Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination and Social Solidarity

Tamar Hostovsky Brandes*

I. INTRODUCTION

Basic Law: Israel as the Nation State of the Jewish People ("the Law") was enacted on July 19, 2018.[1] The Law is the fourteenth and latest Basic Law enacted as part of the incremental, ongoing process of enactment of constitutional norms in Israel.[2] The enactment of the Law triggered an intense public debate in Israel, one that is still far from subsiding.

Opponents of the Law refer to it as racist,[3] shameful, and disgraceful, and demand its immediate repeal. As of August 19, 2018, seven petitions, that oppose the law, have been filed to the Israel Supreme Court ("the Supreme Court").[4] The petitions

* Associate Professor, Ono Academic College, Faculty of Law. I would like thank Peter Berkowitz, George P. Fletcher, Robert Howse, Karin Loevy, Ruti Teitel and Kendall Thomas for helpful comments on previous drafts of this article, as well as the participants of the of the symposium on the Law held at New York Law School in October 2018 and participants of the lecture on the Law I delivered at the Center of Law and Culture at Columbia Law School the same month.

1. Hana Levi Julian, *Basic Law: 'Israel as the Nation-State of the Jewish People' Approved by Knesset 62-55*, KNESSET (July 19, 2018), https://www.jewishpress.com/news/israel/the-knesset/basic-law-israel-as-the-nation-state-of-the-jewish-people-approved-by-knesset-62-55/2018/07/19/.

2. The process is rooted in a 1950 Knesset decision known as the "Harari Decision", according to which the Knesset would enacted a series of Basic Laws which would eventually form, together, the Israeli constitution. *See* SUZIE NAVOT, CONSTITUTIONAL LAW IN ISRAEL (2nd ed., 2016); Gideon Sapir, Daphne Barak-Erez & Aharon Barak, *Introduction: Israeli Constitutional Law at a Crossroads*, *in* ISRAELI CONSTITUTIONAL LAW IN THE MAKING 2 (Sapir, Barak-Erez And Barak eds., 2013).

3. *Retired Justice Jubran: Racist National Law, Hope the High Court Eliminates It*, HAARETZ (July 31, 2018), https://www.haaretz.co.il/news/politi/1.6335538 ("It can be defined as a racist law.").

4. *See generally* Revital Hovel, *24 Druze Politicians File Seventh Petition against Nation State Law*, HAARETZ (Aug. 19, 2018, 10:43 PM), https://www.haaretz.com/israel-news/.premium-24-druze-politicians-file-seventh-petition-against-nation-state-law-1.6390496.

argue that the Law violates equality in various ways, that it hinders recognition of collective rights of non-Jewish minorities in Israel, and that it is premised on the subordination of minorities.[5] The notions of exclusion and offence recur in all petitions.[6]

Proponents of the Law argue that it is a legitimate legal entrenchment of the right of the Jewish people to self-determination, which was, they argue, the justification for the establishment of the state of Israel.[7] They argue that the Law does not violate the principle of equality, which is entrenched, albeit inexplicitly, in a different Basic Law, Basic Law: Human Dignity and Liberty.[8] They further argue that the Law is necessary to balance the Supreme Court's alleged preference of "universal values" over national ones.[9]

The Law contains 11 articles.[10] Article 1 states that the land of Israel is the "historic homeland" of the Jewish people, that the state of Israel is the nation-state of the Jewish people, where they exercise their right to self-determination, and the right to self-determination in the State of Israel is exclusive to the Jewish people.[11] Article 2 declares the state symbols.[12] Article 3 declares "complete and united" Jerusalem to be Israel's capital.[13] Article 4 determines that Hebrew will be the state's language,

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5. *Id.*

6. *Id.*

7. *See, e.g.*, Emanuel Navon, *The Case for Israel's Jewish State Law*, KOHELET (July 18, 2018), https://en.kohelet.org.il/publication/the-case-for-israels-jewish-state-law.

8. *Attorney General Says Israel's Nation State Law Does Not Harm Equality for Minorities*, i24NEWS (Sept. 4, 2018, 3:20 AM), https://www.i24news.tv/en/news/israel/183403-180904-attorney-general-says-nation-state-law-does-not-harm-equality-for-minorities; *see generally* Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters*, *in* ISRAELI CONSTITUTIONAL LAW IN THE MAKING, *supra* note 2, at 269.

9. Revital Hovel, *Justice Minister Shaked: Government Must Return to the People's Control*, HAARETZ (May 18, 2015), https://www.haaretz.com/israel-news/1.656999 ("It seems decision making—governance—is no longer under the control of the people—their elected officials in the Knesset—but is held by the judiciary.").

10. Raoul Wootliff, *Final Text of Jewish Nation-State Law, Approved by the Knesset on July 19*, HAARETZ (July 19, 2018, 3:27 AM), https://www.haaretz.com/israel-news/israel-passes-controversial-nation-state-bill-1.6291048.

11. *Id.*

12. *Id.*

13. *Id.*

and that Arabic will be awarded a "special status."[14] Article 5 determines that the state will be open to Jewish immigration.[15] Article 6 declares the state's commitments to the Jewish diaspora.[16] Article 7 declares Jewish settlement to be a "national value", and states that the state will take actions to promote it.[17] Article 8 determines that the Hebrew calendar will be the official state calendar.[18] Article 9(a) declares Independence Day (*Yom Ha'atzmaut*) to be the official state holiday.[19] Article 9(b) states that Memorial Day and Holocaust Day are official state memorial days.[20] Article 11 determines that the Law can only be changed by a Basic Law that is accepted by a majority of the members of the Knesset.[21]

The questions raised by the Law can be divided into three groups.[22] The first group of questions regards the possible implications the Law may have for individual rights, and, in particular, the right to equality.[23] The second group of questions regards the implications of the Law for possible future recognition of collective rights for non-Jewish minorities, including the Arab-Palestinian and Druze minorities in Israel, or for other forms of accommodation of minorities.[24] The third group of questions regards the manner in which the Law shapes the national identity of Israel, constructs the terms and content of membership in the political community in Israel, and affects social solidarity.[25]

Without familiarity with the political and social context in which the Law was enacted, it is difficult to understand why the

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *See* Tamar Hostovsky Brandes, *Israel's Nation-State Law – What Now for Equality, Self-Determination, and Social Solidarity?*, VERFASSUNGSBLOG (Sept. 9, 2018, 4:00 PM), https://verfassungsblog.de/israels-nation-state-law-what-now-for-equality-self-determination-and-social-solidarity/ (outlining the three groups).
23. *Id.*
24. *Id.*
25. *See, e.g.*, David Sheen, *Israel's 'Jewish Nation-State' Law a Prelude to Annexation*, HAARETZ (July 20, 2018, 10:00 PM), https://www.haaretz.co.il/opinions/.premium-1.6335792 (addressing implications on annexation of the West Bank and Golan Heights).

Law triggered such intense responses and what the Law's practical implications may be. This article argues, in this regard, that the literature on populist constitutionalism provides a useful framework for understanding the issues that the Law raises and the intensity of the public controversy it stirred.

The article proceeds as follows: Section Two places the Law within a populist constitutionalism framework. It explains the political background for the Law's enactment and the public and political discourse around it. It outlines the three groups of questions raised by the Law and explains how each group is linked to the rise of populism in Israel. Section Three examines the Law's main possible implications for equality. Section Four discussed the Law's implications for the self-determination and collective rights of minorities in Israel. Section Five criticizes the Law's construction of exclusionary national identity in Israel, and argues that the Law is likely to negatively affect all-encompassing social solidarity in Israel. Section Six concludes by arguing that while the Supreme Court may be able to mitigate some of the practical concerns raised by the Law in the short term, there is no guarantee that it will continue to do so in the long term, and that in an era of populism, this in itself is concerning. It also argues that the Supreme Court has a limited ability to overcome the harm caused by the expressive force of the Law without striking it down.

II. THE LAW AS CASE STUDY OF POPULIST CONSTITUTIONALISM

The past decade has been characterized by the rise of, what has been referred to by commentators as, "populist" politics.[26] Jan Werner Müller defines populism as "a particular moralistic imagination of politics."[27] A key feature of populism is that

26. *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM 2 (2016); Nadia Urbinati, *Democracy and Populism*, 5(1) CONSTELLATIONS 110, 110 (1998); Paul Blokker, *Populism as a Constitutional Project,* 17(2) INT'L J. CONST. L. 536, 536 (2019); Paul Blokker, *Populist Constitutionalism*, *in* ROUTLEDGE HANDBOOK ON GLOBAL POPULISM 7–113 (Carlos de la Torre ed., 2018); Gábor Halmai, *Is There Such Thing as 'Populist Constitutionalism'? The Case of Hungary*, 11(3) FUDAN J. HUM. SOC. SCI. 323, 323–29 (2018); Marc F. Plattner, *Populism, Pluralism and Liberal Democracy*, 21(1) J. DEMOCRACY 81, 81 (2010); Kim Lane Scheppele, *Autocratic Legalism*, 85 UNI. CHI. L. REV. 545, 545 (2018).

27. MÜLLER, *supra* note 26, at 20.

populists pertain to speak in the name of "the people,"[28] envisioned as an organic, single entity. The will and interests of "the people", not as an aggregation of those of individuals but rather as those of a unitary entity, are both of ultimate moral importance, and, allegedly, the only legitimate basis for political action and law-making.

A key feature of populism is the distinction between "the people" represented by populist leaders and the "corrupt elite".[29] Populists define "the elite" as the enemy and identify the elite with the existing institutional order.[30] David Landau explains that the nature of the "pure people" and the "corrupt elite" differ widely across "different variants of populism."[31]

While not all populist parties are authoritarian or semi-authoritarian, the rise of populism is often associated with the erosion of liberal democracy.[32] The emphasis of collective interests over individual rights, the rejection of deliberative models of democracy, and the denouncement of pluralism all weaken substantive aspects of democracy.[33] In extreme cases, democracy is reduced to mere majoritarianism.[34] In other cases, characteristics of democracy, such as liberal rights to speech and association, remain, but are greatly weakened.[35]

As many scholars have noted, current-day populist leaders employ an array of legal means to weaken opposition and strengthen their control.[36] The result is a legal, gradual, and incremental process of democratic erosion. Tom Ginsburg and Aziz Z. Huq explain that democratic erosion is a slow version of democratic decay.[37] They define it as a "process of incremental, but ultimately still substantial, decay in three basic predicates

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28. *Id.*

29. *See* David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 522 (2018).

30. *Id.* at 526.

31. *Id.* at 524–25.

32. *Id.* at 525.

33. *See id.* at 523–26.

34. *See, e.g.*, Gábor Halmai, *Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective*, https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/09/Illiberal_Constitutionalism_WHK17_Halmai-3.pdf (last visited Sept. 9, 2019).

35. *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 44 (2018).

36. *See* Yascha Mounk & Jordan Kyler, *What Populists Do to Democracies*, ATLANTIC (Dec. 26, 2018), https://www.theatlantic.com/ideas/archive/2018/12/hard-data-populism-bolsonaro-trump/578878/.

37. GINSBURG & HUQ, *supra* note 35, at 45.

of democracy—competitive election, liberal rights to speech and association, and the rule of law".[38] The authors explain that "typically, it does not result in full-blown authoritarianism. Instead, its outcome is some form of competitive authoritarianism, in which elections of a sort still occur, where liberal rights to speech an association are not wholly stifled, and where there is some semblance of the rule of law".[39] Hungary,[40] Turkey,[41] Poland,[42] and Venezuela[43] are all examples of countries in which such processes took place.

Constitutional change is a notable tool in the populist legal toolbox. Paul Blokker argues that while authoritarian leaders were, in the past, assumed to be hostile towards constitutionalism, which was perceived as limiting their power, the relationships of current populist regimes with constitutionalism are more complex.[44] "Populists in power", he explains, "engage in intense reform (and abuse) of the existing constitutional arrangements, in contrast to the idea that populism consists of a merely oppositional, anti-political phenomenon".[45] The phenomenon of populist regimes using constitutional law to advance their goals has been described as "constitutional reform",[46] "constitutional retrogression",[47] "abusive constitutionalism",[48] "autocratic legalism"[49] or

38. *Id.* at 43.

39. *Id.* at 44.

40. *See, e.g.*, Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution,* 23(3) J. DEMOCRACY 138, 138 (2012); Jacques Rupnik, *Hungary's Illiberal Turn: How Things Went Wrong*, 23(3) J. DEMOCRACY 132, 132 (2012).

41. *See, e.g.*, Ozan O. Varol, *Stealth Authoritarianism in Turkey*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 339–54 (Graber et al. eds., 2018).

42. *See, e.g.*, Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, SYDNEY L. SCH. LEGAL STUD. RES. PAPER NO. 18/01, 2–5 (2018), https://ssrn.com/abstract=3103491.

43. *See, e.g.*, David E. Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 41, at 161–75.

44. Paul Blokker, *Populist Constitionalism*, INT'L J. CONST. L. BLOG (May 4, 2017), http://www.iconnectblog.com/2017/05/populist-constitutionalism/.

45. *Id.*

46. *Id.*

47. Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 79 (2018).

48. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 190 (2013).

49. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018).

"populist constitutionalism".[50] The exact content of each of these terms varies, but all terms are based on the observation that one of the characteristics of the "new populism" is the manner in which populists, once in power, employ mechanisms of constitutional change to erode the democratic order.[51]

Whether, and to what extent, democratic decay is taking place in Israel is a topic of ongoing debate. Gila Stopler, for example, argues that, "Israel is in the developing stages of constitutional capture."[52] Stopler specifies political moves aimed at curbing and weakening the power of the Israeli Supreme Court, attempts to pass bills that target certain types of expressions associated with Israel's Arab-Palestinian's experiences and with the political left, and the passing of laws that target left-wing NGOs as measures that are part of democratic decay in Israel.[53] Nadiv Mordechai and Yaniv Ronzai add to these measures by discussing the concentration of governmental powers in the hands of Prime Minister Netanyahu[54] and the weakening of the Knesset's supervisory role with respect to the government.[55]

Other scholars question the premise that Israeli democracy is declining. Iddo Porat, for example, rejects the claims that Israel is heading towards democratic erosion and argues that the measures mentioned in the preceding paragraph are "a generally legitimate democratic response by one side of the political map in Israel—the Right—to its relative weakness in several public spheres."[56] Barak Medina argues that while there "is a real concern of an erosion of the Israeli government's

50. *See* PAUL BLOKKER, *Populist Constitutionalism*, *in* ROUTLEDGE HANDBOOK OF GLOBAL POPULISM 113–26 (Carlos de la Torre ed., 1st ed. 2018); Gabor Halmai, *Is There Such Thing as 'Populist Constitutionalism'?: The Case of Hungary*, FUNDAN J. HUM. SOC. SCI. 324, 324 (2018).

51. Landau, *supra* note 48, at 189.

52. Gila Stopler, *Special Symposium–Part 2 of 7: Constitutional Capture in Israel*, INT'L J. CONST. L. BLOG (Aug. 21, 2017), http://www.iconnectblog.com/2017/08/constitutional-capture-Israel.

53. *Id.*

54. Nadiv Mordechay & Yaniv Roznai, *A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77 MD. L. REV. 244, 257 (2017). As they indicate, "[a]t a certain point, Prime Minister Netanyahu has simultaneously been Israel's Prime Minister, Foreign Minister, Communications Minister, Economy Minister, and Regional Co-operation Minister."

55. *Id.* at 258.

56. Iddo Porat, *Symposium–Part 6 of 7: Is there Constitutional Capture in Israel?*, INT'L J. CONST. L. BLOG (Aug. 25, 2017), http://www.iconnectblog.com/2017/08/is-there-constitutional-capture-in-israel.

commitment to the ideals of a liberal democracy," Israel has not yet "slid into a process of 'constitutional capture.'"[57] Medina does state, however, that there are "troubling signs of insufficient commitment" within Israeli society and politics to the "fundamental ideals of liberalism."[58]

One of the difficulties in identifying democratic decay revolves around understanding and interpreting the meaning of a series of separate, incremental actions, each of which appears to be legitimate on its own.[59] Familiarity with domestic circumstances and background are pivotal in understanding the meaning of such actions. However, since processes of democratic decay are taking place globally, and since there are identifiable similarities among the processes taking place in different countries, comparative analysis is a useful tool in evaluating the cumulative effect of certain similar measures.

In conducting such a comparative analysis, Tom Ginsburg and Aziz Z. Huq argue that Israel "can[not] yet be ranked as a case of democratic erosion."[60] Ginsburg and Huq define democratic erosion as a decay that affects three dimensions of democracy: competitive elections, freedom of expression and association, and the rule of law.[61] Applying this three dimensional test to Israel, they argue that "the damage to the three institutional predicates of democracy is not sufficiently extensive to justify the erosion label."[62] However, Ginsburg and Huq specify certain measures that took place in Israel, including laws imposing disclosure obligations on NGOs and laws that constrain certain types of speech, as policies that trigger concern.[63] They conclude that the circumscription of "liberal rights of speech and association" in Israel, combined with the degradation of partisan competition, does pose a "clear and

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57. Barak Medina, *Symposium–Part 5 of 7: The Israeli Liberal Democracy: A Critical Assessment*, INT'L J. CONST. L. BLOG (Aug. 24, 2017), http://www.iconnectblog.com/2017/08/the-israeli-liberal-democracy-a-critical-assessment.

58. *Id.*

59. *See generally* Yaniv Roznai & Tamar Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism and the Unconstitutional Constitutional Amendment Doctrine*, L. & ETHICS HUM. RTS. (forthcoming 2019).

60. GINSBURG & HUQ, *supra* note 35, at 90.

61. *Id.* at 43.

62. *Id.* at 89.

63. *Id.* at 88. Ginsburg and Huq explain that while transparency requirements are not necessarily incompatible with democracy, in the Israeli case, they were applied a manner that affected one side of the political spectrum.

present danger to democracy" in circumstances such as those existing in Israel.[64]

While Ginsburg and Huq's cautious conclusion is understandable, in light of the ambiguous nature of many of the measures taken by the government in Israel, I believe that they may be underestimating the extent of the erosion taking place in Israel. This can be attributed, in part, to the centrality of "soft" processes to the Israeli case-study, which may not culminate in legislation, but affect the public and political discourse and in the realm of democratic debate. These processes include the propositions of bills that do not eventually pass as laws, the adoption of polarizing rhetoric by political leaders, the characterization of opposition to the government as disloyalty to the state, the conscious attempts to limit the authority of legal advisors, and other gatekeepers that provide checks on the operation of the government.[65]

The friend/enemy distinction, which characterizes populist rhetoric, has been dominating Israeli public discourse in recent years.[66] Landau rightly explains that "some variants of populism are defined in opposition to racial or ethnic outsiders and their supposed enablers within domestic elite groups."[67] In Israel, the distinction is drawn between those considered loyal to the ethos of the Jewish state, and those portrayed as threatening it.[68] Israel's Arab-Palestinian citizens and supporters of left-wing political parties are classified among the latter.[69] Alon Harel argues, in this regard, that the political discourse in Israel is based on "political classifications that distinguish between citizens who have earned their citizenship in social, cultural or legal loyalty tests and members of the political community who are denounced as traitors."[70]

Landau delineates three ways in which populist constitutionalism is employed. Populist constitutionalism, he

64. *Id.* at 89–90.

65. *See* Tamar Hostovsky Brandes, *Law, Citizenship and Social Solidarity: Israel's "Loyalty-Citizenship" Laws as a Test Case*, 6(1) POL., GROUPS, & IDENTITIES 39, 47–50 (2018) (analyzing the role of polarizing discourse related to challenges to individual's loyalty).

66. *See generally id.* at 46–47.

67. Landau, *supra* note 29, at 525.

68. *See* Alon Harel, *Symposium–Part 3 of 7: The Triumph of Israeli Populism*, INT'L J. CONST. L. BLOG (Aug. 22, 2017), http://www.iconnectblog.com/2017/08/the-triumph-of-israeli-populism.

69. *Id.*

70. *Id.*

explains, performs three main functions: it allows deconstruction of the existing political regime, it serves as an ideological critique that promises to overcome flaws in the prior constitutional order, and it consolidates power in the hands of the populist leadership.[71] The Law explicitly performs the second function, and has the potential of indirectly contributing to the advancement of the first and third.

Proponents of the Law explicitly declared that its purpose was to shift the constitutional balance point in interpreting Israel's Jewish and Democratic nature.[72] The Supreme Court, they argued, has been interpreting Basic Law: Human Dignity and Liberty, enacted in 1992, in an over-reaching manner, according too much weight to individual rights, and, in particular, to the right to equality, over national interests.[73] The purpose of the Law is, thus, to create a new constitutional balance in Israel. Mordechai and Roznai classify the Law as "a notable example" of "direct anti-constitutionalism," which seeks to change the existing constitutional order.[74]

The Law also has the potential of contributing, albeit indirectly, to strengthening the control of the existing political regime. As will be discussed below, the Law purports to classify certain political narratives as outside of the realm of legitimacy. In this regard, it should be understood as part of the loyalty-citizenship discourse, which seeks to label opponents as disloyal, narrow the scope of legitimate political speech, and, accordingly, weaken political opposition.[75] The Law may prove to play a more direct role in ensuring the continued reign of right-winged ideology in the case of a full or partial annexation of the Occupied Palestinian Territories. Such an annexation will alter the demographics in Israel, and the Law has the potential of being used as a basis for ensuring the "Jewishness" of the state of Israel in these conditions.[76]

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71. *See* Landau, *supra* note 29, at 523.

72. *See* David M. Halbfinger & Isabel Kershner, *Israeli Law Declares the Country the 'Nation-State of the Jewish People'*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html.

73. *See generally* Mordechay & Roznai, *supra* note 54, at 254.

74. *Id.* at 253. At the time of this discussion, the Law was still a bill.

75. *See* Allison Kaplan Sommer, *Basic Law or Basically a Disaster? Israel's Nation-state Law Controversy Explained*, HAARETZ (Aug. 6, 2018), https://www.haaretz.com/israel-news/.premium-israel-s-nation-state-law-controversy-explained-1.6344237.

76. *Cf.* Neveen Abu Rahmoun, *Opinion: The Nation-State Law Paves the*

With respect to the first function specified by Landau, the deconstruction of the existing political regime, the Law performs a more complex role. Right-wing coalitions have been governing Israel for the majority of the past twenty years.[77] Netanyahu himself has been serving as prime minister for a decade.[78] Despite that, the perception among many of the members of the coalition is that important public spheres, most notably, the judiciary, but also certain parts of civic service, are influenced by the Left.[79] The Law is perceived as a tool that can enable a "willing" court to counterbalance this influence.[80] MK Yariv Levin, one of the Law's most outspoken supporters, has explicitly stated, with respect to the Law, that "[w]hen we make a change to the judicial system and the composition of the judges is different, the final result will be completely balanced."[81]

While all anti-democratic measures taken by populist regimes contribute to democratic erosion, and should, thus, be alarming, abusive constitutionalism poses a special threat to democracy and human rights. First, in constitutional democracies, constitutional law establishes the central restraint on the government's power and the ultimate safeguards against violations of human rights by both the government and the legislator.[82] Abusive constitutionalism erodes these protections by targeting both the institutions that restraint power, such as courts,[83] and the state's democratic values. The Law targets the

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Way for a New Nakba, HAARETZ (Oct. 11, 2018), https://www.haaretz.com/opinion/.premium-the-nation-state-law-paves-the-way-for-a-new-nakba-1.6548177.

77. *See* Carolina Landsmann, *How Israeli Right-Wing Thinkers Envision the Annexation of the West Bank*, HAARETZ (Aug. 18, 2018), https://www.haaretz.com/israel-news/.premium.MAGAZINE-how-israeli-right-wing-thinkers-envision-the-west-bank-s-annexation-1.6387108.

78. *See generally* Nathan Sachs, *Israel's Right-wing Majority*, BROOKINGS (Apr. 11, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/04/11/israels-right-wing-majority/ (mentioning that Netanyahu previously served as Prime Minister of Israel between 1996-1999, and again beginning in 2009-present).

79. *See* Porat, *supra* note 56.

80. *See id.*

81. *See* Jonathan Lis, *Israeli Minister Explains Why He Led Nation-State Law*, HAARETZ (Aug. 7, 2018), https://www.haaretz.com/israel-news/.premium-israeli-minister-explains-why-he-fought-to-pass-nation-state-law-1.6358737.

82. *See generally* Landau, *supra* note 29.

83. *See* David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, 87(2) U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 1 (2017) (claiming that constitutional change takes place when institutions are weak or weakened).

latter: to the extent that the Law will be used as a measure to "balance" existing constitutional rights, it thus may seriously hinder protections against governmental abuse of power.

Second, populist constitutionalism not only erodes existing protections, but also positively entrenches anti-democratic structures as constitutional norms. Once anti-democratic values have been granted constitutional status, attempts to counter them through actions and rules of a lower normative hierarchy may actually be blocked. Thus, laws or initiatives that promote minority rights could potentially be blocked as incompatible with the Jewish character of the state as entrenched in the Law.

Finally, constitutional law has, perhaps more than other legal norms, significant expressive functions.[84] Cass R. Sunstein argues, in this regard, that in evaluating the expressive functions of a law, one should take into consideration not only the intrinsic value of the "statement" made by the law, which carries significance in itself, but also the anticipated consequences of such statements.[85] I will argue, in this regard, that "statement" embedded in the Law is exclusion of Israel's Arab-Palestinian citizens from the body-politic in Israel, and that this statement may, ultimately, have negative consequences on the social and legal protections they enjoy.

III. THE LAW'S IMPLICATIONS FOR EQUALITY

Concerns that the Law will serve as a pretext for discrimination against Israel's non-Jewish citizens have been raised both with regard to the Law's general premise, and with regard to specific clauses of the Law. The claim with regard to the former is that the Law establishes "the superiority of the Jewish majority,"[86] and that the entrenchment of the right of self-determination of the Jewish people in the State of Israel will serve as grounds for future laws that will allow preferential treatment of Jews. By reserving the right of self-determination exclusively to Jews, it is argued, that the Law marks members of Israel's national minorities as second-class citizens.

What the Law lacks is, in this regard, as significant as what

84. *See generally* Cass R. Sunstein, Symposium, *Law, Economics & Norms: On the Expressive Function of the Law* 144 U. PA. L. REV. 2021, 2043–44 (1996) (arguing that the expressive functions of the law are especially important, for example, with respect to norms of partiality).

85. *Id.* at 2045.

86. *See* Hovel, *supra* note 4.

it includes. The Law lacks a reference to equality and does not recognize or acknowledge the existence of minorities in Israel.[87] Neither of these is an oversight. During the legislation process, which included long deliberations in the Knesset's Constitution, Law and Justice Committee ("the Committee"), several alternative bills were presented that included an explicit reference to equality.[88] All proposals to include a reference to equality or to the relationship of minorities to the state of Israel were rejected.[89]

Proponents of the Law argue that there is nothing in the Law that amounts to violations of equality. They provide two justifications for the lack of inclusion of a commitment to equality in the Law. The first is that the Law does not need to include a reference to equality since the right to equality is already entrenched as a constitutional right in a different basic law: Basic Law: Human Dignity and Liberty ("Basic Law: Human Dignity").[90] The second is that the Law needs not refer to equality because the subject matter of the Law is national identity, and not individual rights.[91]

With respect to the first claim, it should be noted that equality is not explicitly mentioned in Basic Law: Human Dignity. When Basic Law: Human Dignity was enacted in 1992, the political compromise that enabled its passing in the Knesset included an understanding that it would not include an explicit reference to equality.[92] Despite this legislative history, the Court has interpreted the notion of dignity as encompassing at least

87. *See* Ofer Aderet, *Neither Arab nor Jew: Israel's Unheard Minorities Speak up After the Nation-State Law*, HAARETZ (Sept. 9, 2018), https://www.haaretz.com/israel-news/.premium.MAGAZINE-neither-arab-nor-jew-israel-s-unheard-minorities-speak-up-1.6464684.

88. *See Israeli Legislators to Vote on Nation-state Basic Law That Would Enshrine Apartheid & Jewish Supremacy*, ADALAH (July 15, 2018), https://www.adalah.org/en/content/view/9563; *see also Adalah Heads to Supreme Court after Knesset Speaker, Deputies Nix Legislation of Arab MK's Bill Declaring Israel 'State of All Its Citizens'*, ADALAH (June 11, 2018) https://www.adalah.org/en/content/view/9541.

89. *Id.*

90. Ruth Gavison, *Israel's Nation-State Law and the Three Circles of Solidarity: a Round Table with Ruth Gavison*, FATHOM (Sept. 2018), https://fathomjournal.org/israels-nation-state-law-and-three-circles-of-solidarity-a-round-table-with-ruth-gavison/.

91. *See* Miriam Berger, *Israel's Hugely Controversial "Nation-State" Law Explained*, VOX (July 31, 2018), https://www.vox.com/world/2018/7/31/17623978/israel-jewish-nation-state-law-bill-explained-apartheid-netanyahu-democracy.

92. *Id.*

some facets of equality, thus recognizing equality as an "unenumerated" constitutional right.[93] This interpretation raised harsh critiques of the Court, and of Justice Barak in particular.[94] Critics argue that it amounted to judicial overreach and illegitimate interpretation, which was explicitly contrary to legislative intent.

Interestingly, in the current debate regarding the Law, the Law's proponents, who are generally critical of the Court's alleged activism, invoke the claim that the right to equality is already a constitutional right.[95] To some extent, then, the claim that there is no need to include an explicit constitutional reference to equality attests to the acceptance of the Court's interpretation of Basic Law: Human Dignity and Liberty.

Despite the fact that the constitutional status of equality now appears to be generally accepted, the claim that there is no need for an explicit constitutional entrenchment of the right to equality is an overstatement. First, not all aspects of equality can be read into the concept of dignity, and the constitutional status of equality is thus limited. In addition, it has not yet been determined whether the status of enumerated rights is identical to that of non-enumerated rights, an issue which may prove to be of importance when the two collide. Finally, the question of the relationship between different and potentially conflicting Basic Laws, in this case, between Basic Law: Human Dignity and Liberty and the Law, is still open. This question is particularly complex when the potential conflict arises between explicit principles or rights and non-explicit ones.

With respect to the claim that the subject matter of the Law is national identity and there is, therefore, no room to include a reference to equality in it, two points should be stressed. The first is that equality is not only a right but also a value. The lack of reference to equality is thus part of the Law's failure to endorse democratic values as part of the state's collective identity.[96] The second is that the Law's effect on equality does not appear to be benign. As will be discussed below, several

93. Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters*, *in* ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Sapir, Barak-Erez & Barak eds., 2013).

94. Ze'ev Segal, *Coming Full Circle*, HAARETZ (May 27, 2009 9:34 PM), https://www.haaretz.com/1.5057601.

95. Gavison, *supra* note 90.

96. *See* Dr. Amir Fuchs, *The Nation State Bill Bias*, ISR. DEMOCRACY INSTITUTION (July 10, 2018), https://En.Idi.Org.Il/Articles/24151.

clauses of the Law appear to potentially violate equality. An endorsement of equality in the Law could influence the interpretation of such clauses.

In addition to the equality concerns raised by the general premise of the Law, a number of specific articles raise equality issues. Two of the articles flagged as especially concerning, from an equality perspective, are Article 4 and Article 7 of the Law.

Article 4 concerns the issue of official languages. Article 4(a) states that "Hebrew is the language of the state."[97] Article 4(b) states that Arabic will have a "special status", and that the use of Arabic in state institutions will be determined by law (to be enacted by the Knesset).[98] Article 4(c) states that the Law will not affect the de facto status of Arabic prior to the enactment of the Law.[99]

Although the wording of Article 4 appears to imply that there will be no implications for Arabic-speakers, this is not necessarily the case. The dominant position among jurists is that, prior to the enactment of the Law, Arabic, along with Hebrew, enjoyed the legal status of an official language in Israel.[100] The normative basis for this status was Article 82 of the Palestine Order-in-Council, a law enacted by the British during their rule in Palestine, which was incorporated into Israeli law.[101]

The official status of Arabic, however, has not been expressed in its de facto visibility and use in the public sphere and in Israeli state institutions. The gap between the official status of Arabic and its de facto status has been a topic of an ongoing legal and social battle, which has, in recent years, achieved some notable successes.[102]

Proponents of the Law argue that, in light of Article 4(c), the

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97. BASIC LAW: ISRAEL – THE NATION STATE OF THE JEWISH PEOPLE (2018), art. 4.

98. *Id.* art. 4(b).

99. *Id.* art. 4(c).

100. David M. Halbfinger, *Israeli Law Declares the Country the 'Nation State of the Jewish People'*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html.

101. *See* Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, 36(2) ISR. L. REV. 2002.

102. *See* H.C. 4112/99, Adalah v. Municipalities of Tel Aviv-Jaffa 56(5) PD 393 (2002) (Isr.). For example, the Court accepted a petition requesting mixed Arab-Jewish municipalities to add Arabic to all traffic, warning and other informational signs in their jurisdiction

Law will have no real ramifications on the status of Arabic.[103] This is not accurate. As indicated above, prior to the Law's enactment, the linguistic landscape in Israel, including the use of languages by official institutions, did not reflect the official status of Arabic. However, the fact that Arabic was an official language served as the basis for legal struggles to bring the de facto status of Arabic in line with its de jure official status by demanding that it be used, in various circumstances, in a manner that is similar to the use of Hebrew, based on the claim that they are both official languages.[104] Downgrading Arabic's status from an official language to a "special status" language, an action that declares it to be inferior to Hebrew, may halt efforts to achieve greater recognition and widespread usage of Arabic.

A recent statement made by the Israel Prison Service indicates that such concerns are not unfounded. In July 2019, the Association for Civil Rights in Israel ("ACRI") wrote a letter to the Prison Authority, requesting it to translate its orders and regulations to Arabic, so that Arab-Palestinian inmates, which constitute, according to the letter, 67 percent of all inmates, may be able to equally understand them.[105] The ACRI argued that since the order and regulations regulate every aspect of prison life, their translation is required under the principle of equality.[106] The Israel Prison Service refused the request and argued, among other claims, that the Law declares Hebrew to be the official language of the state, that official use of Arabic will be determined by law, and that no such law currently exists.[107]

The second article which raises serious equality concerns is Article 7, which determines that "the state considers Jewish settlement to be a national value, and it will act to encourage and promote its establishment and development."[108] This is

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103. *See* Pnina Sharvit Baruch, *The Ramifications of the Nation State Law: Is Israeli Democracy at Risk?*, INST. FOR NAT'L SEC. STUDIES (Aug. 1, 2018), https://www.inss.org.il/publication/ramifications-nation-state-law-israeli-democracy-risk/.

104. *See* Meital Pinto, *The Nation-State Law Is Destructive*, MAKOR RISHON (MAY 12, 2018), https://www.makorrishon.co.il/nrg/online/1/ART2/877/603.html.

105. Josh Breiner, *Israel Prison Service Refuses to Translate Regulations into Arabic, Citing Nation-State Law*, HAARETZ (Sept. 3, 2019), https://www.haaretz.com/israel-news/.premium-israel-prison-service-refuses-to-translate-rules-into-arabic-1.7794567.

106. *Id.*

107. *Id.*

108. BASIC LAW: ISRAEL – THE NATION STATE OF THE JEWISH PEOPLE (2018),

perhaps the most controversial article of Law, and it was vehemently debated in the Committee. The debate revolved around the question of whether it would enable the establishment of settlements for "Jews only" in Israel,[109] contrary to the Supreme Court decision in the case of *Qua'adan*,[110] which determined that the establishment of such settlements violates equality and is prohibited. While some proponents of the Law claim that the current version of Article 7 does not support the establishment of such settlements,[111] the Law's opponents argue that even if Article 7 will not currently be interpreted by the Court as supporting the establishment of Jews-only settlements, it could be interpreted otherwise in the future.[112] This position has also been expressed by some of the Law's proponents.[113] In addition, it is unclear whether and how Article 7 will affect distribution of state resources for the establishment of new cities and villages. In light of the dire state of housing availability in Arab villages in Israel, this is a particularly important issue.

Because the Law is worded in open-ended terms, much is left to the courts, both with respect to interpreting specific terms, and with respect to construing the relationship between the Law and other norms, including other Basic Laws. The public debate about the Law's effect on equality focused on those articles identified by the Law's opponents as raising concerns. As indicated above, courts have the ability to mitigate at least some of these concerns. However, due to the nature of the Law, they also have the power to interpret other articles of Law in a manner that could be problematic from the perspective of

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art. 7.

109. *See id.*

110. H.C. 6698/95, Aadel Ka'adan v. Israel Lands Administration 54(1) *P.D.* 258 (2000) (Isr.). The word "settlement" in the Law refers to various forms of inhabitance, such as community villages, cooperative villages etc., including within the Green Line, to be distinguished from the use of the term settlement to describe Israeli residences in the Occupied Territories.

111. *See* David M. Halbfinger & Isabel Kershner, *Israeli Law Declares the Country the 'Nation-State of the Jewish People'*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html.

112. *See generally* Emma Green, *Israel's New Law Inflames the Core Tension in Its Identity*, ATLANTIC (July 21, 2018), https://www.theatlantic.com/international/archive/2018/07/israel-nation-state-law/565712/.

113. Jonathan Lies, *Levin to Haaretz on National Law: When the Judiciary is Different, We Can Achieve What We Wanted*, HAARETZ (Aug. 5, 2018), https://www.haaretz.co.il/news/politi/.premium-1.6343171.

equality. The practical effect of the Law on equality is thus far from clear.

The first judicial decision based on the Law demonstrates the latter claim and reinforces the position that the concerns regarding the Law's implications for equality are not unfounded. In the recent case of *Messiah v. the Palestinian Authority*, the plaintiff, a survivor of a terror attack, sued Hamas for compensation for mental and emotional damages that he suffered following a bombing in Tel-Aviv.[114] In evaluating whether the plaintiff should be awarded punitive damages, Judge Drori referred to article 6(a) of the Law, which states that "[t]he state will strive to ensure the safety of the members of the Jewish people in trouble or in captivity due to the fact of their Jewishness or their citizenship."[115] Explaining that "one of the goals of Hamas is to kill Jews", Judge Drori determined that when there are a number of available options with regard to punitive damages, and the injured is one of the 'members of the Jewish people in trouble or in captivity due to the fact of their Jewishness or their citizenship,' the scale will weigh towards awarding punitive damages, among another thing, due to Article 6(a) of the Law.[116]

Judge Drori further determined that the Law is intended to be operative, and not only declaratory, and that being a Basic Law, it applies to the terror attack at issue despite the fact that the attack took place twenty years ago.[117]

The implication that the ethnicity of a plaintiff could be a relevant factor in awarding damages is highly troubling.[118]

The *Messiah* decision demonstrates how the Law can be used in manners that are incompatible with equality—not only in ways anticipated by the Law's opponents, but also in completely unexpected ways. It is also notable that, in the first instance in which the Law was referred to by a court, the claim that the Law was predominantly symbolic and declarative was

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114. Revital Hovel, *In Unprecedented Move, Judge Bases Verdict on Controversial Nation-State Law*, HAARETZ (Sept. 18, 2018), https://www.haaretz.com/israel-news/.premium-in-unprecedented-move-judge-bases-verdict-on-controversial-nation-state-law-1.6489705.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* Mordechai Kremnitzer, *In Grand Debut, Israel's Nation-State Law Reveals Its True Colors*, HAARETZ (Sept. 20, 2018), https://www.haaretz.com/israel-news/.premium-in-grand-debut-israel-s-nation-state-law-reveals-its-ugly-true-colors-1.6492396 (critiquing the decision).

already refuted. There is reason to be concerned that lower courts will read the decision as suggesting that the Law justifies distinguishing between Jews and non-Jews. In the particular case of *Messiah*, the distinction was suggested to be relevant with respect to receiving punitive damages. However, once such distinction is legitimized, it could, theoretically, be replicated in other areas as well. The *Messiah* decision thus reinforces the danger the Law poses to the principle of equality.

IV. SELF-DETERMINATION AND GROUP RIGHTS

The right to self-determination is the core of the Law.[119] The Law constitutionally entrenches the ethos of Israel being the embodiment of the right of the Jewish people to self-determination. It declares the Land of Israel to be the "historic homeland" of the Jewish people,[120] and states that "the state of Israel is the nation-state of the Jewish people, where it exercises its 'natural, cultural, religious and historic right to self-determination.'"[121] It also determines that "the execution of the right to national self-determination in the State of Israel is exclusive to the Jewish people."[122]

Despite the centrality of the concept of self-determination to the Law and the reference to self-determination as a "right," the Law does not contain a definition or explanation of the notion of self-determination. Neither the language of the law nor the deliberations in the Committee provide any clear concept of self-determination, nor do they indicate what the "exclusiveness" of the right of the Jewish people to self-determination in the state of Israel implies.

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119. MK Avi Dichter, one of the Law's initiators, stated that article 1 was perhaps "The Clause, with a capital T". *See* DK (2017) Protocol from the discussion held on October 23, 2017, p. 29 (פ (Isr.) (translated by Tamar Brandes); *see also* Raoul Wootliff, *Full Text of MK Avi Dichter's 2017 'Jewish State' Bill*, TIMES OF ISR. (May 10, 2017, 1:35 PM), https://www.timesofisrael.com/full-text-of-mk-avi-dichters-2017-jewish-state-bill/.

120. BASIC LAW: ISRAEL – THE NATION STATE OF THE JEWISH PEOPLE (2018), art. 1(a).

121. *Id.* art. 1(b); *see The Jewish House and the Likud Agreed: The Nation-State Law State that the "Jewish People Have a Right to Religious Self Determination"*, HAARETZ, July 12, 2018, https://www.haaretz.co.il/news/politics/1.6269344 (translated by Tamar Brandes).

122. BASIC LAW: ISRAEL – THE NATION STATE OF THE JEWISH PEOPLE (2018), art. 1(c). It should be noted, in this regard, that the exclusiveness refers to the right to self-determination in the *state* of Israel and not in the *land* of Israel, and thus does not preclude the two-state solution.

The principle of self-determination is a recognized principle of international law, entrenched in the UN Charter,[123] the International Convention on Civil and Political Rights,[124] the International Convention on Social and Economic Rights,[125] and numerous other international instruments.[126] Despite that, there is no agreement on content of this principle. International law literature and jurisprudence distinguish between external and internal self-determination. The Canadian Supreme Court analysed this distinction in *re: Quebec*, an opinion that examines the legality of a theoretical secession of Quebec from Canada. The Canadian Supreme Court explained that:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[127]

In international law, the right of minorities to self-determination is usually discussed either in the context of decolonization, or with respect to possible secession of a minority

123. U.N. Charter art. 2, ¶ 1.

124. International Covenant on Civil and Political Rights art. 1, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

125. International Covenant on Economic, Social and Cultural Rights art. 1, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR].

126. *See also Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, AUDIOVISUAL LIBR. OF INT'L L. (Oct. 24, 1970), http://legal.un.org/avl/ha/dpilfrcscun/dpilfrcscun.html; Vienna Declaration and Program of Action, *adopted* June 25, 1993, § 2; Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16, 1975); Regarding Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J Rep. 136 (July 9, 2004); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22, 2010). For a review of the ICJ's jurisprudence on Self-Determination see Gentian Zyberi, *Self-Determination Through the Lens of the International Court of Justice*, 56 NETH. INT'L L. R. 429 (2009).

127. Reference Re Secession of Que., [1998] 2 S.C.R. 217, para 126. (Can.) (emphasis added).

from an existing state.[128] This was also the context in which the Quebec opinion was delivered. As a result, states usually argue that minorities within their territory enjoy self-determination internally, and thus do not have a right to external self-determination.[129] The Law is unique in that it explicitly reserves the right of self-determination to one national and ethnic group: the Jewish majority

Since Article 1(c) of the Law refers to "the exclusive right of national self-determination" in the State of Israel, rather than in the Land of Israel, it appears that it does not refer to the right to external self-determination, but, rather, to the internal aspects of self-determination, the aspects of which are specified in Article 1(b).[130] This is also clear from the political context in which the Law was enacted. Thus, it is not the theoretical right of Israel's non-Jewish minorities to secede that is at stake. Rather, Article 1(c) regards the right of Israel's non-Jewish minorities to internal self-determination.

The exact content of the right to internal self-determination and the duties that such right imposes upon states are highly debated. The essence of the right to self-determination is the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[131] Arguably, states are required to ensure the existence of conditions that allow such pursuit.[132] These conditions may include autonomy in the management of certain aspects of community life, recognition of collective rights in areas

128. Glen Anderson, *Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?*, 34 ARIZ. J. OF INT'L & COMP. L. 1, 23 (2016).

129. See Surendra Bhandari, *From External to the Internal Application of the Right to Self-Determination: The Case of Nepal*, 21 INT'L J. ON MINORITY & GROUP RTS. 330, 370 (2014), for a discussion on this issue.

130. BASIC LAW: ISRAEL – THE NATION STATE OF THE JEWISH PEOPLE (2018), art. 1(b).

131. ICCPR, *supra* note 124.

132. *See, e.g.*, Christine Bell & Kathleen Cavanaugh, *'Constructive Ambiguity' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345 (1999); Kalana Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective*, 3 ASIAN J. INT'L. L. 305 (2013); Johan D. van der Vyver, *Self-Determination of Peoples of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1 (2000). I suggested elsewhere that one way to mitigate the harms caused by populist constitutionalism is by interpreting it, as far as possible, in compatibility with international law. *See* Tamar Hostovsky Brandes, *International Law in Domestic Courts in an Era of Populism*, ICON (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3195454.

such as language and education, and representation in public institutions. The contours of the right to internal self-determination are often defined through the lack of such conditions: where colonization, oppression, or systematic discrimination of a minority exist, the right to internal self-determination is presumably denied.[133] To the extent that the "exclusiveness" of the right to self-determination of the Jewish people amounts to an explicit denial of the right of minorities to internal self-determination, it is difficult to see how such an idea can be reconciled with international law.

An explicit reservation of the right to self-determination to one national-ethnic group is a unique constitutional feature. The insistence of the Law's initiators to emphasize the exclusiveness of the Jewish right to self-determination, and their refusal to include a clause that recognizes the right of all citizens to express and develop their national, religious and cultural identity, are rooted in the political context in which the Law was enacted. Understanding the meaning of Article 1(c) requires familiarity with such context.

The significance of Article 1(c) is tied to the notion of "the state of all its citizens" and the role of this notion in the current political debate in Israel. The notion of "a state of all its citizens" represents the idea that the state belongs to and should be equally committed to all of its citizens, regardless of race, ethnicity, or religion.[134] On its own, the term may seem not only non-controversial, but also almost obvious. In the Israeli context, however, the term is often perceived as challenging the nature of Israel as a "Jewish state" and as rejecting the contention that Israel is the "national home" of the Jewish people.[135] The notion of "a state of all its citizens" is thus perceived by the majority of Israel's Jewish citizens as an existential threat to the Jewish state. This perception is reinforced by politicians that portray it as such.[136]

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133. Bhandari, *supra* note 129.

134. Aeyal Gross explains that "[s]ince the 1990s, political and legal discourses in Israel have become increasingly polarized between those who emphasize the 'Jewish state' aspect and those who argue that, as a democracy, Israel must consider itself the 'state of all its citizens.' The prevalence of the 'Jewish state' idea as a constitutional principle has often served to delegitimize the idea of Israel as the 'state of all its citizens.'" Aeyal Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 65 (2004).

135. *Id.*

136. *See* Protocol of the Joint Committee, *supra* note 119.

However, striving to define Israel as the "state of all its citizens" is a central aspect of the political agenda of most Arab-Palestinian (and some of the joint Arab-Jewish) parties in Israel, and a national identity based on the idea of "a state of all its citizens" is perceived by many Arab-Palestinian citizens as the only version of national identity that is compatible with equality.[137] In response to the Law, members of the Knesset Jamal Zahalka, Hanin Zoabi, and Joumah Azbarga, all belonging to the Joint List, proposed Basic Law: State of All Its Citizens.[138] The proposal sought to entrench the principle of equal citizenship rights and equality among national groups in Israel, including with respect to the acquisition of citizenship.[139] The Knesset Presidium decided that the proposal could not be brought to the Knesset for discussion, on the basis of section 75(e) of the Knesset's Rules of Procedure, which determines that "The Knesset Presidium shall not approve a bill that in its opinion denies the existence of the State of Israel as the state of the Jewish People, or is racist in its essence."[140]

The two definitions of national identity, that of Israel as a Jewish state and that of Israel as the "state of all its citizens" are thus generally understood in the public and political debate in Israel as mutually exclusive, and as irreconcilable.

In discussing the meaning of Article 1, MK Dichter argued that:

> [T]he Article that antagonizes . . . some of those sitting here is the Article that states that the right to national self-determination in Israel is exclusive to the Jewish people. I believe that this article defines in the clearest manner on the national level the right of the Jewish people, and does not give or grant a similar right to any other minority. It does not violate at all personal rights.

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137. *See, e.g.*, Nadim N. Rouhana, *A State for All Its Citizens*, FOREIGN POL'Y (Apr. 22, 2010), http://foreignpolicy.com/2010/04/22/a-state-for-all-its-citizens-2/; Gideon Samet, *The Battle for a 'State of All Its Citizens'*, HAARETZ (Jan. 8, 2003), http://www.haaretz.com/opinion/the-battle-for-a-state-of-all-its-citizens-1.22915.

138. Jonathan Lis, *Knesset Council Bans Bill to Define Israel as State for All Its Citizens*, HAARETZ (June 4, 2018, 4:59 PM), https://www.haaretz.com/israel-news/.premium-knesset-council-bans-bill-to-define-israel-as-state-for-all-citizens-1.6145333.

139. *Id.*

140. *Knesset Presidium*, KNESSET, https://m.knesset.gov.il/EN/About/Lexicon/Pages/Knesset-Presidium.aspx (last visited Feb. 24, 2020); *see* Zahalka v. Knesset Speaker, HCJ 4552/18, 42(1) PD 1, 2 (2014) (Isr.).

> It's about minority rights, whether it is a national minority, whether it is a religious minority, or a minority on another background.[141]

Thus, although the implications of Article 1 for the collective rights of the Arab-Palestinian minority were not explicitly discussed in the parliamentary discussions preceding the enactment of the Law, Dichter's words suggest that the Law may negatively affect the ability of the Arab-Palestinian minority in Israel to achieve recognition of collective rights.

The status of such recognition is currently unclear. On the one hand, there is no explicit recognition of the Arab-Palestinian minority as a national minority. In a petition to require municipalities to include Arabic on public signs, the majority granted the petition without referral to collective rights.[142] Justice Cheshin, who dissented, thought that the demand to include Arabic on public signs was a claim for recognition of group rights, that such claims were within the prerogative of the legislator and not the courts, and that the legislator has not yet decided to recognize such rights.[143]

On the other hand, in a variety of areas, one can identify what arguably amounts to such recognition. These include, in particular, the existence of a public Arabic-language education system, the religious autonomy of minorities in various areas of family law,[144] and the duty to ensure representation of members of the Arab minority in public service.[145] The exemption from military service granted to the Arab-Palestinian minority can also be viewed as a collective right.[146]

It remains to be seen whether and to what extent Article 1 will hinder further attempts to recognize minority rights. With respect to the latter, of particular importance is the possible

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141. DK (2017) 22 (Isr.) (translated by Tamar Hostovsky Brandes).

142. Adalah v. Municipality of Tel-Aviv-Jaffa, HCJ 4112/99, 56(5) P.D. 393 (2002) (Isr.).

143. *Id.*; *see also* Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, 36 ISR. L. REV. 5, 5 (2002).

144. *See generally* Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISR. L. REV. 537, 537 (1990) (reviewing family law in Israel).

145. Civil Service Law (Appointments) (1959) art. 15. Cheshin noted that these could be seen as collective rights.

146. *See generally* Tamar Hostovsky Brandes, *Law, Citizenship, and Social Solidarity: Israel's "Loyalty-Citizenship" Laws as a Test Case*, 6 POL. GROUPS & IDENTITIES 39, 52 (2018).

effect of the Law on the political representation of the Arab-Palestinian minority. The conditions for disqualification of candidates and lists from participating in the elections are specified in Article 7(a) of Basic Law: the Knesset. The Article states that:

> A candidates' list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the objects or actions of the list or the actions of the person, expressly or by implication, include one of the following: 1. negation of the existence of the State of Israel as a Jewish and democratic state.[147]

The referral to Israel's "Jewish and Democratic" nature in Basic Law: The Knesset, is made in a specific context and with respect to a particular right: the right to be elected to the Knesset. As a result, the Court was confronted, on several occasions, with the challenge of interpreting the term "Jewish and Democratic", in order to determine a candidate or lists' eligibility to participate in the elections.[148] In these instances, the Court was required to determine whether a candidate or a candidate list that openly endorsed the "state of all its citizens" model should be considered as rejecting "the existence of Israel" as a "Jewish state."[149]

The Court recognized the potential explosive results of the clash between two visions, and the devastating effect recognizing their irreconcilability could have on the political representation of Israel's Arab-Palestinian citizens, in light of the fact that the majority of Arab-Palestinian candidates and lists endorse the "state of all its citizens" model. In order to avoid such consequences, the Court chose to understate the conflict between the "state of all its citizens" vision and the "Jewishness" of the state.[150]

"If the goal of Israel being 'a State for all of its Citizens' is only to ensure equality among Israel's citizens," explained the Court, "then such goal does not violate . . . Article 7(a) . . . [i]f it seeks to violate the rational for the establishment of Israel and by that negate the character of Israel as a Jewish state, then it

147. BASIC LAW: THE KNESSET (1958), art. 7(a).

148. Cent. Elections Comm. v. Zou'bi, EC 11280/02, 57(4) IsrSC 1, 3 (2003) (Isr.).

149. *Id.*

150. *Id.*

will violate the core and minimal features characterizing Israel as a Jewish State."[151]

This analysis has several analytical problems. For example, it confuses the justification for the establishment of Israel with a position regarding its desired current character. But, more importantly, it ignores the fact that it is doubtful whether the candidates and lists discussed in Basic Law: the Knesset subscribe to such a narrow interpretation of the term "state of all its citizens", which reduces it to a commitment to individual equality. Indeed, the Court did not explicitly determine that this is the interpretation the candidates adopted, but preferred to leave open and not discuss the question of what exactly the candidates positively meant when they referred to the "state of all its citizens" vision. For the purpose of participating in election, the Court was satisfied with the conclusion that it has not been proven that the candidates "seek to violate the rational for the establishment of Israel" and "negate the character of Israel as a Jewish state."[152]

What enabled the Court to apply this interpretive approach was the open-ended notion of the "Jewishness" of the state. The Law, however, inserts concrete meaning to the notion of "Jewishness"; it associates Israel's character as a Jewish state with an exclusive right of self-determination to the Jewish people.[153] Since Basic Laws are generally interpreted in a coherent manner, the Law may affect the interpretation of Article 7(a). Political agendas, candidates or parties that challenge the exclusiveness of Jewish self-determination and require recognition of the rights of minorities to pursue their "political, economic, social and cultural development" theoretically "negates" the character of Israel as a Jewish state under the Law.[154] This is a much wider scope than the test applied by the Court in the past, which regarded only violations of "the core and minimal features characterizing Israel as a Jewish state" as justifications for disqualifying candidates or parties.[155]

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151. Cent. Elections Comm. for the Sixteenth Knesset v. Tibi, EA 11280/02, NEVO LEGAL DATABASE (by subscription) (May 15, 2003) (Isr.) (translated by Tamar Hostovsky Brandes).

152. *Id.* (translated by Tamar Brandes).

153. BASIC LAW: ISRAEL – THE NATION STATE OF THE JEWISH PEOPLE (2018), art. 1.

154. Cent. Elections Comm. v. Zou'bi, EC 11280/02, 57(4) IsrSC 1, 3 (2003) (Isr.) (translated by Tamar Brandes).

155. *Id.*

If Article 7(a) of Basic Law: The Knesset will be interpreted in light of Article 1(c) of the Law, the political representation of Arab-Palestinian minority in Israeli is likely to severely diminish. Political representation is commonly understood as an important aspect of internal self-determination, and as crucial for the ability of "a people's pursuit of its political, economic, social and cultural development."[156]

The Law may affect the right of minorities in Israel to internal self-determination in various additional ways. For example, the Court has determined that the "Jewishness" of the state cannot justify the preferential treatment of Jewish municipalities, and that public funds must be allocated according to relevant criteria and in a manner compatible with equality.[157] It remains to be seen whether and how the Law will come into play in determining what amounts to "relevant criteria."

Another example includes the Law's recognition, in Article 7, of "Jewish settlement" as a "national value."[158] Even if the Court determines that Article 7 cannot serve as a basis for establishing "Jews only" municipalities or villages, it remains to be seen whether it will interpret Article 7 as justifying preferential treatment of Jewish municipalities. It also remains to be seen how the different parts of the Law will be read together, that is, how the exclusive right of the Jewish people to internal self-determination, entrenched in Article 1, will affect the interpretation of Article 7.

Finally, the Law may be used to hinder any future attempts to achieve collective recognition of the Arab-Palestinian minority in Israel. For example, Yousef Jabareen, a former law professor and current MK, has called in the past for the adoption of a constitutional framework that is based on "participatory sharing" of Israel's Arab-Palestinian minority in the public resources in Israel "in three primary domains: the public domain, the internal domain, and the historical domain."[159]

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156. Reference Re Secession of Que., [1998] 2 S.C.R. 217, 280.

157. Supreme Monitoring Comm. for Arab Affairs in Israel v. Prime Minister, HCJ 11163/03, 61(1) PD 1 (2006) (Isr.).

158. The Nation State of the Jewish People, 5779–2018, SH No. 2743, p. 898 (Isr.).

159. Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Arab-Palestinian Minority in Israel*, 26 WIS. INT'L L. J. 345, 347 (2008); *see also* Yousef Jabareen, *The Politics of Equality: The Limits of Collective Rights Litigation and the Case of the Palestinian-Arab Minority in Israel*, 4 COLUM. J. RACE & L. 23, 25 (2013) (discussing the

Among the issues that warranted reform to achieve such "participatory sharing," Jabareen named allocating land and budgetary resources, recognizing the culture of minorities, ensuring political representation of the Arab-Palestinian minority, and according self-administration powers in various areas.[160] These issues are, arguably, within the realm of self-determination, as they are aimed to promote collective recognition rather than individual equality. Following the enactment of the Law, attempts to promote the recognition of collective rights of the Arab-Palestinian minority in Israel may be perceived as incompatible with the exclusive right of the Jewish people to self-determination in Israel, and therefore as unconstitutional.

V. NATIONAL IDENTITY, MEMBERSHIP IN THE POLITICAL COMMUNITY, AND SOCIAL SOLIDARITY

As indicated above, the majority of the recent situations in which the question of self-determination arises regard the right to secession—the crises in Quebec, Scotland, Catalonia—all revolve around the question of whether a particular group or region has a right to secede and establish an independent state.[161] The question of the delineation of the political community is central, of course, to these situations. However, in these situations, the minority raising the "self-determination" argument claims to be a separate people, while those objecting to secession argue that all citizens are part of the same political community and share a collective identity.[162] The options on the table are either inclusion in the body-politic, or secession.

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difficulties in achieving such recognition through litigation) [hereinafter Jabareen, 2013].

160. Jabareen, 2013 *supra* note 159, at 392–96

161. Montserrat Guibernau, Francois Rocher & Elisenda Casanas Adam, *Introduction: A Special Section on Self-Determination and the Use of Referendums: Catalonia, Quebec and Scotland*, 27 INT'L J. POL. CULTURE & SOC'Y 1, 1–3 (2014).

162. *See generally* Benjamin Levites, *The Scottish Independence Referendum and the Principles of Democratic Secession*, 41 BROOKLYN J. INT'L L. 373 (2015); Thomas Y. Patrick, *The Zeitgeist of Secession Amidst the March Towards Unifications: Scotland, Catalonia, and the Future of the European Union,* 39 B.C. INT'L & COMP. L. REV. 195 (2014); Josep Ma Reniu, *Could Catalonia Become Independent*?, 42 INT'L J. LEGAL INFO. 67 (2014). Whether or not this is correct, that is, whether the allegedly common identity is actually based on the suppression of the culture of minorities is, of course, the heart of the question.

The debate around the right to self-determination in the state of Israel is unique in that secession is not on the table. The scenario that the Law addresses is a possible change in the character of the state, not the alleged secession of some of its members. The Law thus defines the collective identity on an ethno-national basis, in a manner that inherently excludes some citizens, while expecting them to formally remain part of it.[163]

The Law allegedly regards the nature and characteristics of the state, and not the boundaries of the body-politic. However, the two are intertwined. By defining the nature and shared values of the body-politic in Israel as association with the Israeli nation, without any reference to or recognition of minorities, the Law constitutes an exclusionary constitutional ethos. To paraphrase Israeli Author David Grossman's term "Present—Absent,"[164] it ascribes Israel's non-Jewish minorities the status of "included—excluded." While they are entitled to the official status of citizens, they are excluded from the collective identity that defines the body-politic as a whole.

While symbolic exclusion may appear a less concrete injury than violation of equality or denial of collective rights, it is not less serious. The message of exclusion is, indeed, offensive in itself, and the responses of the leaders of minority communities in Israel echo this: many of the reactions revolve not only around equality, but also around the notion of exclusion, which is also central in the petitions against the Law.[165] However, the

163. The ethno-national character of Israel has, of course, been discussed in the literature. *See, e.g.*, Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8(4) NATIONS & NATIONALISM 475 (2002). Yoav Peled described this collective identity, in the early 1990s as Jewish republicanism. Peled argued that in Israel, "two types of citizenship exist: republican citizenship for Jews and liberal citizenship for the Arabs. Thus, although Jews and Arabs formally enjoy equal civil rights, only the Jews can exercise their citizenship in practice, partaking in the definition of "the common social good". Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432 (1992). However, the Law is the first to constitutionally entrench this identity.

164. DAVID GROSSMAN, SLEEPING ON A WIRE: CONVERSATIONS WITH PALESTINIANS IN ISRAEL (Haim Watzman trans., 1993) (translating the book "Present Absent" (*Nokhehim Nifkadim*) originally written in Hebrew).

165. *See, e.g.*, Michael Bachner & Toi Staff, *Druze Leaders Tell Rivlin Many Feel Excluded Over Nation State Law*, TIMES OF ISR. (July 26, 2018, 9:40 PM), https://www.timesofisrael.com/druze-leaders-tell-rivlin-many-feel-excluded-over-nation-state-law/; Loveday Morris, *Deluge of Opposition to Israel's Nation-State Law Builds With New Court Petition*, WASH. POST (Aug. 7, 2018, 2:39 PM), https://www.washingtonpost.com/world/middle_east/deluge-of-opposition-to-israels-nation-state-bill-builds-with-new-court-petition/2018/08/07/054fe9b2-99bd-11e8-a8d8-9b4c13286d6b_story.html?noredirect=on&utm_term=.

construction of the collective identity of the body-politic in Israel as anchored exclusively in Jewish nationhood may lead to the exclusion of non-Jewish citizens that do not subscribe to such identity from the community towards which commitments are owed. Such exclusion is likely to eventually negatively affect concrete rights.

As the emergence and growing popularity of separatist movements in countries like the UK and Spain demonstrate, the existence of a sense of mutual commitment among members of a political community is essential for the existence of states.[166] Jürgen Habermas recognized that such a sense of commitment underlies the modern state, explaining that "accepting decisions whose consequences have to be borne equally by all requires a form of abstract solidarity" and that this "was first produced during the nineteenth century between citizens of different nation-states."[167] Keith Banting and Will Kymlicka argue that solidarity among members of a political community is a necessary condition for the functioning of "just institutions", as well as for the existence of a "just society—one that seeks to protect the vulnerable, ensure equal opportunities and mitigate undeserved inequalities."[168] The realization of rights bears costs, and the existence of solidarity, both as a feeling and as a social phenomenon, renders us willing to bear the costs required for the realization of rights of others. Those that find themselves excluded from the solidarity group are thus vulnerable to violations of rights.

In the case of Israel, the construction of bounded solidarity is based on a distinction between citizenship and nationality. This distinction has been outlined and reinforced by the Court in two cases, the 1972 case of *Tamarin*[169] and the more recent 2013 case of *Ornan*.[170]

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166. *See generally* David Miller, *Like Most Secessionist Movements, Brexit Shows that Breaking Up Is Hard*, NEW STATESMAN AM. (Apr. 1, 2019), https://www.newstatesman.com/politics/brexit/2019/04/most-secessionist-movements-brexit-shows-breaking-hard; Creede Newton, *Which Other Regions Want to Secede from Spain?*, ALJAZEERA (Oct. 27, 2017), https://www.aljazeera.com/news/2017/10/regions-secede-spain-171024055224529.html.

167. JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 17–18 (Max Pensky trans., 2001).

168. KEITH BANTING &WILL KYMLICKA, THE STRAINS OF COMMITMENT: THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES 7 (2017).

169. Tamarin v. State of Israel, CA 630/70, PD 26(1) 197 (1972) (Isr.).

170. Ornan v. Ministry of Interior, CA 8573/08 (2013) (Isr.).

In *Tamarin v. the State of Israel*, the petitioner applied for a declaratory ruling recognizing his nationality as "Israeli" for the purpose of registration in the population registrar.[171] The Court rejected the petition.[172] Justice Agranat explained that nationhood is characterized by a feeling of unity among its members. "Members of a national unit", he explained, "participate in various aspects of their culture, hold a generally positive attitude towards it, and have a shared desire to be partners in fate and in future aspirations."[173] Members of a national unit, he explained, thus have a "feeling of interdependence" that they do not share with outsiders.[174]

Based on this notion of interdependence, Agranat determined that the petitioner could not belong to an "Israeli nation."[175] To recognize an Israeli nation, explained Agranat, would imply that a "separation from the Jewish nation" occurred in Israel, which resulted in the creation of a "separate Israeli nation."[176] The mutual interdependence and concern among Jews indicated, according to Agranat, that this separation has not occurred. As evidence, Agranat stressed the "great concerns of Jews abroad to the safety of Israel and its Jews . . . their moral and material assistance . . . and the great anxiety Jews in Israel and abroad have towards the fate of Jews in the Soviet Union . . . ."[177] In order to prove that an Israeli nationality exists, he explained, the petitioner bears the burden to prove that "there are many Jews in Israel . . . who no longer have the sense of mutual Jewish interdependence . . . and common responsibility."[178] Agranat concluded that since it has not been proven that such sense of interdependence has been eroded, neither has the existence of an Israeli nation.[179] The petitioner's request to have his nationality registered as "Israeli" was, accordingly, denied.[180]

The facts of the case in *Ornan* were similar: in 2008, a group comprised of Israeli citizens belonging to different ethnic and

171. Tamarin PD 26(1) 197 (1972) (Isr.).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

religious groups appealed to the Court and requested a declaratory ruling stating that their nationality was "Israeli".[181] They intended to use the ruling as a public document for the registration of nationality by the population registrar administered by the Ministry of Interior.[182] This required the Court to examine whether, in the time that has passed since the decision in Tamarin, an Israeli nation has been formed. Once again, the petition was denied, on the grounds that "the existence of an Israeli nationality has not been proven".[183]

Reaffirming the analysis of *Tamarin*, the Court adopted a distinction between citizenship and nationality. "Citizenship," explained Justice Vogelman, "creates a continuing legal connection between the individual and the state . . . this connection is important in broad areas of law."[184]

Nationality, on the other hand, was characterized once again by the "feeling of unity that exists amongst the members of the national group," whose members are infused by a sense of interdependence, which also means a sense of common responsibility.[185] The Court repeated the observations made in *Tamarin*, stating that it has not been proven that a sufficiently large group of people of Jewish origin in Israel have switched their sense of common responsibility from the Jewish nation to the Israeli one.[186] Determining that no proof of such shift has been provided, the Court concluded that, as an empirical fact, an Israeli nation has not been formed.

Ornan added two points to *Tamarin*. The first is Justice Vogelman's concern that the recognition of an Israeli nation may have a negative effect on the relationship between Israeli Jews and Jews that reside outside of Israel.[187] The explicit expression of this concern, beyond what was required for the ruling, only emphasizes what the case lacked: a discussion of the consequences that the refusal to recognize the existence of an Israeli nation and the emphasis that the nation is the primary solidarity group of the individual, may have on solidarity between Jews and non-Jewish minorities in Israel.

The second important point is a short comment that appears

181. Ornan v. Ministry of Interior, CA 8573/08 (2013) (Isr.).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*

in Justice Meltzer's ruling. Meltzer indicates that not only has the existence of an Israeli nationality not been proven, but also there is actually a constitutional impediment to such recognition: "the 'constitutional Jewishness' of the state," states Meltzer, "negates the legal possibility of recognizing an 'Israeli nationality', which is distinct, as it were, from the 'Jewish nationality.'"[188] This decree implies that even if an Israeli nation existed, as a primary group of identification and affiliation of all Israeli citizens, the Court would not recognize the existence of such nation. Thus, the definition of Israel as a "Jewish state" in its Basic Laws, under this interpretation, serves as an impediment to the creation of overarching identity that encompasses all of the citizens of Israel.

The *Tamarin* case was delivered prior to the enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, and the notion of Jewish nationhood was thus not yet constitutionally entrenched. The decision in *Ornan* was delivered after the enactment of the two Basic Laws, but the reference to the "Jewish and Democratic" in these laws is general and open to interpretation. The Law offers a more elaborate vision of the Jewishness of the state of Israel, focusing on nationhood rather than on, for example, religion.

As argued above, proponents of the Law argued that there was no need to include a reference to equality in the Law since the Law regarded collective identity rather than individual rights. The distinction between the two Basic Laws also underlies the *Tamarin* and *Ornan* decisions. The assumption that the issues of collective identity and individual rights can be completely separated is, however, largely false. The enjoyment of rights depends, in practice, on the existence of a mutual commitment among members of a political community to each other's welfare.

The Law declares Israel to be the "historical homeland" of the Jewish people.[189] It emphasizes Israel's commitment to Jews in the diaspora while refraining from recognizing the existence of minorities or offering a basis for the bond of such minorities to the state of Israel.[190] The result is a constitutional delineation of a political community in which bounded solidarity is

188. *Id.*

189. Raoul Wootliff, *Final Text of Jewish Nation-State Law, Approved by the Knesset Early on July 19*, TIMES ISR. (July 18, 2018), https://www.timesofisrael.com/final-text-of-jewish-nation-state-bill-set-to-become-law/.

190. *See id.*

presumed to exist and to which non-Jewish minorities in Israel do not belong.

The *Tamarin* and *Ornon* cases are little-known among the general public and their impact on public debate and opinion is, accordingly, negligible. The Law, on the other hand, is a high-profile constitutional act, with considerable expressive powers, which embraces an exclusionary constitutional identity. I indicated above that that the notions of exclusion and offence dominated the petitions filed against the Law, by both individual Arab-Palestinian and Druze citizens and by NGOs. The recurring expressions of a sense of exclusion attest to the nature of the message that the Law conveys to Israel's minorities. However, the Law, which explicitly stresses mutual commitments among Jews but does not explicitly mention commitments to Israel's minorities conveys an equally problematic message to Israel's Jewish citizens by implying that their obligations towards their fellow non-Jewish citizens are inferior to those owed to Jews abroad.

The delineation of a distinction between "us" and "them", and the Schmittian distinction between "friends" and "enemies", are central features of populist politics.[191] As Landau indicates, "some variants of populism are defined in opposition to racial or ethnic outsiders and their supposed enablers within domestic elite groups".[192] Within the context of an already polarized society, the Law may serve as a tool for delegitimizing those that don't accept its premise, and, in particular, those who support or are perceived as supporting the "state of all its citizens" vision.

This aspect of the Law was manifested in the public debate surrounding the struggles of the Arab-Palestinian and the Druze minorities against the Law. While members of both minorities argued that it was offensive, discriminatory, and degraded them to second-class citizens, the collective struggle of each minority against the Law was framed very differently, as were the public and political responses to each struggle.[193]

The Druze struggle revolves, to a large extent, around the alleged wrong caused to the Druze who are "loyal citizens" of the

191. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., Univ. of Chicago Press expanded ed. 1996).

192. Landau, *supra* note 29, at 525.

193. *See* Terrance J. Mintner, *Could Israel's High Court Strike Down the Nation-State Law?*, JERUSALEM POST (Aug. 8, 2018), https://www.jpost.com/Israel-News/Could-Israels-High-Court-strike-down-the-Nation-State-Law-564367.

state of Israel, highlighting the fact that Druze men serve in the Israeli military.[194] The Druze Task Force to Amend the Nation-State Law is headed by Amal Asad, a former Israel Defense Force ("IDF") brigadier general.[195] When recently asked whether the Druze in Israel have national aspirations, Asad answered in the negative, explaining that he was "for the Law of Return."[196] However, he emphasized that the Druze were fighting not only for equality but also for their sense of "belonging in our country", and against a law that designated them as "second-class citizens."[197]

With the exception of a few isolated instances, the Druze protest received a generally sympathetic response from both the Israeli public and from Israeli politicians.[198] Thus, although many of the claims made by the Arab-Palestinian and the Druze protestors were similar, citing notions of discrimination, exclusion, lack of recognition and demotion to the status of second-class citizens, the Druze's claims were perceived as genuine expression of offence, which should, in some manner, be rectified. PM Netanyahu "pledged 'profound commitment' to the 100,000 strong Druze community" and that there will be solutions to address the feelings of offence.[199] Naftali Bennet,

194. According to the Ministry of Defence website, 2368 Druze soldiers served in the IDF in 2014. *Druze*, THE STATE OF ISR. MINISTRY OF DEFENCE (2015), www.noar.mod.gov.il/DruzeAndCircassians/Pages/Druze.aspx.

195. Arik Bender, *Druze Leader Evokes Jabotinsky, Arguing Against Nation-State Law*, JERUSALEM POST (Jan. 24, 2019), https://www.jpost.com/Israel-News/Druze-leader-evokes-Jabotinsky-in-argument-against-Nation-State-Law-578524.

196. *Id.*

197. *Id.*

198. Israel's National Index on Hate and Incitement, published by the Berl Katznelson Foundation, identified a rise in hate and incitement against the Druze in social media at several points since the enactment of the Law. The rise was associated with claims that the Druze protest is funded by the New Israel Fund and with the publication of a fake whatsapp message claiming the opposition was behind the protest. *Isreal's National Index on Hate and Incitement*, BERL KATZNELSON FOUND., http://www.berl.org.il/en/what-we-do/educational-outreach/ (last visited Nov. 25, 2019); *see* Jeremy Sharon, *Online Incitement Rises Massively Against Ethiopian-Israelis*, JERUSALEM POST (July 9, 2019), https://www.jpost.com/Israel-News/Online-incitement-rises-massively-against-Ethiopian-Israelis-595109.

199. *Netanyahu Meets With Druze Leaders Angered By Nation-State Law*, JEWISH TELEGRAPHIC AGENCY (July 27, 2018, 6:30 AM), https://www.jta.org/2018/07/27/israel/netanyahu-meets-druze-leaders-angered-nation-state-law. This sentiment changes following a meeting between Netanyahu and Druze leaders, of which Netanyahu walked out, allegedly on the grounds that Amal Asad, a former Druze IDF Brigadier, stated that Israel was headed towards

Minister of Education, stated that "damage" had been done to "our Druze brothers" and the government must "heal the wound."[200] Similar statements were made by other members of the coalition. The first public statement made by the former Israeli army's chief of staff, Benny Gantz, who is currently running for the Knesset, was that he "will do anything in his power" to amend the Law.[201] Even Ayelet Shaked, who recently declared that the Law "is not going to be amended" recognized the Druze struggle, stating that a separate law "defining the status of the Druze community" could be enacted in order to "mend the rift."[202]

The Arab-Palestinian struggle, on the other hand, received very different responses. While the central Druze demonstration against the Law, held in Tel Aviv in August 2018, received sympathetic media coverage, the media coverage of the Arab-Palestinian demonstration, which took place the following week, focused on the fact that some of the demonstrators were carrying Palestinian flags.[203] Members of the coalition ignored the protestors' claims of discrimination and exclusion, and denounced the demonstration as illegitimate. MK Yuli Edelstein, the chairman of the Knesset, argued that the "struggle of the Arab members of the Knesset is not against the Nation-State Law but against the existence of the state of Israel."[204] Ofir Akunis, Minister of Science, stated that "the

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Apartheid. *PM Walks out on Druze over Criticism from Leader Who Had Warned of 'Apartheid'*, TIMES ISR. (Aug. 2, 2018), https://www.timesofisrael.com/netanyahu-walks-out-as-druze-leader-accuses-him-of-leading-israel-to-apartheid/.

200. Raoul Wootliff, *Bennett: Government Must 'Heal Would' Caused to Druze by Nation-State Law*, TIMES OF ISR. (July 25, 2018, 4:47 PM), https://www.timesofisrael.com/bennett-government-must-heal-wound-caused-to-druze-by-nation-state-law/.

201. Bar Peleg, *In First Public Statement, Benny Gantz Vows to 'Fix' Nation-State Law*, HAARETZ (Jan. 14, 2019), https://www.haaretz.com/israel-news/elections/.premium-in-first-public-statement-benny-gantz-vows-to-correct-nation-state-law-1.6833322.

202. Korin Elbaz Alush, *Shaked to Druze Community: Nation-State Law Will Not Be Amended*, YNET (Jan. 20, 2019), https://www.ynetnews.com/articles/0,7340,L-5449967,00.html.

203. The organizers of the demonstration actually called on the demonstrators to avoid carrying such flags. Tamar Ben Ozer, *Tens of Thousands Protest Nation-State Law at Arab Led Rally in Tel Aviv*, JERUSALEM POST (Aug. 11, 2018), https://www.jpost.com/Israel-News/Arabs-and-Jews-protest-Nation-State-Law-for-second-week-running-564617.

204. Hasan Sa'alan & Shachar Chai, *The Arab Voice was Heard in Tel Aviv*, YNET (Aug. 12, 2018), https://www.ynet.co.il/articles/0,7340,L-5326782,00.html.

pictures from Tel-Aviv" prove why the Law was necessary.[205] Miri Regev, the Minister of Culture, stated that "the Left and Israel's Arabs prefer the red black and green colors over blue and white."[206] Netanyahu himself "launched into an unapologetic defence of the controversial law" stating that "attacks from Leftists circles that define themselves as Zionists are absurd and reveal the depths to which the Left has fallen."[207] While the Druze protest was met, for the most part, with empathy, the Arab-Palestinian protest received lukewarm, if not hostile, treatment from the major media outlets. As indicated above, it was portrayed by members of the coalition as evidence of Israel's Arab-Palestinian disloyalty to the state,[208] and even the majority of members of the opposition were careful not to associate themselves with it.

The different responses to the Druze and Arab-Palestinian protests are rooted in the ongoing "loyalty-citizenship" discourse, which has dominated the public sphere in Israel in recent years. This discourse is based on a few presumptions: that all Israeli citizens can owe a duty of loyalty to the state, that they can be excepted to accept the "Jewish and Democratic" nature of the state, that the state may impose upon its citizens specific obligations that stem from such duty of loyalty, and that as long as these requirements are imposed universally on all citizens, they do not raise any equality issues.[209]

The Druze do not traditionally define their identity in terms of nationhood, and therefore do not challenge the Jewish nation-state model.[210] Members of the Druze minority are perceived as

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205. Hezki Baruch, *Right Blasts Leftist and Arab Protest in Tel Aviv*, ISR. NAT'L NEWS (Dec. 8, 2018, 5:03 PM), http://www.israelnationalnews.com/News/News.aspx/250368.

206. *Id.*

207. Herb Keinon, *Netanyahu: Left Criticism of Nation-State Law 'Absurd',* JERUSALEM POST (July 29, 2018, 12:58 PM), https://www.jpost.com/Israel-News/Netanyahu-Left-criticism-of-Nation-State-Law-absurd-Druze-concerns-563683.

208. *See, e.g.*, Ariel Kahana, *Netanyahu: The Attack on the Nation-State Law Reveal How Low the Left Has Deteriorated*, ISR. HAYOM (July 29, 2018), https://www.israelhayom.co.il/article/575141.

209. *See* Brandes, *supra* note 65, at 40.

210. *See* Corinna Kern, *Israeli Druze Rally Against New Nation-State Law*, REUTERS (Aug. 4, 2018, 3:14PM), https://www.reuters.com/article/us-israel-politics-law-protest/israeli-druze-rally-against-new-nation-state-law-idUSKBN1KP0PU (quoting a Druze teacher "What makes Israel special is its unique social fabric—Jews, Arabs, Druze, Muslims, Christians, Bedouin, Circassians—together we are all Israel.").

loyal to Israel, and Druze men serve in high percentages in the Israeli army.[211] The Druze in Israel are often referred to by politicians and in the media as "blood brothers"[212], implying that they are encompassed within the national solidarity group. The Druze struggle did not, for the most part, challenge the loyalty-citizenship equation, but, rather, claimed that the Law breached it.[213]

The responses to the Druze struggle expose the fallacy of the "Loyalty-Citizenship" discourse, and, in particular, the inequality embedded in it. Minister of Education Bennet's initial response was to apologize and ensure that the mistake will be corrected.[214] Amending the Law in a manner that will recognize the Druze, however, undermines its internal rational. First, as discussed above, it may be difficult to reconcile exclusivity of the right of the Jewish people to self-determination with recognition of collective rights of other groups. Second, recognizing the Druze minority while refraining from recognizing the Arab-Palestinian minority with respect to the right to self-determination would undermine the proponents of the Law's claim that the Law does not affect equality, and will explicitly create separate classes of citizenship in Israel.

The debates regarding the response to the Druze struggle are still ongoing. However, Netanyahu, as well as other supporters of the Law, have already indicated that, contrary to some of their initial statements, the Law will ultimately not be amended. According to media publications, Druze leaders were offered "compensation" for the Law in the form of recognition of the Druze minority in a separate law, and enactment of a Basic Law awarding "social equality", i.e., a benefits package, to minorities whose members serve in the IDF.[215] For the time

211. Shuki Sadeh, *Admired for Their Army Service, Druze Remain Second-class Israelis*, HAARETZ (Aug. 16, 2018), https://www.haaretz.com/israel-news/business/.premium-admired-for-their-army-service-druze-remain-second-class-israelis-1.6387349

212. *See, e.g.*, Jonathan Lis & Noa Landau, *Israeli Minister Admits Nation-State Law Marginalized 'Druze Brothers'*, HAARETZ (July 25, 2018, 6:26 PM), https://www.haaretz.com/israel-news/.premium-bennett-admits-nation-state-law-marginalizes-druze-brothers-1.6314361 (citing a Tweet by Naftali Bennet that stated, "These are our blood brothers.").

213. Sadeh, *supra* note 211.

214. Ariel Kahana, *Reversing Support, Bennett Says Nation-State Law Must Be 'Remedied'*, ISR. HAYOM (July 26, 2018), http://www.israelhayom.com/2018/07/26/reversing-vocal-support-bennett-calls-for-revision-%E2%80%8Eof-nation-state-law/.

215. *See Netanyahu Meets with Committee on Compensating Minorities for*

being, discussions have been halted, and it is too early to predict if and how the crisis with the Druze community will be resolved.

The proposals of politicians who support the Law to make amends towards the Druze amount to recognition that the Law indeed injures them. It is thus notable that no similar proposals were made by the same politicians to leaders of the Arab-Palestinian minority. However, from a legal perspective, even under the loyalty-citizenship discourse, it would be very difficult to justify amendments to the Law that are tailored to recognize only the Druze and not the Arab-Palestinian minority, while, at the same time, continuing to argue that the Law does not violate equality.

The petitions against the Law demand the Court to invalidate it.[216] This invalidation, if it should take place, would amount to an invalidation of a constitutional norm. The applicability in Israel of the doctrine of unconstitutional constitutional amendment, which allows Courts to invalidate constitutional norms, is still an open question. While the Court has hinted, in the past, that the unconstitutional constitutional amendment doctrine may be applicable in Israel,[217] it has not yet issued a decision regarding the status of the doctrine in Israel. The petitions against the Law are the first test case in which the question arises before the Court in such an explicit manner.

The odds that the Court will accept the petitions and strike the Law down are low. It is more likely that the Court will interpret the Law narrowly and declare that it should be interpreted in conformity with equality. However, a Basic Law that conditions rights or important benefits upon military service, or one that recognizes one minority and not another, causes serious equality issues, thus raising the probability that the Court will strike it down.

To avoid such result, the Knesset may seek to recognize the Druze minority in a separate, regular law. This would raise a different set of issues. Here, the question would be whether the constitutionality of such law would be examined on its own, as

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Nation-State Law, TIMES ISR. (Aug. 13, 2018), https://www.timesofisrael.com/netanyahu-meets-with-committee-on-compensating-minorities-for-nation-state-law/.

216. Hovel, *supra* note 4.

217. The Court insinuated that the doctrine may apply in Acad. Ctr. for Law & Bus. v. Knesset, HCJ 8260/16 (September 6, 2107) (Isr.); *see generally* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017) (discussing the doctrine of unconstitutional amendments).

is currently the Court's practice with regard to constitutional review of legislation, or whether it will also be examined in light of the lack of parallel recognition of the Arab-Palestinian minority, and, of course, in light of the enactment of the Law, which would affect the Court's understanding of the latter.

The attempted manoeuvres to "compensate" the Druze for the enactment of the Law are about more than tangible benefits or rectification of concrete injuries. The various proposals attempt to re-delineate the boundaries of solidarity in a manner that will encompass the Druze, but will still retain the exclusive right of the Jewish people to self-determination.

The centrality of the issue of recognition to the public debate on the Law and the recurring notion of exclusion raised by members of Israel's non-Jewish minorities attest to the expressive power of the Law. The Law declares Israel to be the state "of the Jewish people."[218] It reinstates Israel's commitment to the Jews of the diaspora, signalling that Israel is also "theirs."[219] It offers no basis, however, for a connection of non-Jewish minorities to the state of Israel, and, with the exception of the designation of Arabic as a "special status" language,[220] ignores the existence of minorities in Israel altogether. "We, the people", as defined in the Law, includes the Jews of the diaspora, but excludes Israel's non-Jewish minorities.[221]

In the age of globalization, many political theorists undermined the relevance of solidarity, perceiving it as a collectivist notion irrelevant to a social order based on the protection of individual liberties, if not incompatible altogether with such order.[222] Kymlicka and Banting argue that "societal level national solidarity is now widely seen, implicitly or explicitly, as at best mythical, and at worst dangerous and exclusionary."[223] In addition, solidarity was perceived as too

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218. Peter Lintl & Stefan Wolfrum, *Israel's Nation-State Law*, 41 STIFTUNG WISSENSCHAFT UND POLITIK 1 (2018).

219. *Id.* at 1–2.

220. A designation which is a downgrade from its current status.

221. Hassan Jabareen compares the Law's delineation of the political community to the colonial notion of "we, the people", and argues that it is not only exclusionary, but also racist. *See* Hassan Jabareen, *The Origins of Racism and the New Basic Law: Jewish Nation-State*, *VERFASSUNGSBLOG* (Nov. 11, 2018), https://verfassungsblog.de/the-origins-of-racism-and-the-new-basic-law-jewish-nation-state/.

222. The notion of cosmopolitan solidarity is perhaps an exception.

223. Keith Banting & Will Kymlicka, *Introduction: The Political Sources of Solidarity in Diverse Societies*, *in* THE STRAINS OF COMMITMENT: THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES 5 (Keith Banting &

vague and too amorphous a concept to warrant serious academic discussion.[224]

Habermas is exceptional, in this regard, for recognizing the importance of solidarity and the interdependency between solidarity and human rights. It is "informal social relations" he explains, that, "under the condition of predictable reciprocity", require "that the one individual 'vouches' for the others."[225] These obligations are rooted in an "antecedently existing community."[226] Habermas' focus, however, is on the creation of post-national solidarity, which he perceives as a necessary evolvement needed in order to respond to the challenges of globalization.[227]

However, the rise of nationalist, right-wing populist parties world-wide and the reemergence of sovereignty as a political claim indicate that as a matter of fact, the nation-state is still very much a relevant political institution. As long as this is the political reality, the existence of all-encompassing solidarity within states is still necessary for ensuring that *all* members of each state enjoy equal rights.

The Court acknowledged, in the *Tamarin* and *Ornan* cases, that solidarity is the sentiment of commitment that renders members of a group willing to bear the costs associated with protecting other members' well-being.[228] It also recognized the importance of solidarity as a value worth protecting. What the Court failed to recognize, however, is the ways in which exclusion from the solidarity group affects those that are excluded. Research on such exclusion is not only theoretical—it has been empirically shown, for example, that, in the area of welfare, the extent to which particular groups or individuals are included in the solidarity group affects their perception as "deserving" of receiving social benefits.[229] The boundaries of

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Will Kymlicka eds., 2018).

224. With the notable exception of Durkheim and his successors.

225. Jurgen Habermas, Democracy, Solidarity and the European Crisis, Lecture at Leuven University (Apr. 26, 2013) (transcript available at Pro Europa).

226. *Id.*

227. HABERMAS, *supra* note 167.

228. Tamarin v. State of Israel, C.A. 630/70, 26(1) PD 197 (1972) (Isr.); *Israeli Supreme Court Rejects Israeli Nationality Status: Excerpts from Ruling*, MIDDLE E. MONITOR (Oct. 2013), https://www.middleeastmonitor.com/wp-content/uploads/downloads/documents/20131007_SupremeCourtRuling_Israeli Nationality.pdf.

229. HABERMAS, *supra* note 167.

solidarity are thus likely to affect the level and extent of protections individuals enjoy.

In reality, the geographic boundaries of political communities, i.e., states, do not always coincide with all-encompassing solidarity. Both creating such solidarity where it does not exist and sustaining it where it does are challenging tasks. Fostering and sustaining solidarity in societies that are culturally, ethnically, and religiously diverse is especially challenging, and the debate on how it can be achieved is ongoing.[230]

Whether the law can and should actively promote social solidarity is an important question, which is beyond the scope of this article. However, if we agree that solidarity is vital for maintaining a just society, then all-encompassing solidarity should be regarded as a societal value worthy of protection. The Law has the opposite effect: it reinforces exclusionary bounded solidarity, under which Jews in Israel and the diaspora are part of the solidarity group that comprises the political community in Israel, while Israel's non-Jewish citizens are excluded from it.

It is too early to draw empirical conclusions regarding the impact the Law will have on social solidarity between Jews and non-Jews in Israel. What is clear, however, is that the Law accords little regard to the creation of all-encompassing solidarity among Israel's citizens, and that no effort has been made to consider the negative effects the Law may have on such solidarity.

VI. CONCLUSION

The political and legal debate regarding the Law is still fierce in Israel. Much of the public attention is currently focused on the awaited Supreme Court decision on the petitions against the Law. Although the odds of the Court invalidating the Law are low, its decision may offer guidelines regarding the Law's interpretation. Such guidelines may, for the time being, alleviate some of the concerns regarding the Law's effect on equality. The Court can also explicitly state that the Law does not prevent recognition of collective rights, for example, by applying, to Article 1, a presumption of compatibility with international law,

230. *See generally* THE STRAINS OF COMMITMENT: THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES 5 (Keith Banting & Will Kymlicka eds., 2018).

and stating that, despite its wording, the article does not deny minorities internal self-determination.[231]

However, the injuries caused by the Law's expressive power are more difficult to mitigate. The Law deepens the existing rift in Israeli society and facilitates the already-existing friend-enemy discourse. It reinforces an exclusionary notion of solidarity and negatively affects the prospect of creating all-encompassing solidarity, which includes all of Israel's citizens. Since these injuries do not constitute violations of either individual or collective rights, and as long as the Court continues not to perceive the existence of all-encompassing solidarity to be a constitutional value that warrants protection, it is unlikely that the Court's ruling can offer redress to the harm the Law causes to social solidarity in Israel.

231. *See* Tamar Hostovsky Brandes, *International Human Rights Law and Constitutional Law in Israel*, 31 L. STUD. 925 (2018) (Heb.) (claiming that a presumption of compatibility with international law should be applied to the Basic Laws).