenge of belonging can explain why, in the case studies, such intervention was effectively rejected. Similarly, it can account for the political backlash that has occurred against liberal constitutionalism in Israel primarily on issues of collective boundaries, as with the Nation State Law of 2018 that was justified by its proponents as necessary to balance liberal jurisprudence prioritizing human rights over national values.[60] Contrary to this legislation, which enjoys broad political support, other initiatives to weaken liberal constitutionalism through institutional changes are highly contested.[61] They are considered part of an extreme rightist agenda and have as yet been

59. My thanks to the anonymous reviewer who drew my attention to this point and to the relevance of De Vries and Hobolt's work.

60. See, for example, Justice Minister Ayelet Shaked quoted in Hovel 2018. And on Western Europe, where public opposition to human rights or liberal values is focused on certain contexts relating to collective identity and security, see Brubaker 2017; Hartmann and White 2020.

61. Institutional changes that have been proposed include curbing the power of judicial review over statutes, creating an override clause, and establishing a special constitutional court. See Shinar, Medina, and Stopler 2020, 718.

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unsuccessful, with the center of the political spectrum (still) defending liberal constitutionalism from its detractors.

Where additional factors—like political polarization or disagreement on liberal norms—challenge rights constitutionalism, backlash might take the form of a more general attack on liberal constitutionalism and its agents.[62] Indeed, in Israel too, other factors are cited to account for social opposition to liberal constitutionalism: political polarization (Navot and Peled 2009; Mautner 2011; Shinar, Medina, and Stopler 2020); chronic national insecurity (Gordon 2014; Duman 2015); and the prevalence of non-liberal political culture (Hirschl 2014, 43–68; Mordechay and Roznai 2017; Roznai 2018). But without the challenge of belonging, these factors alone—as general characteristics of the sociopolitical setting—cannot account for the differential and selective public opposition to rights constitutionalism.

The Power and Ethical Depth of the Challenge of Belonging: Theoretical Critiques of Human Rights and Liberal Constitutionalism

The essence of rights constitutionalism is in the judicial resolution of conflicts between constitutional rights and other social values and interests. So what distinguishes the clash between rights and collective belonging, such that this conflict calls into question the very legitimacy of judicial resolution? One way to understand why discourses of belonging pose such a powerful challenge to liberal constitutionalism is that they touch on the Achilles' heel of rights liberalism: its implicit dependence on the exclusionary boundaries of collective belonging, which are antithetical to the overtly inclusionary ethic of liberalism.

Hannah Arendt (1958, 291) famously observed: "From the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an "abstract" human being who seemed to exist nowhere." Critiques of rights liberalism's problematic treatment of collective belonging are by now well-trodden ground, though it seems they never quite penetrate the liberal ethos or self-understanding. The anthropological critique exposes the historical and cultural particularity of the rights ethic in its marginalization of collective belonging (Mutua 2008; Mouffe 2014; Abbott 2016). Philosophical critiques point out that, even on its own terms, rights liberalism provides an inadequate account of group identity and belonging. Arendt (1958, 290–302) identifies the paradoxical dependence of human rights on membership in a bounded, particular political community.[63] While assuming exclusionary political belonging, with its associated questions of collective identity and agency, liberal political theory has no say on the constitution and boundaries of political community (Mouffe 2000; Kahn 2005; Song 2018). Communitarian critique adds the dependence of the autonomous, rights-bearing subject—the central concept of rights liberalism—on given social identity and membership (Sandel 1982; Taylor 1989; Nancy 2000).[64] On the normative level, critics

62. As described, for example, for Poland and Hungary (Blokker 2019) or Brazil (Daly 2020).

63. On the problem of political membership and boundaries, see also Walzer 1983; Whelan 2019, 114–16.

64. For useful surveys of the communitarian critique from diverse philosophical traditions, see Avineri and de Shalit 1992; Lacroix and Pranchère 2018, 29–58; Bell 2020. On the liberal contractarian normative

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as early as Karl Marx (1975) have pointed out the insufficiency of human rights as a moral language and its inability to address collective—and markedly political—questions of communal values, attachments, identity, and purpose (Sandel 1982; Glendon 1991; Brown 2004; Gauchet 2017, 647–68; Seligman and Montgomery 2019).

The liberal rights ethic, then, is profoundly challenged by collective belonging. It is challenged by social and political belonging as a fundamental condition of human existence in tension with the Kantian concept of the universal, autonomous subject. It is challenged by the normative significance of given, pre-rational belonging and its associated values of mutual commitment and loyalty that are absent from the liberal moral scheme. It is challenged by the attribution of intrinsic value to the protection and preservation of a particular collective, irrespective of its value or utility to individual members.

In the case studies, these challenges were expressed in social discourses of opposition: the nationalist discourse—couched also in liberal terms—invoked the protection of the identity and boundaries of the state as superior to the protection of individual rights. The community discourse—again, voiced in rights terms as well—invoked the importance of given, pre-rational social identity and challenged a rights ethic that denies the significance of identitarian boundaries. The paradoxical dependence of the individualist rights ethic on political belonging and on given social identity was reflected in the use of rights language on both sides of the debate over Palestinian family unification and selection committees. Rights discourse was revealed as being insufficient to judge between disparate visions of state, society, and community.[65] In the asylum seekers' case, a local-nativist discourse posed an alternative moral logic in which collective values of cohesion, loyalty, and belonging carry no less weight than universal individual rights. This non-liberal discourse rested on the intrinsic moral value of collective identity and boundaries, demonstrating the cultural particularity of the individualist, universal rights ethic.

The challenge of belonging thus mediates between two bodies of scholarship rarely brought into conversation with each other: contemporary analyses of the crisis of rights constitutionalism and theoretical critiques of human rights. Critiques regarding the rights ethic's deficient treatment of collective belonging allow us to appreciate why social discourses that invoke such belonging pose such a powerful challenge to rights constitutionalism.[66]

On the institutional level, liberal constitutionalism shares the limited capacity of the rights ethic to contain claims of collective belonging. The logics of human rights and of collective belonging are historically bound up with each other (Loeffler 2018), and they coexist as necessary and interdependent foundations of any liberal-democratic national order (Mouffe 2000). They are, however, different moral and political logics in inherent and perpetual tension (Mouffe 2000; Wimmer 2002; Taylor 2007). The

ontology of the social sciences, which restricts their ability to address the complexity of group particularity, see also Abbott 2016.

65. On this inadequacy of rights discourse, see Klare 1991.

66. Concepts from cultural sociology, such as "cultural repertoire" and "regimes of justification"—on which I cannot expand here—explain how a weakness of liberal rights theory might translate into a discursive disadvantage for liberal social actors attempting to justify the priority of rights over belonging. See Swidler 1986; Boltanski and Thévenot 1999, 2006; Silber 2003.

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universal, inclusionary logic of rights cannot justify exclusionary boundaries of collective identity without contradicting itself or at least restricting its own application. Situations that bring the two logics into conflict, or appear to do so, thus place liberal constitutional courts in a quandary. On the one hand, their role is to serve as a neutral, consensual arbiter, resolving political discord from a position above and outside politics. On the other hand, in order to fulfill their institutional role of balancing and constraining majoritarian politics, courts must be committed to the rights ethic. In other words, a judiciary responsible for protecting rights cannot serve as an apolitical, neutral arbiter in a political conflict between rights and collective belonging or between disparate conceptions of collective identity. Attempts to adjudicate such conflicts are liable to drag the judiciary into the political arena and place its sociological legitimacy at risk (Lerner 2018; Bassok 2020).

The normative critique regarding the insufficiency of rights language to address collective values also helps appreciate the power of the challenge of belonging. The language and rules of adjudication that guide liberal constitutionalism delimit the analysis of social issues, *a priori*, to the prism of rights: are protected rights being violated, and, if so, are the violations justified? However, the focus of rights discourse on the individual restricts its relevance for communal values (Koskenniemi 1999; Weiler 2018). Legal rights discourse will thus inevitably exclude questions of collective identity and purpose, concealing possible normative and political disagreements on these questions.[67] As described above, the social actors opposed to judicial intervention in the case studies recognized that constitutional framing of an issue in rights terms is not politically neutral but, rather, favors a worldview that belittles collective values relative to individual rights. These actors viewed attempts to couch a liberal social vision in the purportedly neutral language of constitutional rights as bypassing legitimate political debate on this vision.

The sociological phenomenon of opposition to rights constitutionalism, which is often described as a merely circumstantial product of certain historical developments, can be seen through philosophical critiques in a different light. Such opposition, in this light, has ethical significance that reflects on rights constitutionalism itself. The challenge of belonging is the social manifestation of philosophical insights regarding the limits of seeing the social and political world through the prism of human rights. This perspective is inevitably incomplete, restricted by its neglect of the collective dimension of human existence. The primary objective of the rights ethic is to shield individuals from abusive collective power. This individualist ethic cannot produce collective vision or purpose, nor can it account for what binds members of particular political communities and distinguishes one community from another (Koskenniemi 1999; Kahn 2005; Gauchet 2017, 658–76).[68]

On the institutional level, this insight elicits the recognition that rights constitutionalism too is circumscribed to a limited—albeit immensely important—part of social and political life. It is a model that developed and spread globally under historical conditions that demanded checks on state power, and this remains its central role (Weinrib

67. On the concealment of politically contested normative views behind rights language, see Kennedy 1997, 305–35; Koskenniemi 1999; Gavison 2000; Smith 2010.

68. See also Taylor 2007; Lustig and Weiler 2018; Seligman and Montgomery 2019.

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2006; Dowdle and Wilkinson 2017; Lustig and Weiler 2018; Biagi 2019). This rights-centered model, however, does not address additional, collective needs of a polity, including the formulation of common identity, purpose, or good (Brown 2004; Choudhry 2010; Gauchet 2017, 675; Weiler 2018). Liberal constitutional courts, bound by their institutional commitment to protecting rights from the abuse of majoritarian power, are unfit to deal with the challenge that the tension between rights and belonging poses to the sociological legitimacy of rights constitutionalism. It is therefore up to non-court social and political actors, concerned with maintaining this legitimacy, to recognize the challenge of belonging and to strategically avoid bringing rights claims to judicial fora in ways that place rights protection in conflict with collective belonging.[69]

CONCLUSION

In this article, I have introduced the challenge of belonging as a key concept to enhance our understanding of the global crisis facing rights constitutionalism today. It is an empirically grounded concept that captures the ethical dimension of opposition to liberal constitutionalism, largely missing from literature on the crisis. The challenge of belonging emerges when the focus of analysis is diverted from macro processes to a close, qualitative study of discourses used by social actors opposing judicial intervention for human rights in specific contexts. Each of the three case studies presented here reveals a discursive challenge to rights constitutionalism that rests on what I call an ethic of belonging. This is a moral logic that views particular, collective identity as a value no less worthy of protection than the human rights of individuals. Social actors who perceived rights protection as conflicting with the preservation of collective identity and boundaries relied on various discourses of belonging—both liberal and non-liberal—to challenge the legitimacy of rights constitutionalism as a constraint on majoritarian politics.

Unlike most top-down analyses of the crisis of liberal constitutionalism, the challenge of belonging is a theoretical concept based on a sociological, bottom-up approach. By shifting attention to the normative underpinnings of social opposition to rights constitutionalism, this approach complements and enriches explanations that attribute the crisis of liberal constitutionalism to environmental factors: social, political, and economic. This shift of focus also invites a turn to philosophical critiques regarding the limits of the rights ethic *vis-à-vis* collective identity and boundaries in order to appreciate the force and ethical depth of the challenge that discourses of belonging pose to rights constitutionalism.

The sociological approach, which highlights the ethical dimension of antagonism to liberal constitutionalism, provides a theoretical perspective that allows for a nuanced and differentiated understanding of social opposition to rights constitutionalism. The challenge of belonging can explain mixed attitudes in the same polity and even within the same social group regarding rights-oriented judicial intervention. Rather

69. The strategic implications of the challenge of belonging for human rights actors require further elaboration that lies outside the scope of this article. See Alexander 2021, 170–80.

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than characterizing public attitudes toward liberal constitutionalism as generally antagonistic or supportive, they can be understood as context-dependent and differential, depending on the issue at hand and whether it brings out the latent tension between rights and belonging. Moreover, since this tension exists within the liberal worldview itself, the challenge of belonging can explain why support for rights protection might slacken within the liberal camp too, when such protection is perceived as threatening collective boundaries that this camp holds dear. Focused as it is on an ethical clash rather than on the sociopolitical environment, the challenge of belonging can connect between contemporary attacks on liberal constitutionalism in widely varied settings, where this clash is evoked in different ways: from established, Western liberal democracies experiencing new threats to structures of social or political belonging to non-Western democracies with mixed political cultures and polities dealing with contested definitions of national identity.

Rights constitutionalism requires broad and stable public support to fulfill its counter-majoritarian role in a democracy (Fagan 2019; Moyn 2019). The crisis of legitimacy surrounding liberal constitutionalism in various democratic regimes across the globe provides abundant evidence of what can occur when such support is absent. A sociological approach that provides in-depth analyses of public attitudes on rights constitutionalism is thus crucial to appreciating the sources of this crisis. The challenge of belonging, based on such an approach, adds an important theoretical tool to understanding social opposition to rights constitutionalism. It opens new avenues for further research on how this challenge manifests itself in various settings and conditions. More generally, the sociological approach of qualitative discourse analysis offers fertile ground for in-depth empirical exploration of what lies behind increasing global discontent with liberal constitutionalism.

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