

A thesis submitted for the degree of Doctor of Philosophy of The Australian National University

Diasporas and Deliberative Democracy

A case study of Jewish diaspora involvement in constitutional
deliberations in Israel

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I declare that this thesis is my own original work,

Shay Keinan, March 2018

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This thesis is dedicated to my father, Shlomo Keinan, who always inspired me to read and to learn.

Abstract

The boundaries of citizenship are increasingly contested. The trend among scholars is to try to expand the state's responsibilities and duties to include non-citizens in the relevant polity. Legal, social and political theorists ask whether citizenship can or should exist beyond the nation state and a defined territory.

This debate closely relates to the burgeoning research regarding diaspora communities and their connections with their countries of origin or homelands ('kin-states'). Diaspora communities have always maintained some level of interest in the affairs of their kin-states, but globalisation and advanced communication technologies have made it easier for people in the diaspora to engage in activities that are directed at the political and social life of their kin-states. Kin-state governments also increasingly extend their actions beyond their state borders and reach out to their diaspora communities in order to promote a specific definition of the national community and to reap political and economic gains.

This trend of diaspora communities influencing political decisions in a country in which they do not reside raises a question of legitimacy in traditional liberal-democratic models of governance: why should diaspora people be allowed to affect political decisions in their kin-state when they may not have to bear the consequences of such decisions? As diaspora populations become more and more involved in political processes in their kin-states, modern democratic theories need to adapt in order to accommodate such encroachments on traditional democratic principles.

In this thesis I analyse the challenges and legal implications created by the existence of large and influential diaspora communities in today's globalised world. I connect diaspora theory with deliberative democratic theory, filling a gap in deliberative democratic literature. I contend that elite models of deliberative democracy can be useful in overcoming the challenges mentioned above. I examine the role of constitutional courts in a deliberative democracy and argue that they may be better situated to conduct deliberations in divided societies where ethnic and religious

tensions prevent other democratic bodies from deliberating effectively. This is especially relevant when dealing with divided societies with large diasporic populations.

To support these claims, I examine the Israeli Supreme Court. I analyse the Israeli Supreme Court's unique deliberative features and explain how these features have enabled diaspora Jews (and other groups of non-citizens) to participate in the Israeli democratic process. I examine illustrative cases in which Jewish diaspora activists were involved in proceedings and deliberations at the Israeli Supreme Court. The case studies demonstrate that, under certain circumstances, diaspora communities can legitimately and effectively participate in political processes in their kin-states, challenge constitutional norms and influence government policies and laws.

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I. Overview

1. Introduction

There is a growing debate among academics regarding the boundaries of citizenship. In today's world, globalisation increases the number of people who feel deeply connected to more than one state. Concepts of 'global', 'transnational' and 'denationalised' citizenship are developed in an attempt to replace traditional concepts of citizenship.¹ The trend among scholars is to try to expand the state's responsibilities and duties so as to include non-citizens in the relevant polity.² As a result, legal, social and political theorists ask whether citizenship can or should exist beyond the nation state and a defined territory.³

These questions closely relate to the burgeoning research regarding diaspora communities and their connections with their countries of origin or homelands ('kin-states').⁴ Diaspora studies has emerged as a distinct academic field in recent years. A substantial part of it focuses on the relationship between diaspora communities and their kin-states.⁵ Diaspora communities have always maintained some level of interest

¹ Yishai Blank, 'Spheres of Citizenship' (2007) 8(2) *Theoretical Inquiries in Law* 411; Linda Bosniak, 'Citizenship Denationalized' (2000) 7(2) *Indiana Journal of Global Legal Studies* 447; Linda Basch, Nina Glick Schiller and Christina Blanc-Szanton, *Nations Unbound: Transnational Projects, Post-Colonial Predicaments, and De-Territorialized Nation-States* (Routledge, 1994); Christian List and Mathias Koenig-Archibugi, 'Can There Be a Global Demos? An Agency-Based Approach' (2010) 38(1) *Philosophy and Public Affairs* 76.

² Avigail Eisenberg, 'Voting Rights for Non-Citizens: Treasure or Fool's Gold?' (2015) 16(1) *Journal of International Migration and Integration* 133; Cristina M Rodriguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8(1) *International Journal of Constitutional Law* 30; Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1998) 54; Sarah Song, 'Democracy and Noncitizen Voting Rights' (2009) 13(6) *Citizenship Studies* 607.

³ Bosniak, above n 1; Blank, above n 1.

⁴ See, for example, Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75(5) *Fordham Law Review* 2393; Blank, above n 1; Rainer Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora' in Rainer Bauböck (ed), *Diaspora and Transnationalism: Concepts, Theories and Methods* (Amsterdam University Press, 2010) 295; Basch, Glick Schiller and Blanc-Szanton, above n 1; Anupam Chander, 'Diaspora Bonds' (2001) 76 *New York University Law Review* 1005.

⁵ See, for example, Yossi Shain, *Kinship & Diasporas in International Affairs* (University of Michigan Press, 2007); Amanda Roth, 'The Role of Diasporas in Conflict' (2015) 68(2) *Journal of International Affairs* 289; Steven Vertovec, *The Political Importance of Diasporas* (Working Paper No. 13, Centre on Migration, Policy and Society, University of Oxford, 2005); Khachig Tölölyan, 'The Contemporary Discourse of Diaspora Studies' (2007) 27(3) *Comparative Studies of South Asia, Africa and the Middle East* 647; Hariz Halilovich, 'Trans-Local Communities in the Age of Transnationalism: Bosnians in Diaspora' (2012) 50(1) *International Migration* 162; Adeno Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age

in the affairs of their kin-states, but globalisation and advanced communication technologies have made it easier for people in the diaspora to engage in activities that are directed at the political and social life of their kin-states. Kin-state governments also increasingly extend their actions beyond their state borders and reach out to their diaspora communities in order to promote a specific definition of the national community and to reap political and economic gains.⁶

Traditional liberal-democratic models indicate a legitimacy problem when people are able to influence political decisions in a country in which they do not reside: why should diaspora people be allowed to affect political decisions in the kin-state when they may not have to bear the consequences of such decisions?⁷ I therefore address in this thesis a major problem in democratic theory. As diaspora populations become more and more involved in political processes in their countries of origin, modern democratic theories need to adapt in order to accommodate such encroachments on traditional democratic principles.

One way to resolve this tension is to look at it through the prism of deliberative democracy. Deliberative democracy has gained popularity among academics as a useful model to deal with legitimacy problems in modern democratic societies.⁸ The major element emphasized by deliberative democratic theory, as opposed to other democratic

of the Diaspora' (2012) 45 *Vanderbilt Journal of Transnational Law* 963; Andy Sundberg, 'Diasporas Represented In Their Home Country Parliaments' (U.S. Vote Foundation, 2007) <https://www.overseasvotefoundation.org/files/Diasporas_Represented_in_their_Home_Country_Parliaments.pdf>.

⁶ See, for example, Illa Ben-Porat, 'Perpetual Diaspora, Changing Homelands: The Construction of Russian-Speaking Jews as a Diaspora of Both Israel and Russia' (2011) 17(1) *Nationalism and Ethnic Politics* 75; Costica Dumbrava, 'External Citizenship in EU Countries' (2014) 37(13) *Ethnic and Racial Studies* 2340; Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', above n 4; David Fitzgerald, 'Rethinking Emigrant Citizenship' (2006) 81(1) *New York University Law Review* 90, 105.

⁷ See Fitzgerald, above n 6, 107.

⁸ See Robert E Goodin, 'How Can Deliberative Democracy Get a Grip?' (2012) 83(4) *Political Quarterly* 806; Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012); Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004); Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy' in Jane Mansbridge and John Parkinson (eds), *Deliberative systems : deliberative democracy at the large scale* (Cambridge University Press, 2012) 1; KM Hansen and CF Rostbøll, 'Deliberative Democracy' in B. Isakhan and S Stockwell (eds), *The Edinburgh Companion to the History of Democracy* (Edinburgh University Press, 2012) 502; Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

models, is that legitimacy does not derive only from the act of voting at elections but from the act of reflective judgment taking place prior to voting among equally placed citizens. The concept of deliberative democracy is based on principles of mutual respect, reciprocity, fairness and rational argument.⁹ Deliberative democrats also emphasise that the deliberation process should be as inclusive as possible and involve all those who will be affected by the ultimate decision.¹⁰ Applying deliberative democratic principles to diaspora issues should therefore lead us to include diaspora people in major constitutional deliberations taking place in kin-states.¹¹ Another deliberative democratic principle holds that participants in deliberation should deliberate on an 'equal basis'.¹² So how can diaspora people be engaged on an 'equal basis' when they do not live in the relevant kin-state territory and therefore are not subject to the same rules as the kin-state residents? The challenge is to find legitimate avenues of inclusion that enable diaspora people to be involved in political affairs in their kin-states, despite the fact that they are not citizens.

In this thesis I analyse the challenges posed to democratic theory by diaspora communities and I contend that deliberative democracy (and in particular, elite models of deliberative democracy) can be useful in addressing these problems. I utilise deliberative democratic theory to examine diaspora communities' involvement in political processes in their kin-states. Using deliberative democratic theory in this context can help in two ways: first, it provides a theoretical framework that is able to reconcile democratic ideals with participation of non-citizens. Second, it enables democratic states to design various legitimate ways by which to engage with their diaspora populations as well as other groups of non-citizens.¹³

⁹ Amy Gutmann and Dennis Thompson, 'Deliberative Democracy beyond Process' (2002) 10(2) *Journal of Political Philosophy* 153; Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18(1) *The Journal of Political Philosophy* 64, 94.

¹⁰ See Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2002); Gutmann and Thompson, above n 8; Ron Levy, 'The Law of Deliberative Democracy: Seeding the Field' (2013) 12(4) *Election Law Journal: Rules, Politics, and Policy* 355.

¹¹ As I will explain later on, some decisions taken by the kin-state can affect diaspora people in various ways. See below p 20, 52.

¹² See Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State' (2012) 4(1) *International Theory* 39, 44.

¹³ In chapter III I define, in depth, what definitions of 'legitimate' I use throughout the thesis.

Many kin-state governments have already come up with different methods of addressing the interests of their diaspora people who maintain a strong connection to the kin-state. These methods usually include preferential citizenship rights (e.g., to applicants who share a common ethnicity with the kin-state) and allocation of special electoral constituencies for overseas diaspora communities.¹⁴ Diaspora communities get involved in their kin-states' affairs in various ways, for example, by lobbying and donations to political groups and candidates. This thesis focuses on a particular way by which diaspora people influence policies and decisions in their kin-states. This way does not involve voting in general elections or referendums but rather challenging legislation or policies that have major effects, relevance or importance to diaspora populations through the kin-state constitutional court.

Some deliberative democrats see courts as potentially a successful, albeit elite, deliberative democratic body.¹⁵ However, deliberative democrats differ on the role ascribed to governing elites in deliberation. *Popular* variants of deliberative democracy aim to encourage deliberation among the greater public. On the other hand, *elite* variants of deliberative democracy view elites as both capable and responsible for transferring, through deliberation, the often vague and unrefined demands of the masses into practical law.¹⁶ I will argue that while popular deliberation may be neither desirable nor practical in divided societies with large diasporic populations (for various reasons), elite models of deliberative democracy can be useful in overcoming the challenges mentioned above.

Elite models of deliberative democracy focus on fostering deliberation among decision-making bodies such as legislatures and the judiciary. The literature on the deliberative democratic quality of courts is mixed. Theorists like Rawls, Dworkin, and Gutmann and Thompson, hold that courts (especially constitutional court) provide a model for ideal

¹⁴ See, for example, Dumbrava, above n 6; Fiona B Adamson, *Blurring the Lines: Diaspora Politics and Globalized Constituencies* (14 July 2015) World Politics Review <<http://www.worldpoliticsreview.com/articles/16224/blurring-the-lines-diaspora-politics-and-globalized-constituencies>>.

¹⁵ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press of Harvard University Press, 1996) 45; Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013) 3.

¹⁶ See Levy, 'The Law of Deliberative Democracy: Seeding the Field', above n 10, 358.

deliberation.¹⁷ A court generally deliberates in a transparent manner, hears and challenges experts' opinions, provides reasoned arguments and is (partially) separated from electoral constraints. Others, like Sen and Waldron, claim that the court is in fact not as deliberative as some would have us believe.¹⁸ They question the actual quality of deliberation practiced in courts and highlight the courts' elitist and undemocratic nature.¹⁹ I address such objections and explain how the quality of deliberations that take place in courts can be evaluated and improved. I also argue that deliberations in constitutional courts can enhance democracy, either by allowing non-citizens to submit petitions to the court or by accepting and including in deliberations submissions made by third parties through the process of hearing *amicus curiae* ('friends of the court').²⁰ Constitutional courts may also be better situated to conduct deliberations in divided societies where ethnic and religious tensions prevent other democratic bodies from deliberating effectively. Especially when dealing with divided societies with large diasporic populations, a court can be more conducive to effective democratic deliberation than parliaments or popular initiatives.

To support these claims, I examine the case of Israel. The Israeli case is enlightening and relevant for several reasons. Israel has dealt with the challenges posed by a large and influential diasporic population (overseas Jewish communities) and a significant ethnic minority (Arab Israelis), while being in constant conflict with its neighbours. Although many problems persist, Israel has developed a mostly viable democracy and maintained its distinctive ethnic character without lapsing into civil war, unlike other countries dealing with large and influential diaspora populations.²¹ Also, unlike other diaspora communities, the Jewish diaspora pre-dates the creation of the modern State of Israel.

¹⁷ See Gutmann and Thompson, above n 8, 45; John Rawls, 'The Idea of Public Reason' in James Bohman and William Rehg (eds), *Deliberative democracy: Essays on reason and politics* (1997) 95; John Rawls, *Political Liberalism* (Columbia University Press, 1996) 231–6; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 70.

¹⁸ Maya Sen, 'Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System' (2013) 27 *Notre Dame Journal of Ethics & Public Policy* 303; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *The Yale Law Journal* 1346.

¹⁹ See Sen, above n 18; Waldron, above n 18.

²⁰ See Levy and Orr, above n 8, 44.

²¹ Israel is the only country in the Middle East categorised as 'free' by Freedom House. See Puddington, Arch and Tyler Roylance, 'Freedom in the World 2016' (Freedom House, 2016) <<https://freedomhouse.org/report/freedom-world/freedom-world-2016>>. I am referring here to sovereign Israel, excluding the Palestinian Territories.

This meant that the young modern Israeli nation state had to rely culturally, financially and politically on support from its diaspora communities from its inception. Even today, when almost half of the worldwide Jewish population lives in Israel, the State of Israel is still partly dependant and intertwined with its diaspora, as I will explain later on.

Israel's capacity to deal with the tensions that arise when diaspora people seek involvement in the kin-state affairs can be attributed, at least partially, to the willingness and courage of the Israeli Supreme Court to delve into questions that courts in other jurisdictions might consider non-justiciable. The Israeli Supreme Court has dealt with cases that concern the contours of the state's national and ethnic character, the relations between the ethnic majority and ethnic minorities and also the role of religion in citizens' lives. The Israeli Supreme Court would not have been able to do all this without having attained a high level of perceived legitimacy among Israeli citizens and politicians as well as non-Israeli Jews.

In this thesis, I examine illustrative cases in which the Israeli Supreme Court deliberated on constitutional questions that had a direct impact on the Jewish diaspora and its relationship with the state of Israel, and on the rights of Israel's minorities. Diaspora people were involved in such cases on two levels: first, they were often directly involved in court proceedings either as individuals or through diaspora organisations.²² Second, diaspora interests were considered (directly and indirectly) by the judges in their deliberations on the matter. These cases addressed questions such as: who is considered a 'Jew' and therefore belongs to the Jewish diaspora? Is there an 'Israeli' ethnicity that encompasses both Jews and Arabs (and excludes diaspora Jews)? The Court's decisions in those cases had a direct impact either on the lives of Jewish people living in the diaspora or on their ability to intervene and shape Israeli laws and policies.

Allowing diaspora communities to participate and affect major political deliberations in their kin-states therefore achieves an important goal. It offers a legitimate way to include diaspora people in important political and social decisions that bear on the life and interests of diaspora communities. Importantly, it does so while maintaining the

²² In some cases, diaspora organisations were directly involved, whether as petitioners or as respondents. In other cases, diaspora organisations were indirectly involved as major donors and supporters of local Israeli NGOs that submitted the petitions.

relevant distinction between diaspora people who participate through a deliberative process, and citizens who are able to influence laws through voting in elections and referendums.

The relationship between diaspora communities and their kin-states raises issues that have been discussed mainly by social and international relations theorists, but largely neglected by legal scholars.²³ This thesis aims to fill this gap by building scholarly bridges between diaspora studies, deliberative democratic theory and studies of the judicial branch of government. This thesis covers all of these issues with a focus on the legal implications created by the involvement of diaspora communities in the politics of their kin-states, particularly in divided societies. I demonstrate in this thesis that there are democratically legitimate ways for diaspora communities to be involved in shaping constitutional norms in their kin-states. Moreover, this thesis sheds light on a specific legal issue that arises in the context of the diaspora-kin-state relationship: the involvement of diaspora individuals and organisations in constitutional litigation in their kin-state. It does so by examining diaspora Jews and their involvement in constitutional litigation in the Israeli Supreme Court.

For deliberative democrats, this thesis offers the valuable insight that where popular deliberation is not feasible, a reflective constitutional court can serve as an effective deliberative democratic body. For legal scholars, it offers a unique view on how laws can be shaped by groups of non-citizens, and how the courts can effectively take the interests of non-citizens into account when discussing issues that implicate such groups.

²³ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 975. See however Chander, above n 4.

2. Methodology

In order to address the research questions I described in the introduction, I first explore and clarify their constituent parts. For example, I explain what the term 'diaspora' denotes, and what kind of 'citizenship' one has in mind when referring to diaspora people as citizens of a greater polity. I also present clear definitions in order to understand what 'deliberative democracy' means and how it is relevant to societies with a diasporic population. Finally, I connect all these dots analytically and explain specifically how diaspora issues affect deliberative democratic theory. Therefore, in the first chapters of this thesis I explore the main theories and approaches in the relevant literature. I utilise analytical inquiry as the main methodology in order to understand the normative implications of different definitions and theories and to identify gaps and problems within the current literature. Empirical evidence is also important and so I utilise existing empirical research when analysing the different types of engagement between diaspora communities and their kin-states and the prospects of successfully applying deliberative democratic theory to divided societies with large diasporic populations.

I apply both analytical inquiry as well as existing empirical data in order to evaluate the deliberative level of different constitutional courts. For example, I assess the deliberative level of the Israeli Supreme Court by the incidence of dissenting opinions in constitutional cases.

The case studies from the Israeli Supreme Court demonstrate the ideas extracted from the previous theoretical parts. I show through the case studies how diaspora communities can be involved and affect policies of the kin-state directly and indirectly through the kin-state's legal system. The theoretical analysis and the case studies support my claims that diaspora communities are important players in their kin-state politics. There are ways, other than voting, for diaspora people to participate in constitutional deliberations in their kin-state. In particular, under certain conditions, a

constitutional court can function as an effective deliberative democratic body in divided societies – especially when large diasporic populations are involved.

To support my research I conducted interviews with two senior former Israeli Supreme Court judges.²⁴ These senior judges sat in many of the cases I examine in the case study chapter. These interviews gave me a unique understanding and insight into the deliberative dynamics between judges in the Israeli Supreme Court. I used insights gained through these interviews to test and develop some ideas and arguments presented in this thesis.

My discussion entwines deliberative democratic theory with theories of judicial practice and citizenship. While I do not aim to make a specific contribution in each and every one of these areas, the value of this thesis amounts to more than the sum of all its parts. As a result of putting together a coherent argument building on all of these areas, each area benefits by being informed and integrated into a more complete interdisciplinary framework. This thesis contributes to the literature dealing with diaspora communities and their involvement in political processes in their kin-states by viewing this process through a deliberative democratic lens. It also enriches deliberative democratic theory by showing how deliberative democracy is relevant to divided societies. Legal scholars will find in this thesis a much needed examination of the issues raised by the growing involvement of diaspora populations in their kin-states.

²⁴ The interviews were conducted according to ANU Human Ethics Protocol Approval 2015/355.

3. Outline of Chapters

i. Diaspora populations

In this chapter I explain the concept of diaspora. I discuss why and how diaspora people engage in the affairs of their kin-states and why this poses a challenge to democratic theories in general and to deliberative democratic theory in particular.

I commence this chapter with a general introduction to diaspora theory: the origins of the term diaspora and what kinds of people can be described as belonging to a certain diaspora. I explain what binds diaspora people together with the people that reside in the kin-state and what separates them. I explore the concepts of 'citizenship' and 'diaspora' in relation to each other and discuss the effects of diaspora populations on citizenship laws in their kin-states. I explain how a feeling of belonging and connection to the people residing in the kin-state drives people who were born or raised overseas, in countries far away from the kin-state ('host-states'), to become interested in influencing political and social affairs in their kin-state. I review the various legal and economic tools being used by diaspora communities and the respective kin-state governments to interact with each other. I connect these issues to current trends in citizenship law that acknowledge the fact that people today can belong to more than one polity and affect decisions in countries other than those in which they live.

This will lead into a discussion of the 'diasporic citizen' and the legal concepts that scholars are trying to develop for people who live outside the kin-state's territory and do not share the same rights and obligations as citizens of the kin-state who reside in it. This discussion will clarify the nature of the relationships between diaspora communities and their kin-states and I will explain in what sense, or under what circumstances, one can describe diasporic people as 'citizens' of their kin-state. I conclude that diaspora populations are key players in their kin-state politics, especially in cases of divided societies. As diaspora communities increasingly constitute an integral part of the demos, they will be involved in one way or another in deliberations in the kin-state over major constitutional issues that concern them. The challenge therefore is to find

democratically legitimate ways to enable diaspora people to be involved in political affairs in their kin-states, despite their different citizenship or residence status.

ii. Deliberative democracy

In this chapter, I introduce the concept of deliberative democracy: What does deliberative democracy mean? What are the concept's theoretical principles? What are its practical implications? I review in detail the concept of legitimacy which deliberative democracy aims to reinforce. I then differentiate the opinions of deliberative democracy scholars. For example, I examine the difference between 'procedural' and 'substantive' accounts of deliberative democracy and between popular and elite models of deliberation. I also examine the different views on what kinds of arguments and justifications should be raised in a deliberative process, as well as other nuances in the literature.

After a general review of deliberative democratic theory, I specifically discuss the challenges to deliberative democratic initiatives in societies divided across ethnic and religious lines. This is relevant to my overall argument as such societies often produce, and are accompanied by, active diaspora communities.

iii. Elites, democracy and deliberation

The difficulties in applying deliberative democratic theory to divided societies lead me to focus on elite models of democratic deliberation. I explain in this chapter the important role played by elites in introducing and instituting democratic principles in general, and specifically in emerging democracies and divided societies. I then apply these insights to deliberative democratic theory and conclude that in divided societies where effective popular deliberation is unlikely, elite models of democratic deliberation can prove useful.

iv. Courts as deliberative democratic bodies

After elaborating on elite deliberation in a more general sense, I explore the courts' unique roles as elite deliberative democratic bodies. I specifically focus on how constitutional courts can embody the ideals and principles of deliberative democratic theory, namely, rational, fair and impartial deliberation that takes place among equal citizens. I address some criticisms raised against the deliberative processes that take

place in courts as well as against the courts' allegedly undemocratic character. I then offer a list of criteria that can be used to examine the level and quality of deliberation exercised by a given court. These criteria can help us discover whether a certain court is actually more amenable to democratic deliberation than another court. I will argue that a court that performs well on the deliberative scale can encourage and foster deliberation in the media and the public sphere, thus improving deliberation in a society as a whole. This can be particularly useful in societies where democratic deliberation is wanting, such as divided societies or societies with large diaspora populations. Also, a deliberative court can give voice to groups of non-citizens, such as diaspora people and migrants.

v. Case studies from the Israeli Supreme Court

This chapter illuminates a unique mechanism for the involvement of diaspora people in the affairs of their kin-states that has not been adequately discussed in the literature before: the participation of diaspora people in constitutional litigation in their kin-state.²⁵ The previous chapters establish the basis for my theoretical framework, namely, that diaspora populations should be involved in constitutional deliberations and that constitutional courts can be arenas where diaspora concerns can be raised and deliberated effectively. This chapter applies this theoretical framework to real cases in the Israeli Supreme Court.

In order to understand why members of the Jewish diaspora utilise the Israeli Supreme Court as a way to influence Israeli politics, I first provide background on the relationship between the State of Israel and the Jewish diaspora as well as the unique characteristics of Israel's Supreme Court. I then examine in more detail various cases in which the Israeli Supreme Court deliberated over constitutional questions that were raised by diaspora representatives and had hearings on the Jewish diaspora. I also analyse cases that, although not concerning the Jewish diaspora, were raised by Israeli NGOs funded and supported by Jewish diaspora organisations. Such cases involved other groups of non-citizens, such as Palestinians, illegal migrants and asylum seekers. Using the criteria presented in the theoretical section, I assess whether and to what extent the Israeli

²⁵ This point was briefly mentioned discussed in Shain, above n 5, 80.

Supreme Court dealt with these issues in a deliberative manner. I point out the deliberative democratic principles that were applied in the adjudication of these cases, and how the Court's proceedings fostered deliberation among other institutions and the greater Israeli public.

Through these case studies, I explain the conditions that can enable diaspora people to use legal means to push for changes in kin-state policies, even in controversial issues that divide diaspora people from the people who live in the kin-state. When diaspora people use legal means to intervene in the political affairs of their kin-state, they use kin-state institutions. This approach potentially avoids some of the legitimacy problems that may arise when diaspora people act outside kin-state institutions and against the official policies of the kin-state.

II. Diaspora populations: theory and practice

In this chapter I explain what diaspora populations are, what the nature of their relationship with host-states and kin-states is and why diaspora populations pose a significant challenge to certain democratic theories. I start by exploring the concept of 'diaspora'. I then turn to discuss the concepts of citizenship and nationality and how these two concepts relate to diaspora populations. This discussion is needed in order to clarify under what circumstances diaspora people can be regarded as citizens of their kin-states. Understanding the difference between these concepts is also essential when deciding who should be entitled to participate in political processes, and to what extent. This chapter will also review the legal and socio-economic tools being used both by diaspora communities and their respective kin-state governments to interact with each other. Current trends in citizenship law are also discussed. These trends demonstrate the significance that many countries ascribe to their diaspora communities and the importance of diaspora populations to the kin-state national identity. However, despite the growing experience and debate over these issues, scholars still struggle to come up with concrete and satisfactory political systems that are able to accommodate diaspora people who are members of more than one polity. I argue that, in one way or another, diaspora populations play a key role in shaping the political life of their kin-state societies. Consequently, there are good normative and practical reasons to accept this involvement rather than reject it, and to explore the legitimate means available to manage such involvement.

A. What is a diaspora?

Traditionally, the literature defined 'diaspora' as an ethnic community that experienced a traumatic, far-reaching forced dispersal from their homeland to multiple points.²⁶ The

²⁶ Robin Cohen, 'Diasporas and the Nation-State: From Victims to Challengers' (1996) 72(3) *International Affairs* 507; Myra Waterbury, 'Bridging the Divide: Towards a Comparative Framework for Understanding Kin State and Migrant-Sending State Diaspora Politics' in Rainer Bauböck (ed), *Diaspora and*

term was originally used to describe the Jewish diaspora as the paradigmatic case of diasporic population and it was later used to describe other similar cases such as the Greek, Armenian and African diasporas. Kin-state is the term used to describe states whose majority population share ethnic or cultural characteristics with a minority population that lives in a different state (for example, Italy is the kin-state with respect to people of Italian heritage living outside Italy).²⁷

When scholars discuss diasporas in the traditional sense, they identify three main characteristics. The first, as mentioned above, is dispersal from a homeland to multiple locations. The traumatic dispersal of the nation to multiple points is often the starting point of diaspora creation. However, although the notion of victimhood is at the heart of any definition of diaspora, Cohen argues that it is necessary to transcend it, as diasporas have not only suffered, but often also thrived and consolidated among host-states.²⁸ The second characteristic of a diaspora is an enduring presence in at least some of the locations to which people were dispersed. A migration wave alone does not create a diaspora. A substantial amount of time needs to pass before one can recognise the formation of a new diaspora. A diaspora undergoes different phases and forms over time, and in many cases of migration waves, members of a particular ethnic group may intend to embrace the opportunity to lose their prior identity and assimilate into the new host nation.²⁹ The persistence of diasporic identity across multiple generations is therefore an essential criterion for distinguishing diasporic groups from the more temporary phenomenon of transnational migration. The third characteristic is a continuing flow of social, cultural or political ties among the different communities comprising the diaspora in different locations.³⁰ These three are the most common characteristics, but some scholars add other factors to the list. Safran, for example,

transnationalism: concepts, theories and methods (Amsterdam University Press, 2010); Thomas Faist, 'Diaspora and Transnationalism: What Kind of Dance Partners?' in Rainer Bauböck and Thomas Faist (eds), *Diaspora and Transnationalism* (2010); Rogers Brubaker, 'The "diaspora" Diaspora' (2005) 28(1) *Ethnic and Racial Studies* 1.

²⁷ See *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note* (Organization for Security and Co-operation in Europe, High Commissioner on National Minorities, 2008) <<http://www.osce.org/hcnm/33633>>, 3.

²⁸ Cohen, 'Diasporas and the Nation-State: From Victims to Challengers', above n 26, 513.

²⁹ *Ibid* 516–7.

³⁰ Nicholas Van Hear, *New Diasporas: The Mass Exodus, Dispersal and Regrouping of Migrant Communities* (UCL Press, 1998) 6.

identifies two more characteristics: a partial alienation from the host society and a continuous commitment to rebuild and perhaps return one day to the homeland.³¹

However, over the last few decades the use of the term 'diaspora' has expanded further and it is now used in a variety of contexts to describe different categories of people who do not fulfil all the traditional characteristics mentioned above, such as expatriates, expellees, political refugees, alien residents and migrants. For example, a website dedicated to the rights of Australians who are living abroad uses the terms 'Australian diaspora', 'Australian expatriates' and 'overseas Australians' interchangeably.³² A modern definition is given by Shain and Barth who define diaspora quite broadly as 'a people with a common origin who reside, more or less on a permanent basis, outside the borders of their ethnic or religious homeland'.³³

The overuse of the term 'diaspora' meant that it has moved away from its original meaning and has been stretched to accommodate various intellectual, cultural and political agendas.³⁴ North-Africans in France, Turks in Germany, Chinese in South-East Asia, blacks in North America and the Caribbean and even French speaking Belgians in Wallonia are all now said to be part of a 'diaspora'.³⁵

Scholars have similarly developed alternative constructivist accounts of the term 'diaspora', different from the traditional models described above. These accounts focus less on what a diaspora is, but rather on what a diaspora *does*. Diaspora is seen as 'a category of practice, project, claim and stance, rather than as a bounded group'.³⁶ Sometimes using the term 'diaspora' is politically motivated rather than scientific or objective.³⁷ Bauböck, for example, proposes that diasporas should be seen as a political project. He suggests viewing a diaspora less in terms of historic origins of the group, and

³¹ William Safran, *Diasporas in Modern Societies : Myths of Homeland and Return* (1991) 83.

³² See the Southern Cross Group website at <<https://web.archive.org/web/20170407081607/http://www.southern-cross-group.org/>>.

³³ Yossi Shain and Aharon Barth, 'Diasporas and International Relations Theory' (2003) 57(3) *International Organization* 449, 452.

³⁴ Brubaker, above n 26, 1.

³⁵ See Safran, above n 31, 83; Cohen, 'Diasporas and the Nation-State: From Victims to Challengers', above n 26; Tölölyan, above n 5.

³⁶ Brubaker, above n 26, 13.

³⁷ Elena Barabantseva and Claire Sutherland, 'Diaspora and Citizenship: Introduction' (2011) 17(1) *Nationalism and Ethnic Politics* 1, 5.

more in terms of intended actions by elite groups who use diaspora communities to promote their interests and ideologies.³⁸ For example, Paerregaard argues that Peruvian migrant elite groups construct a diasporic identity by excluding working-class, less privileged Peruvian migrants.³⁹ Thinking of diaspora activities in these terms enables us to recognise how certain segments of a particular diaspora community are actually more committed to the 'diasporic project'.⁴⁰

According to such contemporary views, diasporas are not only created by minority elites in host-states but also by kin-state governments in accordance with the government's interests.⁴¹ For example, Greece actively promoted the idea of Greek diaspora during its struggle for independence.⁴² As Chander writes, '[t]he use of the term was often political and sought to establish a common identity through a shared historical experience to gain political strength through numbers and solidarity'.⁴³

In this thesis, I refer mainly to 'diaspora' in the narrower sense, as traditionally described in the literature. This excludes groups such as expatriates (i.e., people who temporarily relocate for overseas for work); people who were born and raised in the kin-state and were forced to leave as refugees; and migrants who chose to leave their kin-state for economic or other personal reasons. Although many parts of this thesis are relevant for all kinds of diaspora, I highlight examples from countries such as Israel, Ireland and Armenia whose diaspora communities fulfil all or most of the traditional criteria mentioned above: an experience of traumatic expulsion, an enduring presence in multiple locations, and the maintenance of close cultural and political exchanges over multiple places (including with the kin-state) over a long period of time. There are two reasons why such traditional diaspora communities are more intriguing and relevant for

³⁸ Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 315.

³⁹ Karsten Paerregaard, 'Interrogating Diaspora: Power and Conflict in Peruvian Migration' in *Diaspora and Transnationalism: Concepts, Theories and Methods* (2010) 91.

⁴⁰ Catarina Kinnvall and Bo Petersson, 'Diaspora Groups, Transnational Activism, and Democratic Legitimacy' in Eva Erman and Anders Uhlin (eds), *Legitimacy Beyond the State? Re-examining the Democratic Credentials of Transnational Actors* (Palgrave Macmillan, 2010) 133.

⁴¹ Waterbury, above n 26, 133.

⁴² See Elpida Vogli, 'The Making of Greece Abroad: Continuity and Change in the Modern Diaspora Politics of a "Historical" Irredentist Homeland' (2011) 17(1) *Nationalism and Ethnic Politics* 14.

⁴³ Chander, above n 4, 1022.

the purposes of this thesis. First, there is a difference between people who reside outside their homeland for reasons of personal preference (such as economic migrants) and people who perceive their life outside the kin-state to be a result of forced historical political events. The latter perception, found among traditional diasporas, produces more intense relationships between diaspora communities and their kin-states. Second, it is not surprising that people who grew up in their kin-state, but were forced to leave it, are still connected to their kin-state and wish to be involved in its political affairs. The involvement of such people in the affairs of the kin-state is also not problematic from a democratic point of view. After all, they were born in the kin-state and are (almost always) still citizens of the kin-state. The involvement of traditional diasporas in kin-state affairs is more complex as they feel connected to the kin-state despite the fact that neither they nor their parents or grandparents grew up in the kin-state.

B. Diasporic identity

One may wonder why people who live in the diaspora maintain such an emotional involvement with places and communities that are often thousands of kilometres away, and continue to do so across generations. To better understand this powerful connection we must consider the role played by the kin-state in shaping the diasporic individual identity.

An individual's sense of identity is not fixed, but is formed and modified over time through complex relations of exclusion and inclusion with significant 'others'.⁴⁴ It is very common to find that an individual's identity is influenced by her ethnicity or nationality. However, sources of identity vary and may include cultural, territorial, political, economic or social pedigrees.⁴⁵ The significance and structure of an individual's identity also varies across cultures: for example, in the western world it is more connected to

⁴⁴ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 988 n 77.

⁴⁵ Samuel P Huntington, *Who Are We?: The Challenges to America's National Identity* (Simon & Schuster, 2005) 21,27; Chander, above n 4, 1019–20.

one's nationality and culture, while in the Islamic world it tends to revolve more around the family and religious tribe.⁴⁶

Huntington makes several important points concerning identities: (i) both individuals and groups have identities; (ii) identities are constructed by the individual, who, despite inheriting some features as race or ethnicity, is free to redefine his or her identity as he or she wishes; (iii) individuals, and to a lesser extent groups, often have multiple identities (this is very characteristic of diaspora people and migrants, who often have 'blended identities', namely, several simultaneous different aspects or dimensions of self-definition);⁴⁷ (iv) though defined by the self, identities are the product of interaction between the self and others; and finally (v) the relative salience of alternative identities for any individual or group is situational (as will be discussed below).⁴⁸

In their analysis of diasporas, Shain and Barth emphasise identity as a key factor in the relations between diaspora people and their kin-states.⁴⁹ Shain and Barth contend that diaspora people are motivated by their perception of a shared identity with the people in the kin-state.⁵⁰ Other than its function as a source of national identity for a collective of people, the kin-state is an important source of identity to the diasporic person. Diaspora people generally view their connection with the kin-state as essential to their sense of individual identity.⁵¹ They perceive themselves and are perceived by others as belonging to the national community of their kin-states.⁵² At the same time, diaspora people are not identical to the people in the kin-state. A distinctive aspect of diasporic identity is that members of the diaspora often are only marginally included in both their host-state and their kin-state.⁵³ For example, an Australian with Indian heritage may feel 'Indian' in Australia and 'Australian' in India, with both societies seeing him as partly

⁴⁶ See Huntington, above n 45, 16.

⁴⁷ See Mark Nolan and Kim Rubenstein, 'Citizenship and Identity In Diverse Societies' (2009) XV(1) *Humanities Research* 29.

⁴⁸ See Huntington, above n 45, 22–4.

⁴⁹ Shain and Barth, above n 33, 455.

⁵⁰ *Ibid* 451.

⁵¹ *Ibid* 138.

⁵² Shain, above n 5, 11.

⁵³ Barabantseva and Sutherland, above n 37, 4.

compatriot, partly foreign. The differences between people who reside in the kin-state and people who live in the diaspora may include different legal status, language, wealth and education. Those differences often lead these two groups to perceive each other as different and foreign, despite being connected through ethnic or religious ties.⁵⁴

As diaspora people have little control over their status as perceived members of their kin-state nation, they often become unwillingly involved in their kin-state's international affairs.⁵⁵ For example, Jews living in the diaspora are often victims of attacks by anti-Israeli activists and terror organisations.⁵⁶ Famous examples include the bombing of the Jewish community building in Buenos Aires in 1994 and deadly shooting attacks against Jews in France in recent years.⁵⁷

This is one reason why some diaspora people see their kin-state policies as having an impact on the interests of 'the people' as a whole, including the people inside and outside the kin-state territory. Another reason why people in the diaspora demonstrate concern over the ways in which the kin-state's government conducts its affairs is that they do not want to see their kin-state endangered as a place of refuge or as a place of inspiration and pertinence to their identity.⁵⁸ According to Shain and Barth:

Diasporas thus engage in efforts to shape national identity not so much to gain through it leverage over (material) interests, but mainly because it is their interest to insure and sustain an identity that perpetuates and nourishes their self-image.⁵⁹

⁵⁴ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 988.

⁵⁵ Shain and Barth, above n 33, 453.

⁵⁶ See for example Jon Henley, *Antisemitism on Rise across Europe 'in Worst Times since the Nazis'* (8 August 2014) The Guardian <<http://www.theguardian.com/society/2014/aug/07/antisemitism-rise-europe-worst-since-nazis>>.

⁵⁷ See for example Edward Cody, *Rabbi, Three Children Shot Dead Outside Jewish School in France* (19 March 2012) The Washington Post <https://www.washingtonpost.com/world/europe/father-two-children-shot-dead-outside-jewish-school-in-france/2012/03/19/gIQAclfUMS_story.html?tid=a_inl>; Griff Witte, *In a Kosher Grocery Store in Paris, Terror Takes a Deadly Toll* (9 January 2015) The Washington Post <https://www.washingtonpost.com/world/europe/paris-kosher-market-seized-in-second-hostage-drama-in-nervous-france/2015/01/09/f171b97e-97ff-11e4-8005-1924ede3e54a_story.html>; Nick Miroff and Juan Forero, *Argentina, Iran to Investigate '94 Bombing of Jewish Center* (5 April 2013) The Washington Post <https://www.washingtonpost.com/world/the_americas/argentina-iran-to-investigate-94-bombing-of-jewish-center/2013/04/05/061c5354-9d2d-11e2-a941-a19bce7af755_story.html>.

⁵⁸ Shain and Barth, above n 31, 455–6.

⁵⁹ *Ibid* 459.

Such connections between diaspora communities and kin-state people are typical for relatively weak, new or reconstituted states (e.g., Israel, Armenia). In such cases, national identity has often been embodied by the experience of calamity and suffering of the diaspora until the (re)establishment of the independent nation-state.⁶⁰ As the culture has been developed and formed in the diaspora for centuries, the new or reconstituted state draws its own culture and traditions from those formed in the diaspora. In such cases it is the kin-state that depends on its diaspora more than the other way around. This is due not only to the fact that the new state relies on the culture and heritage created in the diaspora, but also for the simple reason that more people may live in the long established diaspora communities than in the new kin-state. Modern Israel for example was home to a small minority of Jews when it was established and the majority of the worldwide Jewish population still lives outside Israel (although the trend is moving towards reversing that balance).⁶¹ In the Armenian case, people living in the diaspora outnumber and are often wealthier than the people living in the kin-state and so they have more international political influence.⁶² Indeed, in some cases, it is the diaspora itself that enjoys universal recognition and legitimacy as the true representatives of the polity. For example, the Tibetan diaspora succeeded in gaining support for Tibetan human rights, cultural survival and political autonomy; and in recent years the Syrian National Council, based in Turkey, gained (temporary) recognition by many states as the legitimate representative of the Syrian people.⁶³

This chapter clarifies what diaspora people share with citizens of their kin-states on the one hand, and what separates them on the other hand. Evidently, to say that some people belong to a certain diaspora implies that there exists a homeland from which this diaspora originated. This homeland may be real or symbolic (as is the case, for example,

⁶⁰ Shain, above n 5, 103.

⁶¹ See *Annual Assessment 2015-2016, Executive Report to the Government of Israel* (The Jewish People Policy Institute, 2016) 16 <http://jppi.org.il/uploads/JPPi-2015-2016_Annual%20Assessment-Executive_Summary-English.pdf>; Aaron Kalman, *Global Jewish Population Grows by 88,000 over Past Year* (9 September 2009) *The Times of Israel* <<http://www.timesofisrael.com/jewish-population-grows-by-88000-over-past-year/>>.

⁶² See Susan P Pattie, 'Armenians in Diaspora' in Edmund Herzig and Marina Kurkchyan (eds), *The Armenians: Past and Present In The Making of National Identity* (2005) 131; Shain, above n 5; Shain and Barth, above n 33, 465.

⁶³ See for example Daniel Tovrov, *UK Recognizes Syrian Opposition* (24 February 2012) *International Business Times* <<http://www.ibtimes.com/uk-recognizes-syrian-opposition-415952>>.

with the Kurdish and Sikh diasporas),⁶⁴ independent or under foreign control. If this homeland exists as a modern, independent nation state, we assume a difference between the citizens of this nation state and the diaspora people who are affiliated with this nation while living elsewhere. This distinction is important in order to avoid confusion such as mistakenly accrediting 'diaspora' status to any person who is outside the borders of his or her home country. For example, a person of Irish descent living in the United States can be said to belong to the Irish diaspora, but if she is also an Irish citizen and has lived in Ireland, we might simply call her 'Irish' without tagging her as 'diasporic'. In order to proceed with the analysis of diaspora populations and their interactions with their kin-states, we must understand and make a distinction between people of a particular nation who are citizens of their kin-state and those who, despite belonging to the same nation and maintaining a connection with their kin-state, are nevertheless citizens of a state other than their kin-state. It is important therefore to supplement our discussion of diasporas with a discussion about citizenship and the difference between the concepts of 'citizenship' and 'nationality'. This discussion will explain why countries want to engage with these groups of people who are not necessarily their citizens. It will also help in understanding the challenges that these states face when they try to reach out and engage with their diaspora communities.

C. Citizenship and nationality

People often mean different things when they talk about citizenship. The concept of citizenship is sometimes conflated with nationality and both are mentioned together in discussions regarding the identity of an individual or a group. While it is true that citizenship and nationality essentially represent the same general concept, they differ in a technical legal sense: the term citizenship is used mostly in domestic legal forums, while the term nationality is used in international law forums.⁶⁵ Moreover, citizenship usually denotes a legal status that confers rights and obligations, while nationality

⁶⁴ Since there was never a free independent Kurdish state, for example.

⁶⁵ See Kim Rubenstein, 'Globalisation and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an interconnected globe* (Ashgate, 2003) 159; Kim Rubenstein, 'Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?' (2007) 25(1) *Law in Context* 88.

sometimes represents an informal connection or membership with an ethnic group. Therefore, when one uses the term citizenship, one needs to be clear whether one is referring to a legal status, a system of rights, a form of political activity or a form of identity and solidarity.⁶⁶ In the next few sections I will clarify these issues and provide some useful definitions. I will then apply these definitions in answering some questions about diaspora people and their legal status vis-à-vis their kin-states: In what senses can diaspora people be called citizens of their kin-states? What exactly is the difference between a kin-state citizen and a diasporic citizen? In order to answer these questions I will explore the different meanings of the term ‘citizenship’ and other, related terms, such as ‘nationality’ and ‘ethnicity’.

1. Nationality and ethnicity

As mentioned above, citizenship is usually used in the domestic legal context and nationality in the international legal context. Nevertheless, the term ‘nationality’ is sometimes used to describe someone’s citizenship; for example, ‘she holds Australian nationality’ or ‘his nationality is Canadian’. However, in this section I refer to nationality in its other meaning, which relates to someone’s ethnic origin or group affiliation. We already know that diaspora people often see themselves (and are sometimes perceived by others) as part of the same nation that resides in the homeland or the kin-state. But what is this nation?

A nation, to adopt one popular model, is a group of people who are bounded by some connection that differentiates it from others and is ready to receive authority only if it emanates from within the group.⁶⁷ A popular view sees nationhood as a creation of modernity that emerged in Europe during the 19th century. However, the ‘primordial’ or ‘perennial’ view holds that nationhood existed before modernity, not only in Europe but throughout the world.⁶⁸

⁶⁶ Bosniak, above n 1, 455.

⁶⁷ See Shain, above n 5, 41–42.

⁶⁸ For discussions on these topics see Anthony D Smith, *The Ethnic Origins of Nations* (Wiley, 1991); Azar Gat, *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism* (Cambridge University Press, 2013).

The relationship between a group of people and a defined piece of land is a crucial feature of national identity,⁶⁹ although, in its early stages, European nationalist identity was defined primarily in religious terms (e.g., Protestant/Catholic). During the 19th and 20th centuries, national ideologies in Europe became more secular.⁷⁰ However, secularism gave rise to other nationalistic forms such as Fascism.

Ethnicity, nationality and the state affected each other in a dialectical process. In the past, the primary task of the state was to create and defend the nation: 'war made the state, and the state made war'.⁷¹ Ethnicity and nationality were mixed together with the state in many cases, as throughout history different groups of people sought self-determination and rulers believed that a sense of common identity was necessary to maintain people's loyalty.⁷² However, although nation states appeared only when ethnos and state converged, ethnicity is seldom homogeneous or clear-cut. As a nation state grows, it often becomes more heterogeneous. Distance often produces variable intermediate ethnic affinities within a larger ethnos, which can later develop into cleavages and outright splits.⁷³

The creation and cultivation of a defined national group did not only serve rulers who wished to control their subjects. It also fulfilled a basic natural need of the individual. Membership in a defined political community is widely recognised as a social good that many individuals seek and wish to maintain.⁷⁴ Even today, some scholars contend that a nation cannot be based only on a political contract between individuals who lack any

⁶⁹ Michael Walzer, *Spheres of Justice : A Defence of Pluralism and Equality* (Basil Blackwell, 1989) 44; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 971.

⁷⁰ Huntington, above n 44, 15.

⁷¹ Charles Tilly (ed), *The Formation of National States in Western Europe* (Princeton Univ Pr, 1975) 42. To be sure, in our time, 'war is more often the breaker of states than the maker of them' (Huntington, above n 45, 16).

⁷² Gat, above n 68, 3.

⁷³ *Ibid* 5.

⁷⁴ Walzer, above n 69, 32; Nino, above n 2, 57; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 970.

other common traits that differentiates them from 'others' who are situated outside of their group.⁷⁵

Although there might be good reasons to try to abolish ethnicity and nationalism, such attempts are unlikely to be successful, as they go against a deep human preference toward one's own.⁷⁶ 'Kin-culture identity, solidarity, and cooperation, including their national form, have deep roots in the human psyche and have been among the most powerful forces in human history'.⁷⁷

Historical experience and sociological analysis show that in the absence of an external 'other' as a threat to national security, unity is undermined and dormant divisions arise.⁷⁸ Walzer, for example, supports the right of states to impose limits on immigration in order to retain what he calls 'communities of character', that is, stable, ongoing associations of people with special commitments to one another and a sense of common life: 'the distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life'.⁷⁹ Indeed, many countries are experiencing an 'identity crisis', questioning what they have in common and what distinguishes them from other nations.⁸⁰ Each crisis has its unique causes, but common factors are globalisation processes and rising levels of migration, which drive some people to redefine their identities in narrower senses.⁸¹

Ethnicity and nationality often continue to be mixed together with the concept of the state. Though some modern states adopt a kind of civic identity that is arguably not dependant on a particular ethnicity or religion (e.g., the United States, Australia), many countries are still closely affiliated with a particular ethnic group or religion.⁸² For

⁷⁵ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 55, 59.

⁷⁶ Gat, above n 68, 386.

⁷⁷ Ibid.

⁷⁸ See, Huntington, above n 45, 18–19. See also John Stuart Mill, 'Of Nationality, as Connected with Representative Government' in *Representative Government* (eBooks@Ade, 2012) on the importance of national identity and its connection to forms of governance.

⁷⁹ Walzer, above n 69, 39, 62.

⁸⁰ Huntington, above n 44, 12.

⁸¹ Ibid 13. See also below p 46.

⁸² See Alexander Yakobson, 'State, National Identity, Ethnicity: Normative and Constitutional Aspects' in *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism* (Cambridge University

example, the Belgian Constitution states that Belgium is made up of three communities: the French community, the Flemish community, and the German-speaking community;⁸³ Israel is defined in one of its quasi-constitutional ‘basic laws’ as a ‘Jewish and democratic state’;⁸⁴ and the preamble to the Irish Constitution provides explicit references to Christianity as the state’s religion.⁸⁵

Since diaspora people often share the same ethnicity or religion with people in the kin-state, both groups may also be described as sharing the same nationality. Having all these features in common, it becomes more apparent why diaspora people view their connection with the kin-state as a significant element in forming their collective and individual senses of identity.

However, despite all these common features, what often separates diaspora people from people in the kin-state (besides physical distance) is their different citizenship status. It is important not to conflate one’s ‘citizenship’ with one’s ‘nationality’ when discussing diaspora communities and their relationships with their kin-states. The next section will therefore elaborate on the concept of citizenship.

2. Citizenship

A diasporic person stands in contrast to a ‘citizen’ of the respective kin-state (although sometimes diaspora people can acquire the citizenship of their kin-state if they wish to do so). For example, a person of Irish descent living in the United States can be said to belong to the Irish diaspora, but often she would hold American rather than Irish

Press, 2013) 328; Global Legal Research Center, ‘Constitutional Provisions on National and Religious Identity’ (2014).

⁸³Belgian Constitution article 2, English translation available at <<http://www.legislationline.org/download/action/download/id/1744/file/b249d2a58a8d0b9a5630012da8a3.pdf>>.

⁸⁴According to s 7A.A of *Basic Law: The Knesset (1958)*: ‘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 goals 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 ...’. Full English translation of the law is available at <https://knesset.gov.il/laws/special/eng/basic2_eng.htm>.

⁸⁵“In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial” (Constitution of Ireland, article 1). For more on this subject see Yakobson, above n 82.

citizenship. On the other hand, an Irish citizen who temporarily relocates to the United States will be called simply 'Irish' and not 'diasporic Irish', and may or may not be of Irish descent.⁸⁶

The exact meaning of 'citizenship' is contested among scholars. Although most agree on the concept's value and importance, it is used both as a descriptive and a normative term, which can sometimes lead to confusion.⁸⁷ In the famous *Nottebohm* case, the International Court of Justice defined citizenship as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties'⁸⁸ (the court in that case used the term 'nationality' but it did so in terms of the domestic, legal notion of citizenship, not in terms of ethnic nationality). One can immediately recognise the complexity of such a definition: What is a genuine connection? How can sentiments be measured? In order to unpack this definition, it is important to realise that the term 'citizenship' may take the form of three different concepts: the first is a legal status, namely, the rights and responsibilities of an individual vis-à-vis the state; the second is a broader view that includes political participation, social membership and substantive equality; and the third is a desirable activity – being involved in public life and caring for the public good.⁸⁹

The first concept is a narrow concept, limited to legal obligations between subjects in a specific state. This concept suggests that, unlike nationality, citizenship is necessarily associated with a particular territory: people can be dispersed to multiple locations but still be part of the same 'nation'. In contrast, citizenship is a quality that is limited to a group of people in a defined territory. Interestingly, a number of countries have recently either amended or attempted to amend their laws in order to make it easier for the

⁸⁶ She can be, for example, a daughter of Polish migrants to Ireland, and so of Polish descent. If she relocates permanently, she might be joining the Irish diaspora, while still maintaining her Irish citizenship. However, her descendants in the United States will often be only US citizens of Irish and Polish descent, and part of the Irish or Polish diaspora.

⁸⁷ Bosniak, above n 1, 450-1.

⁸⁸ *Nottebohm Case (Liechtenstein v. Guatemala, second phase)*, Judgment of April 6th, 1955: I.C.J. Reports 1955, 4, 23.

⁸⁹ Rubenstein, 'Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?', above n 65; Ruth Lister, 'Citizenship on the Margins: Citizenship, Social Work and Social Action' (1998) 1(1) *European Journal of Social Work* 5.

state to revoke citizenship of both naturalized and born citizens.⁹⁰ Australia, for example, amended its citizenship legislation in 2015 to enable the termination of Australian citizenship in circumstances where a dual citizen engages in terrorism-related conduct.⁹¹ This implies that there is more to citizenship than merely a formal system of legal rights and obligations. Such laws suggest that citizenship is connected with loyalty to the nation-state (or 'allegiance' as used by the Australian legislator). Citizenship can be therefore taken away under circumstances in which loyalty is deemed to have been breached.⁹²

The other two concepts view citizenship as much more than merely a set of legal obligations between particular subjects. These concepts view citizenship as a set of activities, ideas and emotions. For example, some theorists support mandatory national service as a method of citizenship-making.⁹³ In Israel, for example, serving in the Israel Defence Forces (IDF) is a major constituent of citizenship.⁹⁴ Nationalist Arab leaders object to attempts by the Israeli government to recruit Arab youth to serve in the IDF (or other modes of national service) because they are worried that this will weaken their Palestinian identity and encourage integration into Israeli society.⁹⁵ Similarly, Ultra-Orthodox Jews oppose serving, fearing that it would encourage assimilation into Israel's secular Jewish society.⁹⁶ The refusal of members of these groups to participate in any

⁹⁰ See Shai Lavi, 'Citizenship Revocation As Punishment: On the Modern Duties of Citizens and Their Criminal Breach' (2011) 61(4) *The University of Toronto Law Journal* 783, 784; Sangeetha Pillai and George Williams, 'Twenty-First Century Banishment: Citizenship Stripping In Common Law Nations' (2017) 66 (3) *International and Comparative Law Quarterly*, 521–55; *Fact Check: How Does Australia's Plan to Strip Foreign Fighters of Citizenship Compare to Other Nations?* (11 June 2015) ABC News <<http://www.abc.net.au/news/2015-06-11/foreign-fighters-citizenship-around-the-world/6498920>>; *Swiss to Revoke Citizenship of Dual-National Jihadists* (28 July 2016) Swissinfo <http://www.swissinfo.ch/eng/loss-of-passport_swiss-to-revoke-citizenship-of-dual-national-jihadists/42335686>.

⁹¹ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*.

⁹² See Barabantseva and Sutherland, above n 37, 2.

⁹³ See EJ Dionne, Kayla Meltzer Drogosz and Robert E Litan, *United We Serve : National Service and the Future of Citizenship* (Brookings Institution Press, 2004).

⁹⁴ Stuart A. Cohen, *Israel's Armed Forces in Comparative Perspective* (Routledge, 2010) 183.

⁹⁵ See Associated Press, *Arab Christian Community Divided on IDF Enlistment Drive* (28 December 2013) Ynetnews <<http://www.ynetnews.com/articles/0,7340,L-4470315,00.html>>; *Arab Uproar over Demands for Compulsory Service* (29 June 2012) The Telegraph <<http://www.telegraph.co.uk/news/9364353/Arab-uproar-over-demands-for-compulsory-service.html>>.

⁹⁶ See Naomi Zeveloff, *Ultra-Orthodox Celebrate Rollback of Israel Draft Law* (6 May 2015) Forward <<http://forward.com/news/israel/307624/orthodox-draft-laws/>>.

mode of national service may cause the majority of the population to treat them as 'second class citizens'.

When considering these broader concepts of citizenship, we can identify two kinds of membership and political participation: one is participation in the local sphere, where a community's close and immediate needs encourage collective action on issues such as waste, environment, law and order. The other occurs at the global level, where activists support causes that concern people living in different places, such as human rights and environmental issues.⁹⁷ This kind of political activism creates a kind of 'international' or 'global' civil society that is able to confront issues in the global public sphere and is not confined to a specific state or territory.⁹⁸

Diaspora people can be described therefore as citizens of their kin-state in the sense that they share a sense of identity and solidarity with the political community in the kin-state. Solidarity is not necessarily connected with territorial boundaries, but can be forged through shared history, culture or values.⁹⁹ However, diaspora people can only be described as citizens of the kin-state when applying the broad concept of citizenship. When applying the narrower concept that is linked to political obligation, rights and legal status, diaspora people do not qualify as citizens of the kin-state.¹⁰⁰

D. Diaspora engagement – legal and social effects

This chapter has explained what a diaspora is, what role the kin-state plays in the lives of diasporic people and the difference in status between diaspora people and people in the kin-state. I will now describe the practical ways in which diaspora communities and kin-states interact with each other. These include legal, social and financial means used by people in the diaspora to influence and participate in the political issues of their kin-states as well as means used by kin-states to engage with their diaspora communities. I

⁹⁷ Bosniak, above n 1, 473-4; Seyla Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy' (1994) 1(1) *Constellations* 26, 31.

⁹⁸ Bosniak, above n 1, 478. See also John Dryzek, 'Global Civil Society: The Progress of Post-Westphalian Politics' (2012) 15(1) *Annual Review of Political Science* 101.

⁹⁹ Sarah Song, 'Three Models of Civic Solidarity' in Rogers M Smith (ed), *Citizenship, Borders, and Human Needs* (University of Pennsylvania Press, 2011).

¹⁰⁰ Bosniak, above n 1, 479,486.

first review the common (and sometimes controversial) legal tools that many state governments use in engaging with their diaspora communities. These include the granting of preferential citizenship and voting rights to co-ethnics who live in the diaspora. I also review other social and economic tools used by diaspora communities and kin-state governments to interact with each other. I then focus on the special role played by diaspora communities in divided societies. I conclude with a review of the challenges to traditional democratic theories that arise as a result of these interactions and how scholars have attempted to address these challenges.

1. Preferential and dual citizenship rights

Kin-states often grant citizenship rights to people who are affiliated with the kin-state's dominant ethnic, religious or national character. There are two major modes of automatic citizenship acquisition: (i) *jus soli*, which grounds the right to citizenship on the territory where one was born; and (ii) *jus sanguini*, which grounds it on whether this person has an ancestor (e.g., a parent) who shares nationality or citizenship with the country in question.¹⁰¹

Diaspora people are usually citizens of their host-states, according to *jus soli* provisions. However they often are also able to apply for citizenship of their kin-state, if such kin-state has *jus sanguini* policies in place. Many countries have both *jus sanguini* policy and *jus soli* provisions.¹⁰² In Europe it is common to find legislation that allows for facilitated access to citizenship to people who are regarded as sharing ethnic or national ties with the state.¹⁰³ Greek citizenship law, for example, distinguishes between persons of Greek Orthodox descent ('ethnic Greeks') and other persons, and grants descendants of ethnic Greeks (who are Orthodox Christian) preferential access to citizenship.¹⁰⁴ Kin-states use

¹⁰² See Patrick Weil, 'Access to Citizenship: A Comparison of Twenty Five Nationality Laws' in Thomas Alexander Aleinikoff and Douglas B. Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace, 2001) 17; Alexander Yakobson and Amnon Rubinstein, *Israel and the Family of Nations: The Jewish Nation-State and Human Rights* (Routledge, 2008); Dumbrava, above n 6.

¹⁰³ See Dumbrava, above n 6, 2348–9.

¹⁰⁴ Ibid 2349.

such provisions in order to strengthen ties with their diaspora, protect them from persecution or undo historical wrongs. Spain, for example, has recently adopted special provisions for restoring citizenship to descendants of Jews who were expelled from the country in the late 15th century.¹⁰⁵ In many post-communist countries from Central and Eastern Europe there are special provisions for preferential (re)acquisition of citizenship by co-ethnics living outside the country. For example, Romania, Bulgaria, Hungary, the Czech Republic and Poland provide for the restoration of citizenship to persons who were deprived of citizenship by the former communist regimes.¹⁰⁶ Hungary, Slovakia and Slovenia have adopted laws that introduce quasi-citizenship for minorities of co-ethnic descent living abroad; other countries (including Germany, Ireland, Japan and Portugal) grant citizens of other countries facilitated or automatic naturalization based on ethnic descent or previously held citizenship among their ancestors.¹⁰⁷ In Central and Eastern Europe, preferential acquisition of citizenship for co-ethnics has been the most important method of acquisition of citizenship, with 'external citizens' constituting approximately 20% of the total population.¹⁰⁸ Italy is another country that grants access to citizenship to co-ethnics in the diaspora. Gallo and Tintori estimate that at least 30 million people of Italian descent living around the world can prove their Italian descent and acquire Italian citizenship by 'reviving' their Italian nationality. Between 1998 and 2007, 786,000 people acquired Italian citizenship in this way.¹⁰⁹ In Israel, the 'Law of Return' provides the granting of Israeli citizenship to every Jew who chooses to settle in

¹⁰⁵ See Janis Siegel, *500 years after expulsion, Jewish American claims Spanish citizenship* (February 23, 2016) *The Times of Israel* < <http://www.timesofisrael.com/500-years-after-expulsion-jewish-american-claims-spanish-citizenship/>>; *Spain passes law awarding citizenship to descendants of expelled Jews* (11 June, 2015) *The Guardian* <<https://www.theguardian.com/world/2015/jun/11/spain-law-citizenship-jews>>.

¹⁰⁶ Dumbrava, above n 6, 2346.

¹⁰⁷ Quasi-Citizenship is a limited form of citizenship which does not amount to full citizenship. It is useful in cases where the kin-state or the host-state does not allow dual citizenship and it can include different rights such as a right to return, receive inheritance, acquire real estate property in the kin-state and other cultural and social benefits. See Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', above n 4, 2396; Waterbury, above n 26, 142.

¹⁰⁸ Dumbrava, above n 6, 2341; Szabolcs Pogonyi, Mária M Kovács and Zsolt Körtvélyesi, 'The Politics of External Kin-State Citizenship in East Central Europe Szabolcs' (2010).

¹⁰⁹ See Costanza Margiotta and Olivier Vonk, *Nationality Law and European Citizenship: The Role of Dual Nationality* (EUI working papers, RSCAS 2010/66, Robert Schuman Centre for Advanced Studies, Eudo Citizenship Observatory, 2010), 9 who quote Guido Tintori, *Fardelli d'Italia? Conseguenze nazionali e transnazionali delle politiche di cittadinanza italiane* (Roma:Carocci, 2009), 10; Gerardo Gallo and Guido Tintori, 'Come si diventa cittadini italiani. Un approfondimento statistico', in *Familismo legale: come (non) diventare italiani*, ed. Giovanna Zincon (Roma-Bari: Editori Laterza, 2006), 133.

Israel, including a son, daughter or a grandchild of a Jew and their non-Jewish spouses.¹¹⁰ All of the laws described above aim to reaffirm the country's national character and to protect the co-ethnics living in the diaspora.¹¹¹

One consequence of today's globalised world is the proliferation of dual and even plural citizens, who hold citizenship rights in more than one country. The acceptance of dual nationals is a necessity as more people travel and move across borders. In no period in history has it been as easy and affordable to travel from one side of the world to the other as it is today. But countries also promote dual citizenship as a way to utilise their diaspora communities to advance their own interests. Russia, for example, promoted dual citizenship to Russian speakers after the fall of the Soviet Union as a means to gain influence in the new independent countries.¹¹² Both Israel and Russia treated Russian Jews as part of their own diaspora in order to promote their interests.¹¹³

Often, if a diasporic person decides to immigrate to her kin-state from her host-state, she is able to participate in the kin-state political life by acquiring citizenship and voting in elections. But what about diaspora people who take on their kin-state's citizenship but remain located in their diaspora communities? The next section explains how non-resident diasporic citizens are able to participate in a kin-state's political processes.

2. Diaspora participation in elections and referendums

As explained above, diaspora people are often not citizens of their kin-state in the legal sense and therefore are not allowed to vote in their kin-state's elections. But even when their legal status allows them to vote, they often lack a real ability to exercise this right. For example, Jews who live in the diaspora cannot vote in Israeli elections unless they hold Israeli citizenship, and even if they are Israeli citizens, they have to be registered as Israeli residents and be physically present in Israel on election day. However, there is

¹¹⁰ *Law of Return*, 5710-1950. An English translation is available at <http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>. The Israeli law of return is discussed in more detail below in p 184.

¹¹¹ Dumbraва, above n 6, 2341.

¹¹² See Natalya Kosmarskaya, 'Russia and Post-Soviet "Russian Diaspora": Contrasting Visions, Conflicting Projects' (2011) 17(1) *Nationalism and Ethnic Politics* 54.

¹¹³ Ben-Porat, above n 6.

increasing support among many kin-states for granting voting rights to their diaspora populations.

Most countries still prefer to grant political rights based on nationality rather than residency.¹¹⁴ An ethno-nationalist approach that identifies the polity by using an ethno-cultural and historical demarcation supports the granting of external voting rights to members of this group, regardless of their location. 'External Voting' is the general term used to describe different categories of people who may be allowed to vote from abroad. In addition to diaspora people, these categories include diplomats, members of the armed forces and others who temporarily or permanently are absent from their country of origin.¹¹⁵ The globalisation of political and economic life and large scale migration have contributed to an increasing interest in external voting. With the existing variety of advanced communication methods, people living overseas remain closely connected to the political life in their kin-states and wish to participate in their political processes. For example, organisations representing the Hungarian diaspora aim to amend the Hungarian constitution so as to grant Hungarian nationals living overseas the right to vote.¹¹⁶ Another example was the Southern Cross Group, an international advocacy and support organisation for the 'Australian Diaspora', which actively promoted changes to Australian laws and policies that negatively impact or disadvantage those in the Diaspora.¹¹⁷

Some countries, including Croatia, France, Italy and Portugal, even reserve seats in their parliaments for diaspora representatives.¹¹⁸ Having such an overseas constituency further reinforces the diaspora's link with its national political community in the kin-state and vice versa. Candidates and parties in the kin-state try to garner support from

¹¹⁴ See Ludvig Beckman, 'The Subjects of Collectively Binding Decisions: Democratic Inclusion and Extraterritorial Law' (2014) 27(2) *Ratio Juris* 252, 283.

¹¹⁵ Often in the literature, 'external voting' is used interchangeably with 'absent voting', 'absentee voting' or 'out-of-country voting', not to be confused with the term 'alien voting' which refers to the right of residents who are not citizens to vote in local elections.

¹¹⁶ See *The Hungarian Constitution and Voting Rights* (20 March 2011) The American Hungarian Federation <http://www.americanhungarianfederation.org/news_HungarianConstitution.htm>.

¹¹⁷ The Southern Cross Group website was discontinued in 2017. To review old versions of the website visit <<https://web.archive.org/web/20170407081607/http://www.southern-cross-group.org/>>.

¹¹⁸ Michel S Laguerre, *Parliament and Diaspora in Europe* (Palgrave Macmillan, 2013); Sundberg, above n 5.

diaspora leaders and their organisational networks.¹¹⁹ In such cases, it is not uncommon to see electoral campaigns spill over into diaspora communities. For example, one can find Italian senators campaigning and meeting potential voters in a Melbourne suburb.¹²⁰ The Irish Constitutional Convention, which operated between 2012-2014, was mandated to consider eight specific issues, one of them being the granting of voting rights in presidential elections to people in the 'Irish diaspora' (more accurately, to citizens who reside outside the state). Members of the Constitutional Convention were in favour of granting Irish citizens living outside the state the right to vote in Presidential elections.¹²¹

From a democratic perspective, external voting raises various challenges. As Bauböck notes:

States cannot protect their citizens' civil rights outside their own territory nor provide them with social citizenship rights to public education, health care or poverty relief. Why should they then have an obligation to secure exactly the same rights to vote for external citizens as for those who live in the territory?¹²²

But there is an even stronger moral problem at play here: why should people who do not live in the territory influence decisions that affect those who live in it?¹²³ It seems that a question of legitimacy is raised when people who live overseas under different governments, holding passports of other countries, can shape the rules which will govern the residents of the kin-state. Kin-state residents have no alternative but to obey the decisions of the kin-state government, but diaspora people are not subject to these decisions in the same way that kin-state residents are; diaspora people are often more affected by the rules of their host-state.¹²⁴ One may argue therefore that diaspora

¹¹⁹ Vertovec, above n 5, 6.

¹²⁰ See Conor Duffy, *Australians in Running for Italian Parliament* (8 April 2008) ABC News <<http://www.abc.net.au/news/2008-04-09/australians-in-running-for-italian-parliament/2397626>>.

¹²¹ See Irish Department of Foreign Affairs and Trade, '*Global Ireland: Ireland's Diaspora Policy*' (2015), 21, available at <<http://www.irishinbritain.org/cmsfiles/Downloads/DiasporaVoice/global-irish-irelands-diaspora-policy.pdf>>.

¹²² Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 306.

¹²³ See Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', above n 4, 2394.

¹²⁴ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 40.

people are outsiders who should not be allowed to influence the political community they either chose to leave or refused to re-join.¹²⁵

External voting also raises special complications in post-conflict situations. In post-conflict societies with large numbers of refugees and displaced persons, external voting operations are often organised on a massive scale. For example, in Bosnia and Herzegovina, Kosovo (Serbia and Montenegro), Timor-Leste, Afghanistan and most recently Iraq, the International Organisation for Migration ('IOM') promoted external voting operations to create conditions conducive to the return of refugees and other displaced persons.¹²⁶ It is no wonder that different political parties have very different views on who should participate in elections. If one group of people has left the country as a result of conflict or persecution under the other, ruling group, people affiliated with the ruling group will naturally resist extending voting rights to diaspora communities.

External voting also raises difficulties in host-states that are home to large diaspora populations. Host-states do not always look favourably on foreign governments that try to engage with a large group of their own citizens. Such host-states do not always welcome external voting rights for their dual-nationals. For example, Canada forbids other countries from including Canada as part of an overseas constituency.¹²⁷ In Romania, tensions with Hungary arose after the Hungarian government granted citizenship to some 400,000 ethnic Hungarians living in the diaspora so that they could vote in the Hungarian general elections.¹²⁸ In March 2017, tensions arose between the Netherlands and Turkey after Turkish Ministers were barred from attending rallies in

¹²⁵ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1010.

¹²⁶ Andrew Ellis, *Voting from Abroad: The International IDEA Handbook* (International IDEA; Federal Electoral Institute of Mexico, 2007).

¹²⁷ For example, Canada refused the Tunisian Embassy's request to collect votes from expatriates within Canada, See Heather Yundt, *When Canada Says No to Expat Voting* (2 March 2012) Capital News Online <<http://www.capitalnews.ca/archive/index.php/news/canada-forbids-foreign-expats-from-voting-for-north-american-representative>>.

¹²⁸ See *Hungary and Romania: Flag Wars* (21 February 2013) The Economist <<http://www.economist.com/blogs/easternapproaches/2013/02/hungary-and-romania>>.

Dutch cities aimed at encouraging Turkish migrants living in the Netherlands to vote in a Turkish referendum.¹²⁹

Although external voting is an increasingly popular way for diaspora people and expatriates to get involved in political processes in their kin-states, there are problems with its implementation in particular contexts. But diaspora involvement goes far beyond citizenship and voting rights. As I will discuss in the next part, even without citizenship status and a right to cast votes in elections and referendums, diaspora people have other ways to become politically involved in their kin-states.

3. Other methods of diaspora engagement

In the era of advanced global electronic communications, diaspora communities, organisations and individuals are increasingly vocal and influential.¹³⁰ This consequence of globalisation has significant effects on political movements and affiliations. The spread of mass media across the globe naturally helps diaspora communities to maintain close contacts with their original kin-state.¹³¹ It enables not only diaspora people, but all people, to identify and connect with people outside their own state, creating a global civil society which allows people from across the globe to confront global issues together.¹³² As a result of such processes, national sovereignty is inevitably undermined and isolationist views are often weakened.¹³³ Citizens of the nation state may hold less power over their state affairs and policies than external actors such as multinational corporations, leaders of foreign countries, international NGOs, the World Trade Organisation ('WTO'), the International Monetary Fund ('IMF') and UN bodies.¹³⁴ This presents a challenge, as there is a discrepancy between those who hold the power and those who are affected by the use of this power. But there are also positive implications

¹²⁹ *Turkey-Netherlands Row: Dutch Warn Citizens after Erdogan Threat* (13 March 2017) BBC News <<http://www.bbc.com/news/world-europe-39254556>>.

¹³⁰ Kathleen Newland, 'Voice After Exit : Diaspora Advocacy' (Migration Policy Institute, 2010) 3 <<https://www.migrationpolicy.org/research/voice-after-exit-diaspora-advocacy>>; Vertovec, above n 5, 4.

¹³¹ Alejandro Portes, Luis E Guarnizo and Patricia Landolt, 'The Study of Transnationalism: Pitfalls and Promise of an Emergent Research Field' (1999) 22(2) *Ethnic and Racial Studies* 217.

¹³² Ibid.

¹³³ Rubenstein, 'Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?', above n 65. See also Samuel Scheffler, 'Boundaries and Allegiances Problems of Justice and Responsibility in Liberal Thought' on different allegiances in a modern world.

¹³⁴ See Chander, above n 4, 1039.

of this phenomenon, such as the ability of people from different countries to co-operate and combat global issues together.¹³⁵ International groups and NGOs recruit activists all over the world and governments can no longer ignore global public opinion.

In this context, diaspora people establish and mobilise institutions in their host-state to support causes and effect political changes in their kin-states.¹³⁶ Politically, diaspora organisations lobby host-state governments and other international players in support of their kin-state (or on behalf of certain factions within the kin-state).¹³⁷ For example, one can find Tamils in Norway lobbying for establishing a Tamil state in Sri Lanka, as well as passionate Sikh nationalists in Australia and Canada.¹³⁸ Through such activities, diaspora people expand the notion of political membership beyond territorial boundaries and reaffirm their connection with the nation residing in the kin-state.¹³⁹ However, not all diaspora communities exert the same level of influence and involvement in kin-state affairs. Shain and Barth argue that for diasporic influence to be effectively exerted on kin-states, two conditions must be present: (i) a democratic host-state must allow diasporic activity in its territory; and (ii) a strong sense of identity must exist to connect diaspora people to the kin-state and motivate the former to act.¹⁴⁰ Shain and Barth also divide members of large diaspora communities into three categories: core members, passive members and silent members. Silent members constitute the largest group of the three and consist of people who are generally uninvolved in diasporic affairs but who may be encouraged to get involved in times of crisis (e.g., by protesting or donating money). Passive members are generally available for action when the active diaspora leadership calls upon them. The core members are the organising elites who are intensively active in diasporic affairs and mobilise the other two diaspora groups when necessary.¹⁴¹

¹³⁵ See Rubenstein, 'Globalisation and Citizenship and Nationality', above n 65.

¹³⁶ Maria Koinova, 'Diasporas and International Politics: Utilising the Universalistic Creed of Liberalism for Particularistic and Nationalist Purposes' in Rainer Bauböck (ed), *Diaspora and transnationalism: concepts, theories and methods* (Amsterdam University Press, 2010) 149.

¹³⁷ Shain and Barth, above n 33; Vertovec, above n 5.

¹³⁸ See Giorgio Shani, *Sikh Nationalism and Identity in a Global Age* (Routledge, 2007) 82.

¹³⁹ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 989.

¹⁴⁰ Shain and Barth, above n 33, 466.

¹⁴¹ *Ibid* 452.

Many kin-state governments are well aware of the potential lying latent in their diaspora communities and therefore seek to connect with their diasporic population for economic as well as political reasons.¹⁴² Apart from preferential citizenship rights and external voting, kin-states try to build economic and cultural ties with their diaspora communities. Currently, over 100 countries try to benefit from their 'diaspora capital' and employ a variety of ways to engage and connect with their diaspora communities.¹⁴³ Kin-state governments invest substantial resources in developing methods to approach and engage with their diaspora communities.¹⁴⁴ Ireland, Armenia, Georgia, Israel, Serbia and India are just a few examples of countries that have created special governmental ministries in charge of diaspora issues.¹⁴⁵ These countries try to benefit from the fact that many of their citizens or co-ethnics live abroad, realising that 'brain drain can become brain gain and brain exchange'.¹⁴⁶ These ministries operate in various forms. For example, they guarantee the security of their diaspora communities through diplomatic means, they perform information gathering and fund cultural projects in the diaspora, and they provide political and economic support for repatriation and naturalisation of diaspora people.¹⁴⁷

Apart from official government ministries, there are numerous diaspora organisations that coordinate between diaspora communities and kin-state governments. For example, the Organisation of the Swiss Abroad represents the interests of Swiss expatriates and provides them with a wide selection of services, such as advice on issues relating to emigration and returning to Switzerland.¹⁴⁸

¹⁴² See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 986.

¹⁴³ See, for example, the website 'Diaspora Matters', which lists 75 worldwide diaspora initiatives <<http://diasporamatters.com/75-international-initiatives/>>.

¹⁴⁴ See *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note*, above n 27; Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 316.

¹⁴⁵ For a review of such ministries across the globe see Martin Russell, 'Diaspora Engagement through Representation' (2011) 12.

¹⁴⁶ Kingsley Aikins, Anita Sands and Nicola White, 'The Global Irish Making a Difference Together' (2009) 3.

¹⁴⁷ Latha Varadarajan, *The Domestic Abroad: Diasporas in International Relations* (Oxford University Press, 2010); Dovelyn Rannveig Agunias, *Closing the Distance: How Governments Strengthen Ties with Their Diasporas* (Migration Policy Institute, 2009).

¹⁴⁸ See Organisation of the Swiss Abroad website at <<http://aso.ch/en>>.

Economically, diaspora people create business and trade opportunities between their host-states and their kin-states. Fostering economic ties with a diaspora community can take many forms. For example, some kin-states issue and sell 'Diaspora Bonds' to their diaspora population in order to raise money in times of financial difficulty.¹⁴⁹ Israel, for example, relied heavily on Jewish funds in its early days, with Zionist endeavours in Palestine receiving financial support from the Jewish diaspora as early as the late 19th century.¹⁵⁰ The economies of countries like the Philippines, Mexico and Egypt are heavily dependent on remittances.¹⁵¹ In Somalia, the annual remittance flows provide for the government's largest source of revenue.¹⁵²

Cultural ties can also take many forms. India issues a 'Person of Indian Origin' card which is available to anyone who was formerly an Indian citizen or who is the child, grandchild, or great-grandchild of an Indian citizen.¹⁵³ Ireland is also a prominent model in this field, employing wide-ranging programs and schemes to engage with its diaspora.¹⁵⁴ For example, the Irish Government declared in 2011 that it would issue a 'Certificate of Irish Heritage' for members of the Irish diaspora who do not qualify for Irish citizenship. People applying for the certificate must provide proof of their ancestry and connection with Ireland.¹⁵⁵ Also in 2011, the Irish government announced a new annual award that would honour individuals of the Irish diaspora for sustained and distinguished service to Ireland.¹⁵⁶ More recently, the Irish Minister for Diaspora Affairs has suggested an orientation course on 'what it is to be Irish' aimed at young people from the Irish Diaspora. This idea was inspired by the Israeli 'Taglit'-Birthright program which brought

¹⁴⁹ See Chander, above n 4; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1003 n 117.

¹⁵⁰ Shain, above n 5, 54.

¹⁵¹ Barabantseva and Sutherland, above n 37, 3.

¹⁵² Roth, above n 5, 194.

¹⁵³ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1004 n 121.

¹⁵⁴ See Irish Department of Foreign Affairs and Trade, 'Global Ireland: Ireland's Diaspora Policy' above n 121; Aikins, Sands and White, above n 146, 3.

¹⁵⁵ See Apply for a Certificate of Irish Heritage website at <<http://www.gov.ie/services/apply-for-a-certificate-of-irish-heritage/>>.

¹⁵⁶ Billy Cantwell, *New Awards to Honour Irish Diaspora Achievers* (9 October 2011) Irish echo <<http://ie2015.irishecho.com.au/2011/10/09/new-awards-to-honour-irish-diaspora-achievers/12931>>. Northern Ireland also has a special online organisation that is aimed to grow and develop networks between the country and its diaspora (see <http://www.niconnections.com/default.aspx>).

more than 400,000 young Jewish people from around the world to visit Israel over a period of 15 years.¹⁵⁷

The tendency of some kin-states to see themselves as protectors of their diaspora communities has even led to military interventions in countries where kin-states felt that their diaspora communities were threatened. This ostensibly happened for example with Turkey's invasion of Cyprus and the Russian interventions in Georgia and Ukraine.¹⁵⁸ Israel's commitment to the protection of Jews worldwide is expressed by extending its criminal jurisdiction to foreign countries in certain cases. For example, a special law deals with persons who committed crimes against Jews during the Nazi regime (before Israel was established).¹⁵⁹ Another example is a law that allows for the application of the Israeli penal law not only in Israel but also to offences committed overseas against the life, person, health, freedom or property of any Jew or the property of any Jewish institution.¹⁶⁰

It is therefore not surprising that, in some cases, a diaspora's connection with its kin-state may seem threatening from the host-state's point of view. Some host-state governments and societies may see this connection as endangering the integrity of their own nation state. Some question the diaspora's loyalty to its host-state, suggesting that diaspora people are trying to 'have their cake and eat it too'.¹⁶¹ Tensions between kin-states and host-states over kin-state-diaspora activities led the European Council in 2001 to formally acknowledge the legitimacy of ties between a cultural-ethnic community and

¹⁵⁷ Ciara Kenny, *Referendum on Emigrant Vote 'unlikely' This Year – Deenihan* (15 January 2015) The Irish Times <<http://www.irishtimes.com/life-and-style/generation-emigration/referendum-on-emigrant-vote-unlikely-this-year-deenihan-1.2066892>>.

¹⁵⁸ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', 1000.

¹⁵⁹ Nazis and Nazi Collaborators Punishment Law 5710-1950. English translation available at <http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20punishment-%20law-%20571.aspx>.

¹⁶⁰ Israel's *Penal Law 5737-1977*, s 13(b)(2).

¹⁶¹ See Cohen, 'Diasporas and the Nation-State: From Victims to Challengers', above n 26, 518; Fitzgerald, above n 6, 107. For example, Professor Ben Saul from the University of Sydney has recently raised such concerns with regard to Australian Jews (See Ben Saul, *Prisoner X Ben Zygier* (20 February 2013) The Sydney Morning Herald <<http://www.smh.com.au/comment/zygier-spy-case-gets-ever-curiouser-20130219-2epeh.html>>. See also Kim Rubenstein and Danny Ben Moshe's response *Modern migrant's loyalty is an asset to the world* (26 February 2013) The Sydney Morning Herald <<http://www.smh.com.au/comment/modern-migrants-loyalty-is-an-asset-to-the-world-20130225-2f1uc.html>>.

its kin-state.¹⁶² In this report, the European Council recognised the right of kin-states to look after the interests of those it deems to be part of its nation and help them preserve their identity in their host-states.¹⁶³

In this part, I reviewed the various ways in which diaspora people are involved politically and culturally with their kin-states and vice versa. Voting rights, economic and cultural ties, prizes and awards are a few examples of diasporic participation and engagement with the kin-state, but this is not an exhaustive list. Other means of diasporic participation in the kin-state are still being imagined and structured, such as diasporic advisory councils.¹⁶⁴ In chapter VI I will describe how the Jewish diaspora uses the Israeli Supreme Court to try to promote their political agenda and preserve their interests in Israel.

4. Diaspora advocacy in divided societies

As discussed in the introduction to this chapter, large diaspora communities are often created as a result of a conflict in the original homeland. It is more common for divided societies in which different groups compete, sometimes violently, over the state's national character, to produce complex and influential diaspora populations. In the next section I will examine more specifically the involvement in, and effects of, diaspora populations on ongoing conflicts in their kin-states.

I define divided societies as societies where large groups of people are divided, mainly according to ethnic or religious lines; and where such divisions are often a source of conflict between the different groups, and may include violent conflicts that create large migration waves. The former Yugoslavia and the states that were created following its downfall provide a typical example; so do the more recent examples of Syria and Iraq. A lot of the scholarship on diaspora-kin-state relationships has focused on diaspora

¹⁶² *Report On The Preferential Treatment Of National Minorities By Their Kin-State* (Council of Europe, Venice Commission, 2001) <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(2001\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)019-e)>.

¹⁶³ For a historical review of the treatment of diasporas by the League of Nations see Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 994.

¹⁶⁴ *Ibid* 1028.

involvement and intervention in conflicts in their kin-states.¹⁶⁵ Diaspora support of the kin-state during conflicts can be critical. Diaspora communities provide financial resources, propaganda platforms, weapons and recruits. Jews, Armenians, Kurds, Indians, Vietnamese and Turks living in the United States all devote tremendous efforts to lobby the US government in favour of what they see as their kin-state interests.¹⁶⁶ In the last few decades, Kosovar Albanians, Croats, Sri Lankan Tamils, Syrians and others have returned to participate in struggles taking place in their homelands.¹⁶⁷ During the Arab Spring, demonstrations and protests by Arab migrants were widespread in major European and North American cities.

Various factors motivate people in the diaspora to try and influence conflicts in their kin-states. Shain identifies five main concerns that influence diasporic attitudes toward conflict resolution efforts in their kin-states: (i) maintaining their ethnic identity as they conceive of it; (ii) competition with the kin-state for leadership of the transnational community; (iii) organisational or bureaucratic interests stemming from diasporic organisations; (iv) other political interests; and (v) economic interests.¹⁶⁸

It has been widely suggested that diaspora involvement in conflict resolution efforts in their kin-states is counter-productive and tends to perpetuate conflicts rather than ameliorate them.¹⁶⁹ When compared with their co-ethnics who live in the kin-state, diaspora people are often more hard-line nationalistic.¹⁷⁰ People in the diaspora live under different conditions, and may develop beliefs and ideologies that may be at odds

¹⁶⁵ Koinova, above n 136, 151. Note that not only conflicts, but also natural disasters can mobilise diaspora into action (for example aid sent by Thai, Indian and Indonesian diaspora groups following tsunami waves).

¹⁶⁶ Shain, above n 5; Newland; Shain and Barth, above n 33, 471. See for example the Kurdish National Congress of North America <http://kncna.net/blog/about-us/>.

¹⁶⁷ Shain, above n 5, 109; Aaron Y Zelin, ICSR Insight: European Foreign Fighters in Syria (2013) <<http://icsr.info/2013/04/icsr-insight-european-foreign-fighters-in-syria-2/>>; *Hundreds of Israeli Druze Said Anxious to Join the Fight against Rebels in Syria* (31 March 2013) The Times of Israel <<http://www.timesofisrael.com/israels-druze-said-set-to-join-the-fray-in-syria/>>.

¹⁶⁸ Shain, above n 5, 118.

¹⁶⁹ Ibid; Koinova, above n 136, 152; Vertovec, above n 5, 8; Camilla Orjuela, 'Distant Warriors, Distant Peace Workers? Multiple Diaspora Roles in Sri Lanka's Violent Conflict' (2008) 8(4) *Global Networks* 436.

¹⁷⁰ Shain, above n 5, 114; Bahar Baser and Ashok Swain, 'Diaspora Design versus Homeland Realities: Case Study of Armenian Diaspora' (2009) 3(1) *Caucasian Review of International Affairs* 45, 47; Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', above n 4, 2416.

with those of their ethnic group members in the kin-state.¹⁷¹ For example, while a kin-state citizen might be willing to give up a certain territory of significant symbolic value in order to improve her living conditions, the practical value of peace with a former rival is not directly relevant to the diasporic person's daily experience.¹⁷² It is not uncommon therefore to find influential diaspora organisations and individuals acting against the official policy of their kin-state government.¹⁷³ For example, during the Israeli-Palestinian peace talks in 1993, some American-Jewish organisations protested against Israeli concessions to the Palestinians, while American-Palestinian intellectuals such as Edward Said and Joseph Massad labelled Palestinian leaders as 'collaborators with Israel' for negotiating a peace settlement.¹⁷⁴ According to Shain:

Some may argue that the diaspora has the luxury of dwelling in the past, while at home, governments and people must occupy themselves with issues of day-to-day existence. Yet others maintain that the diaspora's faithfulness to issues of kinship identity reminds the homeland of its historical obligations to preserve certain values that are crucial to the nation's *raison d'être*.¹⁷⁵

Contrary to the above, there are also scholars who suggest that diaspora communities can play a helpful role in resolving conflicts. They argue that diaspora communities can foster moderate politics, peace-building and democratisation activities precisely because of their remoteness from the range of fire.¹⁷⁶ For example, the Irish diaspora (especially in North America) played a key role in the Northern Ireland peace process.¹⁷⁷ In cases where diaspora populations are created as a result of oppression and persecution by the government in an undemocratic kin-state, as the case is with the Iranian and Ethiopian diasporas, people who live in the diaspora are often the only ones

¹⁷¹ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 976.

¹⁷² Shain, above n 5, 106.

¹⁷³ See Ibid 105.

¹⁷⁴ Anthony B Tirado Chase, 'Edward Said's Anti-Oslo Writings' (1997) 4(1) *Middle East Quarterly*; Joseph Massad, *The Gaza Ghetto Uprising* (January 2009) The Electronic Intifada <<http://electronicintifada.net/content/gaza-ghetto-uprising/7919>>. For similar examples involving the Ethiopian and Armenian diaspora see Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1005.

¹⁷⁵ Shain, above n 5, 125.

¹⁷⁶ Baser and Swain, above n 170, 46; Chander, above n 4, 1097; Vertovec, above n 5, 9; Orjuela, above n 169.

¹⁷⁷ Aikins, Sands and White, above n 146, 22.

who can freely criticise the current government in the kin-state and offer an alternative.¹⁷⁸ In this regard, we can also distinguish between different types of diasporas. Not all diasporas are in a position to constructively contribute in this context. Asylum seekers, exiles and stateless people often do not have the opportunity to develop skills, knowledge and insights to the same extent as those who hold legal status and are already settled in well-developed host-states.

One should therefore be cautious when generalising about 'typical' diaspora tendencies. As is often the case with large groups of people, multiple and contradictory opinions can be found among large diaspora populations. As Shain notes: 'the larger the diaspora and more diverse its perspectives, the greater is the likelihood that its members produce conflicting views that mirror debates in the homeland rather than dictate them'.¹⁷⁹ What is evident is that diaspora populations play a key role in conflict resolution efforts in their kin-states. Kin-state governments therefore cannot ignore this fact and should develop effective strategies to deal with the different attitudes prevalent among their diaspora populations.

E. Challenges of diaspora-kin-state relationships

As demonstrated in this chapter, the world has changed since Hobbes stated that 'no man can obey two masters'.¹⁸⁰ It is difficult to define the boundaries of a political community in a globalised world. Citizenship is no longer the only foundation upon which rights are determined and restricted.¹⁸¹ The quality of citizenship is changing, with diaspora communities playing an important role in shaping 'new shades of belonging and their legal expression'.¹⁸² As Addis notes:

[T]he idea of limited and exhaustible loyalty is conceptually incoherent and at odds with the reality of a globalized world where

¹⁷⁸ For example of the Iranian or Ethiopian diaspora, see Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1011.

¹⁷⁹ Shain, above n 5, 126.

¹⁸⁰ Thomas Hobbes, *Leviathan* (The Project Gutenberg EBook, 2002) chapter xx.

¹⁸¹ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 967.

¹⁸² Barabantseva and Sutherland, above n 37, 2.

individuals are increasingly attached to varying communities with different commitments and loyalties.¹⁸³

In this part I discuss the challenges posed by globalisation processes to citizenship laws, with a particular focus on the legal status of diaspora communities.

1. Changes in citizenship and nationalism

Modern states are organised as non-overlapping territorial jurisdictions. In the past, migration between states produced citizens who lived abroad, as foreign citizens in the foreign territory, with their original citizenship clinging to them as they moved across international borders.¹⁸⁴ Today, international law and institutional changes enable migrants to claim rights and membership in several polities, moving away from traditional single-nationality approaches.¹⁸⁵ The legitimisation and active promotion of plural nationality or plural citizenship is widespread, with more than half of the world's countries now recognising plural-nationality.¹⁸⁶ The granting of local voting rights for denizens and external voting rights for expatriates is similarly becoming more common.¹⁸⁷ Immigration is widespread, and immigrants often maintain strong affiliations with their home countries. They are bilingual, comfortable in combining two cultures, and travel regularly.¹⁸⁸ As Franck notes, what is new in our times

[Is] not the re-emergence and tolerance of multiple loyalty references, but the acceptance of a right of persons (and other entities, including transnational corporations) to compose their own

¹⁸³ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1027.

¹⁸⁴ Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 297.

¹⁸⁵ Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', above n 4, 2394, 2428; Chander, above n 4, 1040. For a list of International case laws see Rubenstein, 'Globalisation and Citizenship and Nationality', above n 65.

¹⁸⁶ See Ayelet Shacher, 'Citizenship' in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1002, 1011; Ayelet Shacher, *Dual Citizenship Is the Solution to 'Brain Drain'* (22 May 2012) *The New York Times* <<https://www.nytimes.com/roomfordebate/2012/05/14/can-dual-citizens-be-good-americans/dual-citizenship-is-the-solution-to-brain-drain>>; Thomas M Franck, 'Loyalty, Identity and Community in Law and Practice' (1996) 90(3) *The American Journal of International Law* 359, 380; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1004.

¹⁸⁷ Fitzgerald, above n 6, 114; Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 298. For more on external voting see above p 32.s

¹⁸⁸ Bosniak, above n 1, 484; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 991-2.

identity by constructing the complex of loyalty references that best manifest who they want to be.¹⁸⁹

Interestingly however, despite globalisation processes and wider acceptance of dual nationalities, the world has also witnessed nationalistic resurgences among many communities that wish to express their unique identity through political independence. Never before have there been so many independent nation states. The trend is clearly one of further disintegration rather than unification. A short list of minorities that include members seeking some sort of autonomy or independence in past years (with various levels of success) include the Scots, Flemish, Catalonians, Basques, Quebeckers, Lombards, Corsicans, Kurds, Kosovars, Berbers, Chiapans, Chechens, Tibetans, Muslim Mindanaoans, Christian Sudanese, Abkhazians, Tamils, Palestinians and East Timorese.¹⁹⁰ These examples suggest that despite globalising forces, people still highly value belonging to a particular culture, defined as a nation sovereign over its territory.¹⁹¹ The Brexit vote was arguably another example of popular desire to resist globalisation forces.¹⁹²

While people today may move across borders more freely, they also tend to take their nationality with them. Anderson, for example, does not believe that nationalism is outdated in our global society, with more people living a transnational life. Anderson contends that nationalism is not disappearing; rather, it is maintained and cultivated in previously unimaginable ways:

Think about long-distance nationalism, email/Internet nationalism. In my lecture I referred to exiled Argentinians' websites. These are extremely nationalistic and are purely about Argentina. Think of the Norwegian schools in Spain, it's crazy: The only reason for their existence is that people fear that their children will stop being Norwegian. The Norwegian schools take Norway to Spain. That is the best evidence available that nationalism has gone mobile.¹⁹³

¹⁸⁹ Franck, 'Loyalty, Identity and Community in Law and Practice', above n 186, 383.

¹⁹⁰ See Huntington, above n 45, 13.

¹⁹¹ See Chander, above n 4, 1046–8.

¹⁹² See Larry Elliott, *Brexit Is a Rejection of Globalisation* (26 June 2016) The Guardian <<https://www.theguardian.com/business/2016/jun/26/brexit-is-the-rejection-of-globalisation>>.

¹⁹³ Lorenz Khazaleh, *Benedict Anderson: 'I like Nationalism's Utopian Elements'* (2005) <<https://www.lorenzkhazaleh.com/english/2005/benedict-anderson-interview/>>.

Diasporas are the main source of this kind of mobile nationalism. The existence of diasporic populations seriously undermines the traditional assumption that nationality and community are linked with territory.¹⁹⁴ According to Cohen:

The central idea is that transnational bonds no longer need to be cemented by migration or by exclusive territorial claims. In the age of cyberspace, a diaspora can, to some degree, be held together or re-created through the mind, through cultural artefacts and through a shared imagination.¹⁹⁵

Diaspora people conflate old concepts of identity, citizenship and nationhood and pose a problem to the old world order that was divided into well-defined nation states.¹⁹⁶ As Shain notes, diasporas are 'outside the state but inside the people'.¹⁹⁷ But are diasporas really part of the people in the sense that would grant them the right to shape the laws of the kin-state?¹⁹⁸ Some claim that allowing the involvement of diaspora people in the political and economic life of the country violates a basic principle of international law and democracy – that of 'the ruled being the rulers'.¹⁹⁹ A diaspora's relationship with its kin-state defies a very popular dichotomy that is often employed in international law and political discourse, namely, the division between nationalist/localist views versus cosmopolitan/universalist views.²⁰⁰ Cohen argues that 'nationalists cannot now return the genie of social identity to the bottle of the territorial nation-state. Globalisation has put paid to that possibility'.²⁰¹ Addis points out that neither universal nor local accounts capture diaspora-kin-state relationships: diaspora people are neither strangers nor members, neither local nor cosmopolitan. Such complex relationships will increasingly occupy international relations and international law theorists.

¹⁹⁴ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 988.

¹⁹⁵ Cohen, 'Diasporas and the Nation-State: From Victims to Challengers', above n 26, 516.

¹⁹⁶ See Barabantseva and Sutherland, above n 37, 5.

¹⁹⁷ Shain, above n 5, 124.

¹⁹⁸ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 990; Song, 'Democracy and Noncitizen Voting Rights', above n 2, 616.

¹⁹⁹ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1009; Fitzgerald, above n 6, 107.

²⁰⁰ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 983.

²⁰¹ Cohen, 'Diasporas and the Nation-State: From Victims to Challengers', above n 26, 520.

2. Proposed solutions

Social and legal scholars try to adapt to the changes in the boundaries of citizenship resulting from globalisation processes and the rise of diaspora populations. They acknowledge that there is a need to introduce new norms into international law in order to coordinate citizenship policies between states. Some political and social theorists contemplate whether citizenship can or should exist beyond the nation state and a defined territory. Concepts such as 'global', 'transnational' and 'denationalized' citizenship are being developed to replace old concepts, and some suggest a universalist position that places persons, rather than citizens, as the main proper subject of political rights and obligations.²⁰² Indeed, some scholars go as far as advocating cosmopolitan democracy as a viable and humane response to the challenges of globalisation.²⁰³ They envision a world in which democratic participation by citizens is not constrained by national borders and local governments, and democracy spreads through dialogue and incentives rather than coercion and war.²⁰⁴ Some argue that the state should expand the relevant polity to include not only non-citizen residents, but also foreign non-citizens who live outside the state's territorial borders such as citizens of neighbouring countries.²⁰⁵ For example, environmental theorists argue that democratic institutions should take into account the interests of non-citizens (as well as non-humans and future generations) in environmental decision making.²⁰⁶

However, such theories must be capable of overcoming many difficulties before they can be realised. It is still difficult to imagine a real alternative to the current dominant system of separate and independent nation states. As Bauböck notes: 'Political theorists have so far hardly ever attempted to specify and contextualise how norms of equal

²⁰² See Song, 'Democracy and Noncitizen Voting Rights', above n 2, 613, 616; Bosniak, above n 1, 449, 454; Blank, above n 1; List and Koenig-Archibugi, above n 1.

²⁰³ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 53.

²⁰⁴ See for example Daniele Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (Princeton University Press, 2008). For more on the cosmopolitan model see Chander, above n 4, 1042.

²⁰⁵ See Song, 'Democracy and Noncitizen Voting Rights', above n 2.

²⁰⁶ See Sherilyn MacGregor, *Beyond Mothering Earth: Ecological Citizenship and the Politics of Care* (UBC Press, 2006) 89; John Barry, *Rethinking Green Politics Nature, Virtue, and Progress* (SAGE, 1999).

citizenship apply beyond a single polity framework'.²⁰⁷ One difficulty is how to maintain equality between individuals who are 'positioned differently within a citizenship constellation'.²⁰⁸ As Bauböck argues, introducing 'transnational citizenship' perspectives means that we have to develop citizenship policies that not only respond to individuals' claims but can also guide political decisions of different polities without conflicting with each other or producing unjustifiable burdens for other countries.

Similarly, Addis asks whether the relationship between diaspora communities and their kin-states opens up 'new forms of community and peoplehood worth cultivating' or rather 'undermine the possibility of developing any community of character and depth'.²⁰⁹ Addis argues that the strong relationships between diaspora communities and kin-states supports the cosmopolitan argument that territorial states are no longer the only source of peoplehood. He calls for a new theory of 'peoplehood' that is capable of capturing what he calls 'the paradox of diasporas'.²¹⁰ At the same time, he also believes that these relationships reinforce the fact that allegiances and obligations should be worked out in the context of specific historical narratives that involve 'common sympathy and origin'.²¹¹

However, all these new social membership descriptions remain too vague for real states to work with. While contemporary scholars can use terms such as 'transnational social fields'²¹² or 'networks'²¹³ to describe multiple national affiliations, government and legislators need exact definitions that can be applied to actual cases. Fields and networks are not political entities that can serve to address claims to membership status and political rights. In contrast with societies, networks and fields, political communities are

²⁰⁷ Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 306.

²⁰⁸ Ibid 302.

²⁰⁹ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 967.

²¹⁰ Ibid 969,983.

²¹¹ Ibid 968.

²¹² See, for example, Peggie Levitt and Nina Glick Schiller, 'Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society' (2004) 38(3) *International Migration Review* 1002; Luin Goldring, 'The Power of Status in Transnational Social Fields' in Michael Peter Smith and Luis Eduardo Guarnizo (eds), *Transnationalism from Below* (Transaction Publishers, 1998) 316.

²¹³ See, for example, Andreas Herz and Claudia Olivier, 'Transnational Social Networks—Current Perspectives' (2012) 2(2) *Transnational Social Review* 115.

demarcated by territorial jurisdiction or other legal mechanisms that must determine if a person is a member of community X or Y and is therefore entitled to a certain right or benefit. Apart from practical considerations, there are also normative reasons to prefer the division into modern states over a united world government.²¹⁴

Some scholars are aware of the normative trade-off between territorial autonomy and transnational citizenship.²¹⁵ Bauböck and others propose 'individual stakeholding' in the future of a political community as a political criterion for membership claims.²¹⁶ According to this criterion, as different people have different stakes in a particular decision taken by the state, one's influence should be relative to her stake in the decision.²¹⁷ Adopting this term, Addis provides further details and divides the 'individual stakeholding' into three elements: cultural stake, economic stake and political stake.²¹⁸ Nino adopts a similar position, saying that 'it may be necessary to use different changing gradations of citizenship'.²¹⁹

The problem with these kinds of criteria is that they are still vague and require further clarification in order to provide workable definitions for legislators and law enforcers: Who is going to decide what the stake is? What kind of different 'influence levels' are available and how should they match the corresponding 'stakeholding' level? Another problem created by these approaches is that a different constituency of voters will need to be identified for every decision, as different decisions affect different people in different ways.²²⁰

²¹⁴ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12.

²¹⁵ Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 312; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1038.

²¹⁶ See Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 299; Eisenberg, above n 2, 139.

²¹⁷ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 49.

²¹⁸ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1038.

²¹⁹ Nino, above n 2, 134.

²²⁰ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 56.

Moreover, the fact that one group is affected by a decision does not necessarily mean that this group must have a right to vote on the matter, as there are other considerations that may point against granting voting rights to that group.²²¹ For example, many European countries refuse to grant voting rights to non-citizen residents in order to protect the ethnic and linguistic character of the state.²²²

There should not be, it seems, too much controversy about the rights of diaspora people to maintain cultural ties and economic involvement with people in the kin-state. The question therefore remains as to what legal status should be granted to diaspora people who are part of the people, but live outside the country: 'the categories of members and strangers in the traditional sense do not seem to capture the complicated relationship between diasporas and homelands'.²²³

Take, for example, the question of external voting. The use of referendums in constitutional amendment processes became an almost universally adopted practice among countries emerging from undemocratic models of government.²²⁴ But how would one determine the boundaries of the group whose members are to enjoy political rights such as the right to vote? A territorial demarcation would simply include all those who would be directly affected by the results. This follows the core democratic principle that those who are subject to the law should also be its authors.²²⁵ Indeed, some states grant local voting rights to all long-term residents²²⁶ and some nation states' constitutions cover all people residing within the territory and not just citizens.²²⁷ However, territorial demarcation would exclude parts of the nation that were forced or

²²¹ See Eisenberg, above n 2, 149.

²²² See Ibid 140.

²²³ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 982.

²²⁴ See Tierney, above n 8, 10.

²²⁵ See Seyla Benhabib, *The Rights of Others : Aliens, Residents and Citizens* (Cambridge University Press, 2004) 217; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 973.

²²⁶ See Blank, above n 1, 431; Rodriguez, above n 2. In New Zealand, for example, non-citizens residents can register as electorate after six months, see Rubenstein, 'Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?', above n 65, n 22.

²²⁷ Rubenstein, 'Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?', above n 65, n 22; Song, 'Democracy and Noncitizen Voting Rights', above n 2.

chose to live in the diaspora. As discussed above, external voting challenges norms of inclusion in the concept of transnational citizenship and creates political inequality.²²⁸

As mentioned above, one can simply argue that diasporas are effectively not ruled by the laws of the kin-state, and so they should not take part in the process of designing them. However, some kin-state policies and decisions can affect diaspora people in various important ways. For example, if the Armenian government agrees to reconcile with Turkey this may have bearing on the entire national narrative regarding the Armenian genocide and on the rights of the Armenian diaspora;²²⁹ actions by the State of Israel may affect anti-Semitism in the Jewish diaspora; a new migration policy declared by country A with respect to foreigners can affect the way other governments treat country A's migrants in their own territories. In all such cases, diaspora people have a legitimate interest in the decisions taken by the kin-state. The question remains, however, for which decisions should diaspora people be considered part of the people, and for which decisions should they not?

On this issue, Gans and Addis argue that it seems reasonable to allow all the members of a national group, including members of the diaspora, to take part in the decision-making process with regard to issues of national identity and membership that have little to do with everyday life in the kin-state.²³⁰ With regard to such decisions, diaspora people could be said to belong to the relevant demos that should vote on the issue, as they may be affected by the decisions. However, this approach is not sufficiently clear and raises further questions: How can one decide exactly what issues really concern 'national identity' so as to allow diaspora people to participate in such decisions? For example, do decisions regarding which languages should be recognised as official languages involve practical or identity aspects or both? Also, how, and in what forum, would this decision be made? Currently there are no established institutions or principles of international law that are able to resolve disputes between diaspora and kin-states. Such questions are still waiting to be researched and addressed by legal

²²⁸ Fitzgerald, above n 6, 115.

²²⁹ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1006, 1013; Shain, *Kinship & Diasporas in International Affairs*, 120.

²³⁰ Chaim Gans, *The Limits of Nationalism* (Cambridge University Press, 2002) 84; Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1024.

scholars and international relation theorists.²³¹ This thesis offers a deliberative democratic approach to these questions. The case studies also provide practical examples of how to involve diaspora communities – namely, via deliberations in the kin-state constitutional court.

F. Summary

In this chapter I examined diaspora communities and their relationship with their kin-states. I described the different ways in which governments extend their actions beyond the state's borders and reach out to their diaspora communities in order to promote a specific definition of the national community. I also described the various methods used by diaspora communities to participate and intervene in kin-state affairs. Despite the fact that diasporic activities take place outside the kin-state, they influence life in the kin-state. Thus, as Shain and Barth note, diasporas expand the meaning of the term 'domestic politics' to include not only politics inside the state but also 'inside the people'.²³²

Such extraterritorial citizenship can sometimes violate territorial integrity and the ideal of the ruled being the rulers. Diasporas therefore pose a problem to the democratic ideal: they obscure and conflate the relevant demos so as to include people who are living outside the state, are only partly subject to the same rules, and often have different interests and aspirations from those held by the kin-state residents. This problem intensifies especially when certain minority groups in the kin-state feel marginalised by the state's propensity towards a specific ethnic or religious denomination. It becomes even more complex given that often there are groups of non-citizens who reside in the kin-state but are excluded from political participation (e.g., foreign workers).²³³

²³¹ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1008.

²³² Shain and Barth, above n 33, 451.

²³³ See Song, 'Democracy and Noncitizen Voting Rights', above n 2.

In the next chapters I address these challenges using deliberative democratic theory. I argue that by looking at the diaspora-kin-state relationship through a deliberative democratic lens, the challenges look less daunting, and modes of engagement emerge that offer solutions that are less drastic and problematic than, for example, external voting and preferential citizenship laws. I highlight examples from the Israeli Supreme Court, in which members of the Jewish diaspora challenged certain policies of the Israeli government in what can be described as an elite deliberative democratic engagement.

III. Theory of Deliberative Democracy

In this chapter I examine whether deliberative democratic theory can accommodate the involvement of diaspora people in their kin-states. In the previous chapter I discussed the different kinds (and implications) of engagement between diaspora people and their kin-states. These issues should be discussed under a framework of democratic theory that can accommodate the involvement of non-citizens in a political community. In order to do this I delve into the theory of deliberative democracy. First, I introduce definitions and the major themes of deliberative democratic theory. I then explore in more depth the concept of legitimacy which is at the core of democratic theories and, as explained above, is at risk when diaspora people become involved in kin-state affairs. Understanding the different streams of deliberative democratic theory is important as deliberative democracy is a broad concept that includes many variants and sometimes even conflicting opinions. I provide a review of the major thinkers who contributed to the development of deliberative democratic theory and I explain the different attitudes and controversies one can find among deliberative democrats: for example, the difference between ‘procedural’ and ‘substantive’ accounts; the difference between ‘elite’ and ‘popular’ deliberation; and the different positions on what kinds of reason-giving count as ‘deliberative’. I then explain which streams of deliberative theory I utilise and apply in this thesis, and why I think these streams are suitable when discussing diaspora-kin-state relationship, especially in divided societies with large diasporic populations. The next chapter builds on the theoretical framework outlined in this chapter and analyses the qualities of the judiciary as a deliberative democratic institution.

A. What is deliberative democracy?

Before discussing deliberative democracy in detail, it is useful to define the terms democracy and deliberation and explain how they act together. According to Christiano, the term democracy ‘refers very generally to a method of group decision making characterized by a kind of equality among the participants at an essential stage of the

collective decision'.²³⁴ Note that the level of equality required by this definition may vary. For example, equality may mean simply formal equality of one-person one-vote, or it may be more robust, demanding equality in the processes of deliberation and coalition building, before and after the voting process.²³⁵ Dryzek defines deliberation as 'communication that induces reflection on preferences, values and interests in a non-coercive fashion'.²³⁶ Deliberative democracy therefore is an idea that strives to combine these two concepts. It has gained popularity as a useful model to deal with problems of legitimacy in modern democratic societies. Deliberative democracy focuses on the quantity and quality of the communication among participants in a democratic process.

The major criterion of legitimacy emphasised by deliberative democratic theory, as opposed to other models of democracy, is that legitimacy does not derive only from the act of vote counting, but also from reflective judgment practised by the participating citizens before the vote.²³⁷ While, for example, a liberal model of democracy emphasises the protection of personal freedoms and a populist model emphasises the expression of the popular will, deliberative democracy sees reasoned deliberation and persuasion among people as the best way to respect people's autonomy and their ability to self-govern.²³⁸ In other words, what is most important is not necessarily the fact that decisions are taken by a majority of the people; rather it is the *process* that precedes the voting and the protection of some basic democratic principles during that process. Although majority decision making is also a necessity in deliberative democracy, it is not, in itself, perceived as the true expression of the people's will. The majority decision is seen merely as an unavoidable break in an ongoing discussion that records an interim result in the discursive process.²³⁹ A decision is binding for the relevant campaign, but

²³⁴ Christiano, Tom, 'Democracy', *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/spr2015/entries/democracy/>> [1].

²³⁵ See Ibid.

²³⁶ John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000).

²³⁷ See Hansen and Rostbøll, above n 8, 502.

²³⁸ See Amy Gutmann, 'Democracy' in Robert E. Goodin and Philip Pettit (eds), *A companion to contemporary political philosophy* (Wiley, 1993) 417. It should be noted however that differences between different democratic models are not dichotomised and each model may incorporate elements from the other, See Tierney, above n 8, 20.

²³⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1996) 179; Hansen and Rostbøll, above n 8, 508.

does not determine the result of future contentions (but note that this cannot always be the case, as some decisions have an immediate effect that cannot be reversed easily, as is usually the case with constitutional referendums).²⁴⁰ To some, the criterion that most clearly distinguishes deliberative democratic decision-making mechanisms from non-deliberative mechanisms is that no coercive power should exist in the deliberative process: 'participants should not try to change others' behaviour through the threat of sanction or the use of force'.²⁴¹

Through these principles, deliberative democratic theory deals with the question of a government's legitimacy, that is, these principles explain why people should abide by the governments of democratic regimes (beyond naked force or majority rule).²⁴² However, as many deliberative democrats admit, at the end of the process there must be a way to ensure that people who disagree with the final decision will comply with it nevertheless. Sometimes this will inevitably involve some level of coercion.²⁴³

The requirement that the process preceding the decision should be deliberative means that the people who are involved in the process should debate open-mindedly and exchange views with each other under principles of mutual respect, reciprocity and fairness.²⁴⁴ The process should improve the participants' knowledge of the possible implications of the decision. Such process would ideally involve all the people who are going to be affected by the decision.²⁴⁵ Deliberative democratic theory therefore is a

²⁴⁰ Gutmann and Thompson, above n 8, 57,138; Jürg Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge University Press, 2012) 124.

²⁴¹ Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', above n 9, 66. Note that I refer here to the authors' definition of coercion, that is, threats of sanction and the use of force against an individual's interests. Coercion according to this definition involves an actual deprivation of freedom. This definition excludes inducements that enhance those interests or inhibit them. The authors acknowledge that this definition may be ambiguous and there might be other forms of indirect coercion (see Ibid 81 n 45, 46).

²⁴² See Nino, above n 2, 117.

²⁴³ Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', above n 9, 81.

²⁴⁴ Gutmann and Thompson, 'Deliberative Democracy beyond Process', above n 9; Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', above n 9, 94.

²⁴⁵ See Young, above n 10; Gutmann and Thompson, above n 8; Levy, 'The Law of Deliberative Democracy: Seeding the Field', above n 10; Archon Fung, 'Deliberation's Darker Side: Six Questions for Iris Marion Young and Jane Mansbridge' (2004) 93(4) *National Civic Review* 47. How to define who is going to be affected by a decision is a complex issue in itself, see Robert E Goodin, 'All Affected Enfranchising Interests, and Its Alternatives' (2007) 35(1) *Philosophy & Public Affairs* 40.

theory that aims to promote elementary democratic principles, as democratisation involves ‘expanding the scope of issues subject to collective control, the effective number of people who can exercise influence over the content of collective decisions, and the competence with which such influence and control is exercised’.²⁴⁶

B. Problems in modern democracies

Having explained the basic principles of deliberative democracy, I will elaborate in this section on the problems that spurred the development of deliberative democratic ideas and how deliberative democratic designs have been implemented practically in an attempt to address these problems.

Increasing concerns over the level of public trust in democratic institutions and public involvement in democratic processes helped to trigger the development of deliberative democratic theory.²⁴⁷ Even in many of today’s most robust democracies, where transparency is mandated by state institutions, the public is still subject to manipulation by different interest groups.²⁴⁸ Lobbyists hired by corporations, powerful political groups, unions and media tycoons cooperate behind the scenes and pressure legislators in order to protect their interests. Billionaires use media outlets to divert and shape public opinion and public broadcast is affected by the government that controls its budget. The general public is bombarded with political scandals circulated by spin-doctors, and is only able to have a direct say in political affairs every few years through voting. The public often considers politicians to be more concerned with their image in the media, and how that image will affect re-election chances, than with what is best for the general public. Although some less direct means of participation are always open to active citizens – for example, public and legislative petitions, submissions to reform

²⁴⁶ Dryzek, ‘Global Civil Society: The Progress of Post-Westphalian Politics’, above n 98, 107.

²⁴⁷ Levy and Orr, above n 8, 4.

²⁴⁸ Jürgen Habermas, ‘Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research’ (2006) 16(4) *Communication Theory* 411; James Fishkin, *When the People Speak : Deliberative Democracy and Public Consultation* (Oxford University Press, 2009); John Ferejohn, ‘Conclusion: The Citizens’ Assembly Model’ in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizen’s Assembly* (Cambridge University Press, 2008) 192.

commissions – these methods are not always available and are limited in their effectiveness.²⁴⁹

A related problem that deliberative democratic theory aims to ameliorate is what is sometimes referred to as democracy's 'myopia', that is, its inability to develop and implement long-term projects. There is ongoing concern that public representatives are not in fact free to pursue long-term solutions for public issues due to their need to secure their re-election in the next electoral cycle. Seeking short-term gains, public representatives are pushed to do things that would secure populist support, instead of doing what is actually needed.²⁵⁰ For example, reducing taxes on petrol and new cars will garner immediate support from the public (as well as car manufacturers and importers), while investing in efficient public transport infrastructure may require raising taxes and major traffic disturbances in the short-term, which are likely to be unpopular. So, despite public transport usually being the best long-run solution, politicians will often prefer the short-term solution. Pressure by specific interest groups is highly effective in 'disciplining' politicians, and majority interests are often compromised as a result. One of the reasons for this is that an interest group is well organised and each group member has a strong incentive to act and protest, while the majority of the population is less organised, and each member of the majority has little incentive to act and pressure its representative.²⁵¹ For example, a car-manufacturing labour union has a strong incentive to request the government to subsidise its industry, while each member of the general public has very little incentive to oppose this move as the loss suffered by each citizen as a result of subsidising this specific industry would be very small.

²⁴⁹ See Richard Hough, 'Do Legislative Petitions Systems Enhance the Relationship between Parliament and Citizen?' (2012) 18(3–4) *The Journal of Legislative Studies* 479.

²⁵⁰ For a discussion of these shortcomings in Australian context see Michael P Crozier and Adrian Little, 'Democratic Voice : Popular Sovereignty in Conditions of Pluralisation' (2012) 47(3) *Australian Journal of Political Science* 333.

²⁵¹ This is a brief description of the collective action problem articulated by Olson. See Mancur Olson, *The Logic of Collective Action* (Harvard University Press, 1965).

All of these problems and practices lead to a dangerous decline in the public's trust in democratic institutions.²⁵² One consequence of growing distrust is that the legitimacy of such institutions and the decisions they produce are questioned.²⁵³

C. Deliberative democracy in practice

Deliberative democrats strive to address the problems discussed above through several methods. First, they try to encourage more citizens to engage in public policy debates. Second, they aim to include more representatives of marginalised groups in such debates. Third, they seek to improve the quality of the deliberation that precedes legislation, so that the people who deliberate over and legislate rules will be more informed and consider all relevant factors and views before enacting them. Lastly, some deliberative democrats argue that the process of deliberation and decision making should be more transparent, so as to make it easier for the general public, which usually does not directly participate in the decision making process, to follow it and identify the reasons and motives behind the different positions.

How do all of these methods play out in practice? Scholars have proposed various innovative strategies to overcome the shortcomings of traditional representative models of democracy. Although no one seriously proposes to eliminate representative parliaments, some deliberative democrats propose to supplement existing institutions with new ones that better promote deliberative democratic goals. Many of these approaches involve the shifting of some legislative powers from professional politicians to 'mini-publics' (e.g., 'citizens' assemblies', 'citizen forums') chosen by sortition. That is, such forums comprise a representative sample of ordinary citizens who are chosen by lot to serve a certain term as a kind of jury, deliberating over public matters.²⁵⁴

²⁵² See Russell J Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (Oxford University Press, 2009); Colin Hay, *Why We Hate Politics* (Polity Press, 2007); Peter Levine, If You Want Citizens to Trust Government, Empower Them to Govern (15 March 2011) The Democratic Strategist <http://thedemocraticstrategist.org/2011/03/if_you_want_citizens_to_trust/>.

²⁵³ Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) *Melbourne University Law Review* 805, 807.

²⁵⁴ See, for example: Ethan J Leib, *Deliberative Democracy in America : A Proposal for a Popular Branch of Government* (Pennsylvania State University Press, 2004); Alex Zakaras, 'Lot and Democratic

Another popular suggestion, advanced by Fishkin, is 'deliberative polling', which is a form of public consultation that engages random samples of the citizenry in weekend-long information and deliberation sessions in order to survey how opinions would change if people were better informed.²⁵⁵

These kinds of forums emphasise the importance of ordinary citizens and their contribution to the polity. Moreover, deliberative forums encourage citizens to participate in public debate and exchange reasons in a respectful way, acknowledging that each fellow citizen is a morally capable and autonomous person. All viewpoints should therefore be heard and considered, though not necessarily agreed with. By shifting responsibilities from professional politicians to ordinary citizens who are not concerned with their own re-election, long-term projects and policies that benefit the majority of the population may have a better chance of being pursued and realised.²⁵⁶ If a certain politician's re-election is dependent upon support from the car industry, for example, she might be disinclined to promote public transport solutions or cut subsidies to the car industry sector. In contrast, a member of a citizens' assembly is free from such constraints, and is able to decide according to what she thinks is the best for the public at large.

As Levy describes it:

Running democracy through a more elaborate deliberative course is a strategy to encourage participants to consider policy options not from pre-formed factional or ideological positions, but with greater attention to perspectives other than their own. While no institution can guarantee its members will assume an enlarged and flexible view of their own and others' interests, deliberative democratic bodies at least leave open this possibility by putting decision-makers in the position to learn from and cooperate with each other.²⁵⁷

Deliberative forums in the form of 'citizens assemblies' and other 'mini-publics' have been conducted in many countries, including Denmark, the United States, Australia,

Representation: A Modest Proposal' (2010) 17(3) *Constellations* 455; Bruce Ackerman and James Fishkin, 'For a Smarter Public, Deliberation Day' (2004) 15 *The American prospect*.

²⁵⁵ Fishkin, *When the People Speak : Deliberative Democracy and Public Consultation*, above n 248.

²⁵⁶ Levine, above n 252.

²⁵⁷ Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change', above n 253, 811.

Canada, Iceland and Ireland.²⁵⁸ In Iceland, citizens have actively participated in the process of constitutional reforms.²⁵⁹ In Ireland, a Constitutional Convention was established in 2012 to deliberate over and propose amendments to the Constitution of Ireland.²⁶⁰ Even in countries without a strong democratic tradition, we can find cases where the task of drafting or reforming constitutions is put in the hands of public representatives who are not always professional politicians. These representatives are then engaged in a (more or less) deliberative process that aims to achieve consensus over the new constitution. In recent years, public representatives have gathered in Yemen and in Tunisia as part of the 'National Dialogue Conference' and the 'National Constituent Assembly', respectively, assuming the task of drafting new constitutions following unprecedented steps towards democratisation in these countries.²⁶¹ However, one should keep in mind that the kind of deliberative processes that may work in liberal, Western democracies are not always relevant or applicable to divided or post-conflict societies.²⁶² I will elaborate on this point in part H of this chapter.

The observed effects of deliberative processes that involve ordinary citizens differ and may include one or more of the following: better informed public; better media coverage and public debate; stronger sense of legitimacy and accountability for public

²⁵⁸ See Robert E Goodin and John Dryzek, 'Deliberative Impacts: The Macro-Political Uptake of Mini-Publics' (2006) 34(2) *Politics & Society* 219; Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change', above n 253.

²⁵⁹ Opinions on the results of that procedure vary, See Björg Thorarensen, 'The People's Contribution to Constitutional Changes. Writing, Advising or Approving? – Lessons from Iceland' in Xenophon Contiades, Alkmene Fotiadou (ed) *Participatory Constitutional Change, The People as Amenders of the Constitution* (Routledge, 2017) 106; Silvia Suteu, 'Constitutional Conventions in the Digital Era : Lessons from Iceland and Ireland' (2015) 38(2) *Boston College International & Comparative Law Review* 251.

²⁶⁰ See Ibid; David M Farrell, 'Deliberative Democracy, Irish Style' (2014) 34 *Inroads* 110; David M. Farrell, Clodagh Harris and Jane Suiter, 'Bringing People into the Heart of Constitutional Design: The Irish Constitutional Convention of 2012-14' in Xenophon Contiades, Alkmene Fotiadou (ed) *Participatory Constitutional Change, The People as Amenders of the Constitution* (above n 259), 120. This convention constituted 100 members: a chairman; 29 members of the parliament; 4 representatives of Northern Ireland political parties; and 66 randomly selected citizens of Ireland.

²⁶¹ Neil MacFarquhar, Yemen Makes Strides in Transition to Democracy (25 May 2013) *The New York Times* <<http://www.nytimes.com/2013/05/26/world/asia/yemen-makes-strides-in-transition-to-democracy.html?mcubz=1>>. See the conference's website at <<http://www.ndc.ye/default.aspx>>; *National Constituent Assembly Elections in Tunisia* (The Carter Center, 2011), <http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/tunisia-final-Oct2011.pdf>.

²⁶² See Suteu, above n 259, 257; David Landau, 'Constitution-Making Gone Wrong' (2013) 64(5) *Alabama Law Review* 923; Jennifer Widner, 'Constitution Writing in Post-Conflict Settings: An Overview' (2007) 49 *William and Mary Law Review* 1513.

decisions and sometimes direct influence on the content of policy.²⁶³ However, some scholars identify potential problems with such deliberative processes and note that their positive assessments may be overstated.²⁶⁴ One common critique made against deliberative democracy is the problem of scale or ‘the problem of economy’.²⁶⁵ Many question the prospects of successfully transforming effective deliberation from small groups and local issues to large groups and national issues.²⁶⁶ It is practically very difficult for thousands of people to engage in deliberation and ‘reason together’.²⁶⁷ Although attempts to address these problems have been made by various deliberative democrats,²⁶⁸ sceptics remain unconvinced. This problem of scale is one of the main reasons that elite models of democratic deliberation exist alongside popular models. In part F of this chapter I elaborate more on the difference between popular and elite models of deliberation. First, however, I address in more detail the concept of legitimacy and its special role in deliberative democratic theory. Understanding the role of legitimacy in deliberative democracy will clarify how diaspora participation in political processes in their kin-states can fit within deliberative democratic theory.

D. Legitimacy

In the previous section I outlined the basic principles of deliberative democracy and how deliberative democratic initiatives have been put into practice in the real world. In order to connect the diaspora issues discussed in the previous chapter with deliberative democratic theory, I will discuss in this part how deliberative principles are designed to enhance the legitimacy of the final decision and how inclusion of people from the

²⁶³ Goodin and Dryzek, above n 258; Hansen and Rostbøll, above n 8, 509.

²⁶⁴ See for example Eoin Carolan, ‘Ireland’s Constitutional Convention: Behind the Hype about Citizen-Led Constitutional Change’ (2015) 13(3) *International Journal of Constitutional Law* 733. For replies to some lines of criticism see Farrell, above n 260.

²⁶⁵ See John Dryzek, ‘Legitimacy and Economy in Deliberative Democracy’ (2001) 29(5) *Political Theory* 651; Robert E Goodin, ‘Democratic Deliberation within’ (2000) 29(1) *Philosophy & Public Affairs* 81.

²⁶⁶ See Tierney, above n 8, 211.

²⁶⁷ Michael Walzer, ‘Deliberation, and What Else?’ in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford Uni, 1999) 58.

²⁶⁸ See Jane Mansbridge and John Parkinson (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012); Goodin and Dryzek, above n 258; John Parkinson, ‘Legitimacy Problems in Deliberative Democracy’ (2003) 51(1) *Political Studies* 180; Ron Levy, ‘“Deliberative Voting”: Realising Constitutional Referendum Democracy’ (2013) *Public Law* 555.

diaspora helps to achieve this goal. First I explore the concept of legitimacy and how deliberative democratic ideas are designed to address concerns over legitimacy deficiencies. I then explain how a given decision making body can enjoy a higher level of legitimacy compared to other decision making bodies in a political system. This discussion supports my overall argument that including diaspora people in deliberation processes in the kin-state helps to strengthen the legitimacy of such decisions.

1. Legitimacy in political theory

In today's democracies, laws are often shaped by interest groups without much public awareness or influence, which leads people to question the legitimacy of such laws.²⁶⁹ One of the main aims of deliberative democratic theory is to strengthen the legitimacy ascribed to decision making bodies. But what exactly is legitimacy in this context?

Political legitimacy has both a descriptive aspect and a normative aspect. The descriptive aspect deals with different beliefs held by people regarding the nature of political authority; the normative aspect refers to the justification behind the use of political power.²⁷⁰ Some scholars combine the two aspects into one account of political legitimacy. Beetham, for example, holds that 'legitimacy is determined by whether power is acquired and exercised according to established rules which are justifiable by reference to shared beliefs'.²⁷¹

One should also differentiate between the general question which asks whether political authorities may be legitimate at all (and if yes, under what conditions), and the more particular questions regarding the legitimacy of specific regimes or specific decisions. Anarchists, for example, argue that all authorities are always illegitimate. But most political theorists assume that at least some authorities, sometimes, are legitimate and

²⁶⁹ See Ferejohn, above n 248.

²⁷⁰ See Fabienne Peter, 'Political Legitimacy', *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2016/entries/legitimacy/>> [1]; Nino, above n 2, 8.

²⁷¹ John Kane and Haig Patapan, 'Recovering Justice: Political Legitimacy Reconsidered' (2010) 38(3) *Politics & Policy* 589, 601, n 11. See David Beetham, *The Legitimation of Power* (Humanities Press International, 1991).

produce legitimate orders.²⁷² In this chapter, I discuss the normative aspect of legitimacy: when are political institutions, and the decisions taken by them, legitimate?

At its core, legitimacy is closely related to concepts of justice and fairness and is based on an assumption that the ruling authority has a right to rule and enforce its decisions, and that it generally acts fairly and diligently.²⁷³ A popular position among democratic theorists is that a decision is legitimate only if all those who are going to be affected or coerced by the decision have the opportunity to take part in the process that leads to that decision.²⁷⁴ Theorists such as Rawls and Raz see legitimacy as the feature that provides the moral ground for the requirement to heed the decision making body and follow its orders.²⁷⁵ According to Rawls:

[E]xercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.²⁷⁶

A lack of legitimacy therefore has moral implications, as only a legitimate authority is justified in coercing its subjects to comply with its directives.²⁷⁷ As Michelman notes:

To call ... a system legitimate is to say that moral justification exists to enforce whatever laws may issue from that system against everyone alike, including persons who may deeply, considerately, and reasonably disagree with the justice or the prudence of some of those laws.²⁷⁸

Therefore, in the background of almost every political authority (such as a king or a democratic government) a constant debate will take place among the subjects of such authority regarding the legitimacy of the regime. This debate may refer to the very nature of the body taking the decisions (e.g., 'this royal family has no right to rule us')

²⁷² See Richard e. Flathman, 'Legitimacy' in Robert E Goodin, Philip Pettit and Thomas W Pogge (eds), *A Companion to Contemporary Political Philosophy* (John Wiley & Sons, 2012) 527, 528.

²⁷³ See Ibid 527.

²⁷⁴ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 51.

²⁷⁵ Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).

²⁷⁶ Rawls, *Political Liberalism*, above n 17, 217.

²⁷⁷ See Peter, above n 270 [3.1].

²⁷⁸ Frank Michelman, 'Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment' (2004) 72(5) *Fordham Law Review* 1407.

or to specific decisions (e.g., ‘the government has no right to decide *on this matter*’). While in democratic societies this debate is more open and public (e.g., the opposition can claim publicly that the government has lost its legitimacy to rule, for various reasons), in undemocratic societies this debate will be more secretive. On a practical level, an authority that lacks legitimacy will have to work harder in order to mobilise its subjects to follow its orders and will need to expend more effort enforcing its decisions.²⁷⁹

Ideally, a legitimate authority will conduct its affairs with maximum diligence (e.g., making sure that decisions are aimed to serve the people; that everyone has a chance to participate and express their opinions prior to the execution of the decisions; and that actions respect basic human rights). However, it must be kept in mind that legitimacy is merely an ideal, and we will judge a decision or a regime according to how close it is to this ideal, keeping in mind that rarely, if ever, will a decision or decision-making body be perfectly legitimate.²⁸⁰ As Parkinson explains:

[T]o pursue perfect legitimacy is to pursue a chimera: there is no such beast as a perfectly legitimate decision, a perfectly legitimate institution, or a perfectly legitimate regime, because legitimacy's elements cannot all be present at once.²⁸¹

2. Legitimacy in democratic theory

In order to capture what confers political legitimacy on a democratic institution, it is important to understand the division in general democratic theory between instrumental and non-instrumental justifications for democracy.

Attaching an instrumental value to democracy means that we justify democracy consequentially, by reference to the outcomes produced by democracy compared to other methods of political decision making. The idea behind instrumentalism is that political legitimacy is dependent upon the results the political authority produces. That is, the outcomes of the decisions taken by the political authority help us to determine whether this regime is legitimate. Therefore, according to this view, legitimacy is not

²⁷⁹ See John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 21–22.

²⁸⁰ See Nino, above n 2, 145.

²⁸¹ Parkinson, above n 279, 43. See also Nino, above n 2, 10.

(only) about the process by which decisions are being taken, but also concerns the content of these decisions. Legitimacy cannot be sustained if decisions do not fulfil substantive goals such as answering the needs of the people who are being affected by the decision as well as promoting a morally sound goal in general.²⁸² According to Raz, an authority's legitimacy will primarily turn upon the authority's ability to promote values and goals that the subjects of this authority want and should achieve, but cannot achieve on their own.²⁸³ Others hold that more normative conditions should be satisfied in order for a legitimate authority to create political obligations.²⁸⁴ Democratic decision-making procedures are therefore selected as the preferable means to achieve these goals.

On the other hand, non-instrumental accounts of democracy place the normative weight on procedural values. They hold that democracy is justified intrinsically, by reference to the inherent qualities of a democratic decision making process. Therefore, a fair and democratic form of political organisation and decision making is one that provides political legitimacy, independent of the instrumental value of the decision (i.e., its content and outcome).²⁸⁵ In the next section I discuss how this division between instrumental and non-instrumental models of democracy is expressed specifically in the context of deliberative democratic theory.

3. Legitimacy in deliberative democratic theory

Like other useful theories, deliberative democracy contains many contested variations, articulations and definitions.²⁸⁶ For example, theorists differ as to whether consensus should be the purpose of deliberation or whether the purpose of deliberation is merely to clarify positions and understand each other's points.²⁸⁷ However, all theorists agree that deliberative democracy is primarily an account of political legitimacy.²⁸⁸ Many

²⁸² See Parkinson, above n 279, 23; Song, 'Democracy and Noncitizen Voting Rights', above n 2, 609.

²⁸³ See Joseph Raz, 'The Problem of Authority : Revisiting the Service Conception' (1979) 1003, 1026.

²⁸⁴ See Peter, above n 270 [2.1].

²⁸⁵ See Thomas Christiano, 'The Authority of Democracy' (2003) 11(2) *Journal of Political Philosophy* 1; Christiano, 'Democracy', above n 234 [2]; Peter, above n 270 [4].

²⁸⁶ Mansbridge et al, 'A Systemic Approach to Deliberative Democracy', above n 8.

²⁸⁷ See Tim Heyse, 'Consensus and Power in Deliberative Democracy' (2006) 49(3) *Inquiry* 265; Dryzek, above n 236, 170.

²⁸⁸ Parkinson, above n 279, 4; Nino, above n 2, 8.

theorists of deliberative democracy argue that legitimate decisions are those that ‘everyone can accept’ or at least ‘not reasonably reject’.²⁸⁹ But how should we determine if a certain decision is indeed a decision that cannot be reasonably rejected?

The answer to this question varies to some degree among different theorists. Although the exact form of deliberation is open to debate and refinement, two main deliberative democratic principles are adequate information and fairness. Fairness regards the process of deliberation, while adequate information is designed to improve the quality of the decisions. Deliberative democrats therefore argue that deliberative democracy has epistemic as well as procedural advantages.²⁹⁰

As Levy puts it, ‘Deliberative democratic bodies potentially accommodate key values that are otherwise in conflict: majoritarian democratic legitimacy, on the one hand, and well-informed or ‘rational’ decision-making, on the other’.²⁹¹

i. Epistemic approach

An epistemic advantage exists when people, who are provided with relevant and adequate information, genuinely deliberate and exchange reasons with each other. Participants in this process are learning and improving their knowledge and understanding of the subjects at hand, and therefore are more likely to arrive at a ‘good’ or ‘correct’ decision, that is, a decision that best answers the situation and satisfies the interests of the most people. ‘Correct’ decisions can answer questions of fact (e.g., what is the best way to achieve higher school grades?) but also questions of social morality (e.g., should we aim to achieve higher grades or focus on behaviour and values?).²⁹²

The epistemic advantage of the many over the few was expressed by Aristotle in ‘Politics’: ‘as a feast to which all the guests contribute is better than a banquet furnished by a single man, so a multitude is better judge of many things than any individual’.²⁹³ This idea is supported also by Condorcet’s theorem, which holds that if one member of

²⁸⁹ Mansbridge et al, ‘A Systemic Approach to Deliberative Democracy’, above n 8.

²⁹⁰ Hansen and Rostbøll, above n 8; Mansbridge et al, ‘A Systemic Approach to Deliberative Democracy’, above n 8; Gutmann and Thompson, above n 8.

²⁹¹ Levy, ‘Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change’, above n 253, 808.

²⁹² See Nino, above n 2, 107.

²⁹³ Aristotle, Politics, 15:137. Aristotle then adds that the many are also less corruptible than the few.

a panel is more likely to take a right decision, then the probability of taking the right decision increases the more members there are in the panel.²⁹⁴ The arguments of those theorists who emphasise the epistemic value of deliberative democracy echo the arguments of those who hold to an instrumental account of democracy. They contend that good deliberation will lead to 'right' decisions and therefore a deliberative process is more legitimate than other, less-deliberative processes.

Nino, for example, adopts an epistemic account of deliberative democracy because he regards the transformation of interests and preferences as a key element in a democracy. He claims that this makes deliberative democracy superior to other democratic theories (such as utilitarianism, elitism, pluralism and consensualism), which accept differences of interests and leave them as found.²⁹⁵ Fishkin is another example of a deliberative democrat who is interested in the epistemic advantages of deliberative democracy. Fishkin is not concerned with reaching a consensus at the end of the deliberation process. He holds that the primary goal of deliberative democracy is to include different perspectives, and to produce better-informed citizens. Fishkin states that 'consensus usually distorts judgments because of the social pressure that is involved'.²⁹⁶ He promotes deliberative polling, in which representative groups of citizens are presented with detailed information regarding the pros and cons of different choices, discuss the issues in small groups, and eventually fill survey questionnaires. Fishkin argues that this method applies a 'scientific approach' to debates about public issues, which can produce better informed citizens and improve the quality of the decisions.²⁹⁷ Haidt holds a similar position, albeit from an evolutionary psychology perspective. He claims that bringing together people who can argue civilly from different points of view will end up 'producing good reasoning as an emergent property of the social system'.²⁹⁸

²⁹⁴ See Nino, above n 2, 127.

²⁹⁵ Ibid 70.

²⁹⁶ James Fishkin, *Most People Are Rationally Ignorant* (13 August 2012) The European <<http://www.theeuropean-magazine.com/783-fishkin-james/784-deliberative-democracy>>.

²⁹⁷ See Ibid.

²⁹⁸ Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Penguin Books Limited, 2012) 105.

Pointing out that a certain decision is 'correct, 'right' or 'good' is not enough to impose it on others. Rationalisation and justification of a decision may be very important, but it is not a sufficient moral justification for requiring a person to follow a decision she does not agree with, at least if we respect people's autonomy to decide on their own what is best for them.²⁹⁹

ii. Procedural approach

Many deliberative democrats therefore emphasise the procedural elements of deliberative democracy, echoing the arguments of those who hold a non-instrumental account of democracy.³⁰⁰ Proceduralists acknowledge that citizens often disagree about fundamental values and courses of action, so their main concern is to find a fair and rational way to deal with conflicting views between fellow citizens. A procedural view holds that what confers legitimacy on decisions in a deliberative democracy is the kind of process that leads to the final decision. While in other democratic models legitimacy is based on the process of election, namely the fact that the people express their will through a fair system of 'one person, one vote', deliberative democracy puts the source of legitimacy in the process that precedes the act of voting.³⁰¹

The key principle in this approach is that decisions should be taken as part of a fair deliberative procedure; there should be no limitations on the content of these decisions.³⁰² More accurately, it is up to the people, or their representatives, to decide whether the content of a decision is 'right' or 'wrong'.³⁰³ A legitimate decision is one that has been taken as a result of a fair process of deliberation: a process that took place among equals who are respectful of each other, and an inclusive process in which all people affected by the decision had a chance to participate and express their opinions.³⁰⁴

²⁹⁹ See Raz, 'The Problem of Authority : Revisiting the Service Conception'.

³⁰⁰ See James Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy' (1998) 6(4) *Journal of Political Philosophy* 400, 402.

³⁰¹ See Hansen and Rostbøll, above n 8, 507.

³⁰² See Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds), *Deliberative democracy: Essays on reason and politics* (MIT Press, 1997) 72, 72–75.

³⁰³ See Gutmann and Thompson, above n 8, 25. Iris Young, for example, seems to hold such a view in Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

³⁰⁴ See Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy', above n 300, 400.

iii. *Substantive approach*

Some deliberative democrats stress the importance of observing certain substantive principles when engaging in a deliberative democratic process. These substantive principles relate to fundamental values that any decision must comply with in order to be considered legitimate, no matter how deliberative the process leading to this decision was. Such values may include, for example, equality and individual liberty.³⁰⁵

To illustrate and clarify this difference between ‘procedural’, ‘epistemic’ and ‘substantive’ accounts of deliberative democracy, one can evoke Pettit’s distinction between institutions that *honour* a certain value, giving it a *deontological* standing, from those that are meant to *promote* a value, applying a *consequentialist* approach. For example, *honouring* liberty and freedom of speech as a deontological constraint would sanction even extreme religious views, while *promoting* liberty would mean that we should care about the consequences of certain speech acts, and perhaps ban some extreme views that, if allowed, may result in less liberty overall.³⁰⁶ In this sense, procedural views can be seen as granting deliberation a deontological status, asking to ‘honour’ deliberation by adhering to deliberative principles under any circumstances. Such an approach considers a decision that was taken in a fair process as legitimate, regardless of its content. Substantive or epistemic views on the other hand have a consequentialist dimension. They are more concerned with ‘good results’ and promoting deliberation in the long run, so that they might favour relaxing a few process standards during the course of deliberation, or imposing other requirements that may seem not to be deliberative, if they think such requirements are necessary in order to safeguard other principles they deem essential. For example, a decision that was taken in an adequate deliberative process (and is therefore legitimate according to a procedural account) may still be deemed illegitimate by a substantivist if it encroaches

³⁰⁵ Obviously, people can have different opinions as to what principles of equality and freedom actually entail. Eventually, there needs to be a process by which a final decision can be taken, a process with which people will feel obliged to comply even though they may disagree with the decision. For more on this see Gutmann and Thompson, ‘Deliberative Democracy beyond Process’, above n 9.

³⁰⁶ Robert E Goodin, Philip Pettit and Thomas W Pogge, *A Companion to Contemporary Political Philosophy* (John Wiley & Sons, 2012) 29.

too much on individual freedom; and it can be also considered illegitimate by an epistemicist who thinks that this decision is manifestly 'wrong'.

Another way to describe the division between the procedural account and the epistemic and substantive accounts is to say that proceduralists treat deliberative democracy as a second-order theory. They concern themselves mainly with the procedure by which decisions are to be taken, and less with the content of the decisions. According to this view, deliberative democratic theory does not prescribe a comprehensive ideology or moral system, but aims to provide a way of dealing with conflicting claims of first-order theories such as utilitarianism, libertarianism and egalitarianism. The decision that is eventually taken following a deliberative process may still be in accordance with any of these first-order theories.³⁰⁷ On the other hand, an epistemic account of deliberative democracy requires it to produce better decisions than other forms of decision making, while a substantive account requires that the final decision will comply with basic principles of freedom and equality.

iv. Combined approaches

Ultimately, most theorists treat deliberative democracy as a convergence among epistemic requirements, according to which decisions should be 'right' or 'good'; substantive principles, such as gender equality; and procedural views that emphasise a fair and inclusive decision making procedure. Estlund, for example, introduces an account of 'epistemic proceduralism' that highlights the epistemic superiority of the democratic procedure.³⁰⁸ As Gutmann and Thompson note, '[t]he most compelling theories of deliberative democracy combine both substantive and procedural principles. They also both recognize that all democratic principles require substantive defence'.³⁰⁹

This approach, also called 'rational proceduralism', holds that the legitimacy of democratic decisions relies on both procedural values and on the quality of the

³⁰⁷ Gutmann and Thompson, above n 8, 13,132.

³⁰⁸ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2009). See also James Bohman, 'Epistemic Value and Deliberative Democracy' (2009) 18(2) *The Good Society* 28.

³⁰⁹ Gutmann and Thompson, above n 8, 26; Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and Difference: Contesting Boundaries of the Political* (Princeton University Press, 1996) 95.

outcomes that these deliberative decision making procedures generate.³¹⁰ Habermas for example claims that deliberative decision making processes are especially capable of reaching superior epistemic decisions and therefore contribute to the creation of legitimacy: '[d]eliberative politics acquires its legitimating force from the discursive structure of an opinion and will-formation that can fulfil its socially integrative function only because citizens expect its results to have a reasonable quality'.³¹¹

Chowcat presents a moral argument for including diverse opinions in deliberations. He explains that discussions that do not include minority viewpoints defeat the very reasons that drive us to adhere to democratic decisions in the first place: first, such discussions violate the moral obligation to consider the views of all those who are affected by the decision; second, the arguments that usually justify following a majority opinion are weakened when dissenting views are not adequately considered.³¹²

One can therefore say that, according to deliberative democratic theory, when certain views are not taken into account during the decision-making process the legitimacy of the decision is undermined. Deliberative democrats therefore suggest to promote legitimacy in two main ways: the first is to increase the number of people who participate in public deliberation; and the second is to improve the quality of deliberation among citizens (and legislators) so that they deliberate in a more rational way, with reasons that (almost) anyone can reasonably accept. It may seem at first blush that the first way is linked to a 'procedural' view; while the latter is affiliated with 'substantive' or 'epistemic' principles. However, a more careful look reveals that both approaches improve procedural as well as epistemic goals of democratic deliberation.

An ideal deliberative process will therefore provide legitimacy by promoting a mutually respectful process of decision making while providing relevant information and improving the quality of the decisions so that they are more likely to be 'correct'. It is also important for a deliberative process to be flexible enough to correct mistakes.³¹³

³¹⁰ Peter, above n 270 [4.3].

³¹¹ Ibid 304.

³¹² See Ian Chowcat, 'Moral Pluralism, Political Justification and Deliberative Democracy' (2000) 48(4) *Political Studies* 745, 755.

³¹³ Gutmann and Thompson, above n 8, 10.

The fact that decisions can be re-considered and changed if necessary also improves the chances of arriving at a just and right decision. However, in real-life politics we would rarely succeed in realising all the objectives of such an ideal deliberative process.

v. Summary

In this section I discussed different deliberative democratic accounts: the 'epistemic' account, the 'procedural' account and the 'substantive' account. I showed that these different views resemble the division between instrumentalist and non-instrumentalist accounts of democracy. Identifying the differences among these accounts is important in order to understand why one deliberative democrat will value some deliberative principles more than other principles. One should remember, however, that these different approaches are not mutually exclusive, and indeed many deliberative democrats support and combine elements from all of the three different accounts.

We can understand now why including diaspora people in deliberation processes in the kin-state may improve the legitimacy of the final decisions. From a procedural view, the process will be more legitimate if people who will be affected by a decision take part in the process of deliberation that precedes it. From an epistemic perspective, including a group that may add different considerations and viewpoints increases the chances that the 'right' decision will be taken. This is especially true in cases that have relevance to diaspora people and may affect their rights and obligations. These advantages will become even clearer in the next section, which will add an international law perspective to the discussion.

4. Legitimacy in international law

This part enriches the discussion of legitimacy in deliberative democratic theory with insights from theories of legitimacy in international law. This analysis is relevant and useful for two reasons: first, when we talk about diasporas' involvement in their kin-states' politics, a major theme in international law theory is invoked, namely, the involvement of international actors who operate outside the state but affect legal institutions in the state. Secondly, one of deliberative democratic theory's main principles is to conduct deliberation and reach decisions in an environment which is as

free from coercion as possible.³¹⁴ Similarly in international law, coercion is not usually a real threat. There is no central body that can consistently and effectively enforce decisions made by international law institutions.³¹⁵ Neither the United Nations ('UN') nor any other international governance body has concrete coercive powers to enforce its decisions. Unlike law enforcement bodies in independent states, there is no 'international police force' whose job is to ensure countries abide by international law. Therefore, the international legal system relies on constructed norms of compliance rather than coercion when requiring member states to follow, for example, UN resolutions. In such cases, enforcement relies heavily on voluntary compliance with accepted norms.³¹⁶ Norms of compliance are constructed through rhetoric and social practices that produce mutual expectation and understanding between the relevant actors.³¹⁷ Practices and repeated interactions among different actors help to produce norms that most actors choose to follow.³¹⁸ In this model, enforcement depends on social norms rather than brute force and the level of compliance depends on the level of legitimacy of the body that produces the decisions.

Deliberative democrats hope that something similar will happen in the local sphere when societies exercise ideal democratic deliberation processes. A key principle of deliberative democracy is that people will not surrender their positions due to the threat of sanctions, but rather because deliberation helped them to understand the merits of the other side, as well as the reasons behind choosing a certain course of action. As is

³¹⁴ See above n 241 regarding the definition of 'coercion'.

³¹⁵ The UN Security Council does have some enforcement powers (see Chapter VII of the Charter of the United Nations, available at <<http://www.un.org/en/sections/un-charter/chapter-vii/>>). However, these sanctions (especially those involving military interventions) are utilised only in rare cases, and are usually preceded by similar sanctions already put in place by state actors such as the United States or the European Union. See Michael Brzoska, 'International sanctions before and beyond UN sanctions' (2015) 91(6) *International Affairs* 1339.

³¹⁶ See Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press, USA, 1990) 3. This factor will be also relevant later on when I discuss constitutional courts, as constitutional courts also rely heavily on public trust and social norms when demanding the executive and legislative branches to comply with their decisions.

³¹⁷ See Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 34. Brunnée and Toope's account draws heavily on Fuller's account of legality. For criticism of their approach see Martti Koskenniemi, 'The Mystery of Legal Obligation' (2011) 3(2) *International Theory* 319.

³¹⁸ See Sandra Raponi, 'Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law' (2015) 8(1) *Washington University Jurisprudence Review* 35, 39–42.

the case in international law, deliberative democrats hope to create a sense of legitimacy through mutual interactions and understanding rather the threat of force. Following a deliberative democratic process, people will respect the decision and comply with it even though they might disagree with it; they will do so out of respect for a social norm that is created due to the existence of a fair process that precedes the decision.

The similarities between theories of deliberative democracy and international law becomes more apparent when one takes a closer look at how theorists of international law view legitimacy and the ways in which it can be constructed and sustained. When, for example, Franck discusses legitimacy in the context of international law and institutions, he defines legitimacy as ‘that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with “right process”’.³¹⁹ In the same context, Franck opines that a legal system will be judged:

[F]irst by the degree to which the rules satisfy the participants’ expectations of justifiable distribution of costs and benefits, and secondly to the extent to which the rules are made and applied in accordance with what the participants perceive as right process.³²⁰

This reflects the substantive and procedural elements of deliberative democracy discussed earlier. The first criterion Franck mentions is substantive; it refers to the inherent justice of the decision, to the fact that the decision is in some way ‘right’. The second condition Franck mentions is a procedural element that regards the correctness of the process. Franck sees legitimacy as expressing a preference for systemic order by which rules are to be made, interpreted, and applied fairly. Rules that are not produced by a uniform process nor enforced equally will not enjoy legitimacy.³²¹

Brunnée and Toope also present an account of legitimacy in international law which resembles deliberative democratic ideas. They agree that legitimacy depends greatly on the perceived fairness of the system as well as the subjects’ expectations with respect

³¹⁹ Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 26. For more about Franck’s conception of legitimacy see Franck, above n 316. For criticism of Franck’s account see Martti Koskenniemi, ‘Book Review: The Power of Legitimacy among Nations’ (1992) 86(1) *American Journal of International Law* 175.

³²⁰ Franck, *Fairness in International Law and Institutions*, above n 319, 7.

³²¹ *Ibid* 7–8.

to each other: '[f]idelity to law depends upon the reciprocal fulfilment of duties'.³²² One has little incentive to adhere to the law if she sees that others, who do not follow it, remain unpunished. Toope and Brunnée argue that 'the distinctiveness of law lies not in form or in enforcement but in the creation and effects of legal obligation'.³²³ By 'legal obligation' they mean the continuing interactions between the actors, and the reciprocal expectations that are created as a result of these interactions: 'law is created and maintained through interaction. It is interaction ... that is the core of "legal" legitimacy'.³²⁴ Again, this way of seeing the law as being shaped through public engagement fits well with deliberative democratic ideas. Deliberative democrats argue that actors' identities change through the process of deliberation and that deliberation shapes law: in the process of communicating and interacting with each other, social norms emerge in a way that helps to shape future interactions and public policies. Dryzek, for example, defines 'discursive legitimacy' as 'being achieved when a collective decision is consistent with the constellation of discourses present in the public sphere, in the degree to which this constellation is subject to the reflective control of competent actors'.³²⁵

Similarly, Toope and Brunnée use the term 'communities of practice' to refer to the different actors that emerge through the communal practice of legal norms in the context of international law. Such communities can include both state and non-state actors operating transnationally and affecting each other. Participation by a diversity of players in the creation of practices of legality is a major contributor to the conferral of legitimacy. They emphasise that interactions between players leads to behavioural change and observe that a legitimacy deficit results from limited participation in the process of norm building.³²⁶

Indeed, deliberative democrats have tried to envisage how deliberative forums can help to create new norms in international law. Goodin, for example, suggests convening a set of global 'citizens' juries', tasking them with setting new norms that hopefully will be

³²² Brunnée and Toope, above n 317, 38.

³²³ Ibid 7.

³²⁴ Ibid 54.

³²⁵ Dryzek, 'Legitimacy and Economy in Deliberative Democracy', above n 265, 660.

³²⁶ Brunnée and Toope, above n 317, 13, 54.

accepted and followed by international tribunals.³²⁷ Another suggestion is a ‘transnational deliberative forum’ that will create deliberation groups from a randomly selected sample of citizens from different countries impacted by a particular cross-border issue.³²⁸

This connects us back to the role of diaspora communities in creating legitimacy in their kin-state institutions. The previous chapter discussed in detail the different methods used by diaspora communities to become involved in and influence political and social affairs in their kin-states. At the end of that chapter, I pointed to the moral problem that arises when diaspora people intervene in their kin-state politics: diaspora people are able to affect laws and policies that they are not directly subject to, as they live in different countries under different jurisdictions. Seeing diaspora and kin-state activities in light of international law accounts mentioned above can alleviate these difficulties. The international law perspective helps to explain why diaspora involvement contributes to the legitimacy of laws in the kin-state, as well as why it is practically valuable. First, such diasporic engagement can be viewed as part of norm-building that contributes to the legitimacy of the final decision. This is true especially in cases where diaspora interests are affected in one way or another by the decision.³²⁹ If diaspora communities are affected by some decisions taken by the kin-state, it is often fair that they participate in the shaping of these decisions. When diasporas participate in political processes (or in legal proceedings that affect political processes, as we shall see later in the case study chapter), the final decision and the institutions in which such engagements take place (e.g., the court, the parliament) become more legitimate, not less. Second, accommodating diaspora interests often serves the interests of the kin-state. As discussed above, under international law states choose to comply with some decisions not because they are forced to do so but because of social norms and fear of possible countermeasures by other states (e.g., economic or cultural isolation).³³⁰ Similarly, when diaspora communities disagree with kin-state policies, they have no real

³²⁷ See Goodin, ‘How Can Deliberative Democracy Get a Grip?’, above n 8.

³²⁸ Song, ‘The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State’, above n 12, 65. See also John Dryzek, André Bächtiger and Karolina Milewicz, ‘Toward a Deliberative Global Citizens’ Assembly’ (2011) 2(1) *Global Policy* 33.

³²⁹ See above p 52.

³³⁰ See Raponi, above n 318, 40.

threat of sanctions against the kin-state. However, kin-states usually cooperate and accommodate diaspora concerns because they want to continue to use diaspora communities for their own benefit. The kin-state attends to the concerns of the diaspora in order to maintain the diaspora's economic, political and cultural support (or simply because members of the diaspora are seen as a legitimate part of the polity). As explained in the previous chapter, kin-states use and mobilise their diaspora communities in order to lobby host-state governments and gain political and economic benefits (e.g., Turkish, Jewish, Armenian, Arab and Kurdish advocacy groups active in the United States). It may be appropriate therefore for kin-states to consider and accept diasporic views in order to maintain their valuable support for the kin-state.

E. How deliberation should be conducted

Having covered the major themes of deliberative democracy, I now explore deliberative democratic theory in more detail. The different theoretical approaches to deliberative democracy presented lead to different opinions as to how a deliberative process should be conducted. For example: should all deliberation sessions be transparent and open to the general public or is it better sometimes to conduct deliberation behind closed doors? How should participants in a deliberative process justify their positions? Can any kind of argument be considered 'deliberative'? I discuss these differences and argue that elite models of deliberative democracy are more applicable to divided societies and societies with large diaspora populations. Insights from this part will be relevant to chapter V which discusses the deliberative qualities of courts and explains why courts are potentially suitable venues for democratic deliberation, especially in divided societies with large diaspora populations.

1. What counts as 'deliberative'?

As explained earlier, any concept of deliberative democracy is based on an ideal of political justification that relies on the free exchange of public reasons among equally placed citizens.³³¹ An ideal deliberation process involves the exchange of reasoned

³³¹ Cohen, 'Procedure and Substance in Deliberative Democracy', above n 309; Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92(3) *The journal of philosophy* 109; Gutmann and Thompson, above n 8.

arguments that everyone can reasonably accept. But what kinds of arguments and justifications can be regarded as valid 'public reasons' in a deliberative process? Certain types of rhetoric will be more conducive to democratic deliberation than others. One can find different views among deliberative democrats regarding the kinds of arguments that should be used during deliberation in order to achieve its objectives. These disagreements are reminiscent of the divisions discussed above between procedural and substantive views of deliberative democracy.³³²

Previously the dominant view was that public deliberation should rest only on the standards of 'reason'. That is, arguments need to be justified in a rational and logical way and be subject to 'the authority of the better argument'.³³³ This view relied heavily on Habermas' earlier work and his theory of 'communicative action'.³³⁴ This theory's underlying premise is that the capacity for rationality is inherent in humans' use of language. Communicative action is a cooperative action, undertaken by two or more individuals who interact with each other and 'mobilize their potential for rationality' through agreed interpretations of the situation and the circumstances.³³⁵ In this way, communicative action is based upon mutual deliberation and argumentation.

In recent times, this Habermasian model has lost some favour due to criticisms by scholars such as Steiner, who argues that 'the power of the better argument' does not really work in real life, as even in the most developed and mature democracies (let alone divided societies) political rivals rarely change their minds due to the exchange of reasoned arguments and admit that the other side has a valid point. Steiner suggests that this standard should be relaxed, and that one should be content if each side at least recognises that the other side also presents a reasonable argument.³³⁶

³³² See also Gutmann and Thompson, above n 8, 108,122.

³³³ See Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', above n 9, 67; Steiner, above n 240, 57,104,139.

³³⁴ Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, 1984).

³³⁵ See James Bohman and William Rehg, 'Jürgen Habermas', *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/fall2014/entries/habermas/>> [3.1]; Nino, above n 2, 110.

³³⁶ Steiner, above n 240, 150–1.

Reflections on these issues can be found among other theorists who have contributed to the formation of deliberative democratic theory. For example, Rawls' account of 'public reason' requires that citizens present their proposals and arguments in relation to the common good.³³⁷ Rawls offers a 'reciprocity' criterion, relying heavily on standards of 'reasonableness'. According to this criterion, exercise of political power, both on the institutional level and on the particular legal level, is proper only when the reasons offered for the political action may reasonably be accepted by other citizens as a justification for those actions.³³⁸ Some theorists think for example that religious arguments should not be allowed in public deliberation as they are not accessible to participants who do not share such views or lack 'religious feelings'.³³⁹ Others disagree: Habermas for example previously contended that religious arguments should be translated to secular political claims. However, he later changed his mind, admitting that this excludes religious people from arguing their position in a deliberative process.³⁴⁰

Similarly, Nino argues that only 'genuine' arguments (not necessarily 'valid' ones) should be allowed in democratic debates.³⁴¹ He enumerates eight conditions for 'genuine discussion'. For example, arguments should not be mere expressions of wants; should take into account the interests of others; should be practical; should be normatively general and apply to all people in similar circumstances.³⁴²

However, reference to shared beliefs and accepted norms does not necessarily preclude arguments that rely on self-interest. When large numbers of people are involved from different groups, conflicts among different interests become inevitable. Mansbridge et al. argue that differences related to self-interest are not only inevitable but should even be welcome in order to recognise and celebrate diversity:

Ideally, participants in deliberation are engaged, with mutual respect, as free and equal citizens in a search for fair terms of cooperation. These terms can include the recognition and pursuit of

³³⁷ James Bohman and William Rehg, *Deliberative Democracy: Essays on Reason and Politics* (The MIT Press, 1997) xvi.

³³⁸ John Rawls, 'The Idea of Public Reason', above n 17, 134.

³³⁹ See Gutmann and Thompson, above n 8, 25, 51.

³⁴⁰ See Steiner, above n 240, 104.

³⁴¹ Nino, above n 2, 121.

³⁴² *Ibid* 122.

self-interest, including material self-interest, and some forms of negotiation, constrained by the deliberative democratic ideals of mutual respect, equality, reciprocity, mutual justification, the search for fairness, and the absence of coercive power.³⁴³

One particular line of criticism views deliberative democracy as yet another form of constraint imposed by elites to maintain and promote their prerogatives. The requirements that arguments should be 'rational' and rely on 'acceptable reasons' is seen as under-inclusive, as it excludes other means of discourse and reasoning used by the under-privileged such as story-telling and personal narratives.³⁴⁴ For example, according to Habermas, democratic communication is incompatible with plain rhetoric.³⁴⁵ However, O'Neill argues that rhetoric can also be subjected to rational analysis and is sometimes necessary for persuading and reaching final decisions.³⁴⁶ Nino acknowledges that although the presence of emotional factors can interfere with democratic discussions, emotions also assist in the progress of a 'genuine process of argumentation'.³⁴⁷ These kinds of differences led Dryzek to write in 2000 that he prefers the term 'discursive democracy' over 'deliberative democracy'.³⁴⁸ For Dryzek, this was not just a question of terminology but a distinction between deliberation, which is calm, reasoned and can take place in the individual mind; and a more expansive discursive process, which involves inter-subjective interaction and can include 'unruly and contentious communication from the margins'.³⁴⁹ Dryzek contends that all forms of communication should be admitted into discursive democracy, including storytelling, testimony and greeting, provided that they are non-coercive and 'capable of connecting the particular to the general'.³⁵⁰ However, Dryzek also notes that some kinds of

³⁴³ Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', above n 9, 94; Gutmann and Thompson, above n 8, 113.

³⁴⁴ See, for example, Lynn M Sanders, 'Against Deliberation' (1997) 25(3) *Political theory* 347; Iris Marion Young, 'Justice, Inclusion and Deliberative Democracy' in Stephen Macedo (ed), *Deliberative politics: essays on democracy and disagreement* (Oxford University Press, 1999) 151, 151.

³⁴⁵ Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, above n 239, 318.

³⁴⁶ John O'Neill, 'Rhetoric, Science, and Philosophy' (1998) 28(2) *Philosophy of the Social Sciences* 205. For more on this point see Parkinson, above n 279, 26.

³⁴⁷ Nino, above n 2, 125.

³⁴⁸ Dryzek, above n 236, v.

³⁴⁹ *Ibid* vi.

³⁵⁰ *Ibid* 167.

communication, such as lies, threats and commands, are intrinsically anti-deliberative.³⁵¹

Gutmann and Thompson make two important points regarding these critiques. First, they note that the assumption that disadvantaged groups are less reasonable is misleading and prejudiced; second, they argue that passionate rhetoric can ultimately lead to rational deliberation.³⁵² Stories, for example, usually cannot be considered as rational arguments per se, but they can help to demonstrate the complexity of a situation. However, some empirical evidence suggests that although story telling is potentially beneficial for deliberation, it can sometimes inflame rather than quell tensions.³⁵³ According to O'Flynn:

The fact remains that public policy cannot be based on stories. What is more, narrative may itself be a source of unjust exclusion, since, in the hand of manipulative ethnic elites, it can be used as a means of enforcing internal conformity.³⁵⁴

Even if one accepts stories as a legitimate means of argument in the process of deliberation, there is no reason why these stories themselves should not be subject to criticism and repudiation.

2. Transparency

Transparency is also considered an important element in effective democratic deliberation. Most deliberative democrats (including many of those who favour elite-deliberation models) require that the deliberative process be transparent and public.³⁵⁵ When discussions are open to the public, people can more easily follow the different reasons and arguments presented by the participants. People can then reflect on these reasons and arrive at their own independent conclusions. This process of public and transparent deliberation is sometimes called 'external deliberation', as opposed to

³⁵¹ John Dryzek, 'Democratization as Deliberative Capacity Building' (2009) 42(11) *Comparative Political Studies* 1379, 1381.

³⁵² Gutmann and Thompson, above n 8, 50.

³⁵³ Steiner, above n 240, 72.

³⁵⁴ Ian O'Flynn, *Deliberative Democracy and Divided Societies* (Edinburgh University Press, 2006) 11.

³⁵⁵ See for example Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research', above n 248, 413.

'internal deliberation' done behind closed doors.³⁵⁶ Contrary to this view, some theorists contend that deliberation can (at least sometimes) benefit from secrecy, especially in particular stages.³⁵⁷ Some argue, for example, that high-quality deliberation, such as the kind that is required in constitutional deliberation, is only possible if deliberation is conducted in secrecy, away from the public eye.³⁵⁸ According to this view, secrecy is needed in order to reduce the effects of demagogues who appeal to popular but unfounded sentiments.

When deciding whether to conduct deliberation in public or in secrecy, there are additional factors to consider. On one hand, the quality of deliberation behind closed doors is sometimes lower because actors may take 'shortcuts' when justifying their decisions if the process is not exposed to public scrutiny.³⁵⁹ For example, a politician can simply state her inclination, without feeling an obligation to actually explain her position and justify it to her fellow politicians. When deliberations are open to the public, a politician may feel a greater obligation to explain why she has taken her position. On the other hand, evidence shows that behind closed doors people tend to act in a more 'civilised' way, that is, people are more respectful of other people's opinions and are less reluctant to change their old views.³⁶⁰ Secrecy allows the participants to be persuaded by counter-arguments and to change their minds without the fear of being heavily criticised for inconsistency and betrayal by their group members.³⁶¹ In public deliberative forums, even when an individual is actually persuaded by other speakers' arguments, it is hard for her to admit it, because she then risks losing her credibility in the eyes of the viewers. Changing minds is also more common in what Fung classifies as 'cold' deliberative settings, where participants are less partisan and the forum is

³⁵⁶ See Ferejohn, above n 248. While Ferejohn calls this 'internal deliberation', others use the term 'internal deliberation' to refer to 'inside the mind' deliberation, done by individuals on their own. See Goodin, 'Democratic Deliberation Within', above n 265.

³⁵⁷ Steiner quotes Chambers, Goodin and Dryzek as scholars who acknowledge that publicity can sometimes harm deliberation. See Steiner, above n 240, 125.

³⁵⁸ Mendes, above n 15, 95.

³⁵⁹ Steiner, above n 240, 195.

³⁶⁰ Ibid 130; Parkinson, above n 279.

³⁶¹ See Simone Chambers, 'Open versus Closed Constitutional Negotiation' in David Kahane (ed), *Deliberative democracy in practice* (UBC Press, 2010) 77; Ferejohn, above n 248; Timur Kuran, 'Insincere Deliberation and Democratic Failure' (1998) 12(4) *Critical Review* 529.

classified as unofficial or advisory.³⁶² Mackie argues that it is true that people tend to ‘stick to their guns’ and avoid admitting to changing their minds in deliberative forums, but there is a greater chance that they will admit to changing their views subsequently under different conditions and among different participants.³⁶³

As I discuss below, publicity and transparency are even more complicated in divided societies. In such cases, secrecy might assist representatives from opposing groups to negotiate an inter-group settlement without having to worry at every turn about their constituents blaming them for treason and trying to hinder the intended compromises. However, if the secret negotiations prove successful and the parties reach an agreement, leaders of both sides will often find it hard to convince the hard-liners within their group to accept a done deal, in which they (the hard-liners) were not involved.³⁶⁴

F. Popular versus elite models of deliberation

In this part I explore the differences between ‘popular’ and ‘elite’ models of democratic deliberation. The distinction between the two models is particularly important as it sets the background for the following chapters, in which I argue that constitutional courts can act as effective democratic deliberation bodies and promote deliberative democracy in divided societies with diasporic populations.

Deliberative democrats differ on the specific roles that should be given to ordinary citizens and governing elites in deliberation. There are two main approaches on this issue: the ‘popular’ model and the ‘elite’ model of democratic deliberation. The label ‘popular’ is not due to its popularity among scholars, but because it is concerned with involving as many individuals as possible in deliberation processes. Popular variants of deliberative democracy emphasise inclusiveness and hold that it is crucial to include

³⁶² Archon Fung, ‘Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences’ (2003) 11(3) *Journal of Political Philosophy* 338; See also John Dryzek, ‘Deliberative Democracy in Divided Societies Alternatives to Agonism and Analgesia’ (2005) 33(2) *Political theory* 218, 229.

³⁶³ Gerry Mackie, ‘Does Democratic Deliberation Change Minds?’ (2006) 5(3) *Politics, Philosophy & Economics* 279.

³⁶⁴ See Ian O’Flynn, ‘Divided Societies and Deliberative Democracy’ (2007) 37(4) *British Journal of Political Science* 731, 745. The prospects of deliberative democracy in divided societies are discussed in more detail below on p 90.

directly all those who are affected by a political decision in a deliberative process before the decision is taken. This principle is designed to countervail the financial and administrative powers concentrated in the hands of governmental and other elites.³⁶⁵ Supporters of popular models aim to combine participative methods with deliberative designs to allow as many ordinary people as possible to participate in deliberation, while improving the level of deliberation among the participating citizens. The more people are exposed to, and participate in, public debate, the more transparent the process becomes; there is less chance for elite manipulation; and the final decision is rendered more legitimate. From an epistemic perspective, supporters of the popular model refer to empirical evidence that confirms the ‘wisdom of crowds’ hypothesis, namely, that often a large group of ordinary people can make better judgments than a small group of more informed people.³⁶⁶

However, one cannot deny the unavoidable trade-offs between ordinary citizens’ participation and system effectiveness.³⁶⁷ Time and resources are not unlimited. Actions ought to be taken under limited time constraints, and it is often not possible to delay a decision until each person has enjoyed ample time to examine the facts, argue and convince. It would be unrealistic to expect that every single person affected by a decision will actively participate in prior deliberative processes. This is why many scholars argue that truly deliberative politics requires some form of representation.³⁶⁸

Elite variants of democratic deliberation therefore focus on improving the level of deliberation among groups such as legislators, government officials, parliamentary committees and the judiciary.³⁶⁹ In contrast to popular models, elite models of deliberative democracy see elites as both capable and responsible for transferring the often vague and unrefined demands of ordinary citizens into practicable policy and

³⁶⁵ See Habermas as quoted in Steiner, above n 240, 32.

³⁶⁶ See James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few* (Abacus, 2005). See also above p 68.

³⁶⁷ Robert A Dahl, *On Democracy* (Yale University Press, 2000) 110.

³⁶⁸ Nadia Urbinati, ‘Representation as Advocacy: A Study of Democratic Deliberation’ (2000) 28(6) *Political theory* 758, 761.

³⁶⁹ Urbinati draws on J.S. Mill to give an account of how legislators in a representational democracy function as ‘advocates’ who deliberate and exchange reasons passionately (see *Ibid.*).

law.³⁷⁰ I will elaborate more on elite models of democratic deliberation in chapter IV, where I argue that elite models are more suitable for divided societies with large diaspora populations.

G. The approach adopted in this thesis

The previous parts reviewed deliberative democracy's main ideas and principles and the different approaches within it. Before discussing more particularly how diaspora communities fit within a deliberative democratic framework, I will first clarify my position in relation to the different principles and approaches within the theory of deliberative democracy.

My approach to deliberative democracy is more traditional: I tend towards the classical 'deliberative' approach rather than the 'discursive' one. I therefore favour substantive and epistemic accounts of deliberative democracy over procedural ones. Deliberative democracy faces legitimacy problems if the decisions it produces violate substantive principles of freedom and equality. Deliberative democratic theory loses much of its appeal if it does not aim to produce epistemically superior results. It can succeed in doing so only if the process of deliberation consists of an exchange of reasoned and rational arguments.

The very nature of deliberative democracy is based on the assumption that reasoning has the capacity to change minds.³⁷¹ One of the main aims of deliberation is to induce citizens to reconsider their convictions by exposing them to other people's arguments and claims. We all have a moral obligation to reconsider our positions honestly when others challenge our views and beliefs. As Rousseau said, what characterises an individual who is a part of a civil state is that he needs to 'consult [h]is reason before listening to his inclinations'.³⁷² Chowcat also states that 'our orientation towards others must be one of openness to dialogue'.³⁷³ This is, I think, the central point

³⁷⁰ This approach is described in Levy and Orr, above n 8, 24.

³⁷¹ Gutmann and Thompson, above n 8, 20.

³⁷² Jean-Jacques Rousseau, *The Social Contract* (eBooks@Adelaide, 2014th ed, 1762) chapter 8.

³⁷³ Chowcat, above n 312, 751.

of deliberative democracy. Deliberative democratic theory is more convincing when it advocates deliberation among rational agents who recognise each other's equal status and are committed to a reciprocal standard of reason-giving. A permissive approach, which requires merely the free exchange of opinions and narratives without a commitment to seriously reconsidering one's position and changing one's mind if needed, is not a truly deliberative approach.³⁷⁴

It would be hard to achieve the aims of deliberative democratic theory if we expanded the scope of deliberation and treated a wide range of speech activities, such as story telling and narrative exchanges, as valid instances of democratic deliberation.³⁷⁵ A deliberative democratic process should end in a vote in order to be collectively binding.³⁷⁶ Clearly, an engaged and lively 'civil society' has important positive impacts on public policy.³⁷⁷ However, as desirable and beneficial as these activities may be, they are not part of a decision making mechanism. As such, they belong to a much broader concept of political engagements that include a diverse toolbox of political activism and social interactions.³⁷⁸

It should be stressed that advocating reason-based deliberation does not exclude minorities, women or the poor. True, if we establish that reason-based arguments should be the main way through which to conduct deliberation, then it naturally follows that this will undermine the ability of some individuals to participate. However I agree with Gutmann and Thompson's argument that assuming disadvantaged groups to be less reasonable is misleading and prejudiced.³⁷⁹ There are many women and minorities' representatives who can talk convincingly and present compelling rational arguments in support of their causes. In fact, progress in these causes has been achieved due to such representatives making good arguments that succeeded at changing people's views.

³⁷⁴ See Ibid 750.

³⁷⁵ For arguments of why story-telling and narratives are important for political communication see Young, above n 10, 73–74.

³⁷⁶ Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 45; Hansen and Rostbøll, above n 8, 508; Nino, above n 2, 118.

³⁷⁷ Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, above n 236, 100.

³⁷⁸ See Dennis Thompson, 'Deliberative Democratic Theory and Empirical Political Science' (2008) 11(1) *Annual Review of Political Science* 497.

³⁷⁹ Gutmann and Thompson, above n 8, 50.

If we want to reduce majoritarian biases and give equal respect to minority groups and to less popular opinions, the power of the good argument will serve us better. A more permissive approach or purely procedural approach will be insufficient to achieve such outcomes. Such approaches may simply empower the majority, or the wealthy who can influence public opinion through expensive media campaigns.

The mere fact that one group has a majority in a given population at a given time is a kind of unfair bargaining power. The most effective and long-term solution to such a problem can only come in the form of free exchange of opinions and reasons, through which the minority can win minds and hearts among the majority. The appreciation of good argumentation over majority voting is widespread among deliberative democrats. Mansbridge et al. opine that: '[t]he more an issue involves basic rights and fundamental justice, the less ought it to be decided by votes conceived simply as the exercise of power in a field of competing wills'.³⁸⁰ Similarly, O'Flynn notes that: '[p]ublic deliberation privileges reasoning over bargaining or the strength of the better argument over the sheer force of numbers'.³⁸¹ Hansen and Rostbøll state that: '[t]he point of deliberative democracy is to reform society to conditions that approximate the situation in which political decisions are the results of good arguments rather than bargaining power'.³⁸²

H. Deliberative democracy and diasporas

Having reviewed the main principles of deliberative democratic theory and explained my approach, I now focus on the relevance of deliberative democratic theory to divided societies and address specific challenges in applying deliberative democratic theory to societies with large diaspora populations. The prospects of deliberative democracy in divided societies have been discussed in the literature to a limited extent, but without express attention to diaspora populations. The involvement of diaspora communities in democratic deliberation in their kin-states is therefore an important but unexplored

³⁸⁰ Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', above n 9, 89.

³⁸¹ O'Flynn, *Deliberative Democracy and Divided Societies*, above n 354, 112.

³⁸² Hansen and Rostbøll, above n 8, 506.

area in deliberative democratic theory. This chapter addresses this gap and connects deliberative democracy with diaspora theory.

In many cases, a divided society has an influential external diasporic population. Conflicts between members of different ethnicities or religions often create large diaspora communities as people either are coerced to leave the conflict area or leave voluntarily in search of a better life. Diaspora communities also tend to be involved in their kin-state conflicts. It is therefore important to discuss the particularities of deliberative democracy in divided societies in order to understand the additional challenges created by the involvement of large and influential diaspora communities. I start by reviewing literature on deliberative democracy in divided societies. I then elaborate on the further challenges posed to such societies by large diasporic populations. After reviewing the difficulties raised by such societies for deliberative democratic theory, I argue in the next chapter that elite models of deliberative democracy are better suited than popular models to promote deliberative democracy in such societies.

1. Deliberative democracy in divided societies

Deliberative democracy theorists have been slow to address the challenges of deliberative democracy in divided societies.³⁸³ Those who have done so have not always been clear about the definition of a ‘divided society’ and how it differs from other polarised societies.³⁸⁴ When I speak about divided societies in this thesis, I do not refer merely to societies where the population features large and distinct ethnic or religious groups who sometimes compete with each other in the public sphere over the share of goods. I use the term ‘divided societies’ to refer to societies where such divisions sometimes manifest in violence, and where there are serious attempts by members of the different groups to see the groups disengage from each other.³⁸⁵ For example, according to such definition, Ireland and Israel would be divided societies, while Canada,

³⁸³ O’Flynn, *Deliberative Democracy and Divided Societies*, above n 354, 3.

³⁸⁴ Addis for example enlists four factors that define ‘severely fractured societies’ but these factors are too general as they fit too many countries in our modern world, see Adeno Addis, ‘Deliberative Democracy in Severely Fractured Societies’ (2009) 16(1) *Indiana Journal of Global Legal Studies* 59.

³⁸⁵ Admittedly, these factors are a matter of degree, as many societies experience violence from time to time, and there are separatists groups in many countries.

despite its division between the French speaking and the English-speaking parts, would not fall under this category. Adopting a broader definition would include too many societies, as almost all societies are divided in one way or another (e.g., Republican vs. Democrat, liberal vs. socialist, etc.).

This definition also highlights the importance and involvement of diaspora communities. Violent conflicts tend to mobilise diaspora populations to intervene in the affairs of the kin-state, where their respective group in the kin-state is threatened by inside or outside forces. For example, the conflict in Sri Lanka drove both Sinhalese and Tamils in the diaspora to take part in propaganda and fundraising in support of their respective groups in the kin-state.³⁸⁶

The obvious problem when dealing with democratic deliberation in divided societies is how to bring about genuine and effective deliberation among polarised and sometimes violently conflicting groups. Most scholars agree that deliberation is more difficult to achieve when the issue under discussion polarises the participants, or when participants themselves come to the table already polarised.³⁸⁷ As O'Leary puts it:

Those who embrace a politics of deliberative democracy as the prescription for conflict need reminding that deliberation takes place in languages, dialects, accents, and ethnically toned voices and that it is not possible to create 'ideal speech situations'.³⁸⁸

While even in stable democracies deliberative democracy needs further specification in order to make it a tangible option, in societies divided in terms of class, ethnicity, language and religion, the grounding efforts are even more daunting.³⁸⁹ Conducting deliberation under such conditions over contentious issues can in fact cause more division than mutual understanding and heightened distrust between the parties. Representatives of both groups may be fearful of 'losing' and will try to gain benefits at the expense of the

³⁸⁶ See Orjuela, above n 169. This involvement can be also used to promote peace initiatives (see above p 41).

³⁸⁷ Steiner, above n 240, 134.

³⁸⁸ Brendan O'Leary, 'Debating Consociational Politics: Normative and Explanatory Arguments' in Sidney John Roderick Noel (ed), *From Power Sharing to Democracy: Post-conflict Institutions in Ethnically Divided Societies* (McGill-Queen's Press - MQUP, 2005) 3, 10.

³⁸⁹ Juan E Ugarriza and Didier Caluwaerts, 'Deliberation in Contexts of Conflict: An Introduction' in *Democratic Deliberation in Deeply Divided Societies* (Palgrave Macmillan UK, 2014) 1, 1.

other group rather than looking for a compromise.³⁹⁰ Constitutional deliberations in post-conflict societies can sometimes inflame passions and spark violence (as happened, for example, in Iraq, Chad and the Solomon Islands).³⁹¹ Empirical evidence suggests that dialogue in divided societies can exacerbate existing conflicts, reinforce opinions or decisions made prior to the exchange of information, and have other negative consequences.³⁹² Moreover, divided societies are often societies where conflict erupts sporadically between conflicting groups. This creates another barrier to the achievement of effective deliberation: in times of crisis and conflict, each group may feel threatened and so it is easy to label those who wish to compromise with the other group as unpatriotic and illegitimate participants in public debate.³⁹³

Due to these problems, some scholars simply hold that deliberation is impossible in divided societies. Gilley for example opines that in deeply divided states racked by mutual animosities 'legitimacy is impossible'.³⁹⁴ Lijphart argues that consociational design is the only viable option in a society divided along ethnic lines.³⁹⁵ Dryzek notes that those who believe in Rawlsian schemes of reasonableness fail to sufficiently appreciate just how difficult it can be to make political decisions in deeply divided societies, especially when those decisions are attached to issues of identity and competition for a state's resources.³⁹⁶ As Dryzek notes, granting autonomy to each group in a divided society is one of the defining features of consociational democracy as it is conducive to stability in divided societies. The problem, however, is that it provides no opportunity for members of different groups to communicate with one another.³⁹⁷

³⁹⁰ See Steiner, above n 240, 43; Didier Caluwaerts and Juan E Ugarriza, 'Beating the Odds: Confrontational Deliberative Democracy' in Didier Caluwaerts and Juan E Ugarriza (eds), *Democratic Deliberation in Deeply Divided Societies: From Conflict to Common Ground* (Springer, 2016) 206, 213.

³⁹¹ Widner, above n 262, 1514.

³⁹² Ugarriza and Caluwaerts, above n 389, 2.

³⁹³ Dryzek, 'Democratization as Deliberative Capacity Building', above n 351, 1398.

³⁹⁴ Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (Columbia University Press, 2009). Quoted in Kane and Patapan, above n 271, 605.

³⁹⁵ Consociationalism is a form of democracy in which power sharing is regulated and divided between different ethnic, religious or linguistic groups. For more on this see Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press, 1977). See also below on p 108.

³⁹⁶ Dryzek, 'Deliberative Democracy in Divided Societies Alternatives to Agonism and Analgesia', above n 362, 226.

³⁹⁷ Dryzek, 'Democratization as Deliberative Capacity Building', above n 351, 1397.

Certain important conditions that are required in order for deliberative democracy to function effectively are often lacking in divided societies. Dryzek, for example, outlines favourable and unfavourable conditions for effective deliberation. Favourable conditions for deliberation include literacy and education; a shared language; and a preferential voting system that allows the expression of support for more than one party or candidate. Unfavourable conditions include religious fundamentalism; ideological conformity; and segmental autonomy for different groups.³⁹⁸ Looking closely at these factors, one can understand why the prospects of deliberative democracy in many divided societies are not promising, especially with regard to popular deliberation. Democratic deliberation cannot be conducted effectively where illiberal values are prevalent and literacy rates are low. First, illiberal values tend to exclude certain groups, for example religious minorities, women and LGBTI people, from fully participating in the democratic process. Second, it is very difficult for a citizen who is unable to read to expand her knowledge and become exposed to different viewpoints. Deliberation is not effective if one is not able to adequately learn about the subject matter. Unfortunately, Illiteracy is still prevalent in some areas of the world, especially among women in developing countries.³⁹⁹ The problem in some divided societies is that both institutional change and cultural change are needed. This is especially true in societies with no previous experience in conducting politics according to democratic principles of liberty, justice and equality.⁴⁰⁰ While institutional changes may be easier to construct, cultural changes require much more time and effort.⁴⁰¹ In such places, deliberation must begin with the inclusion and education of women and other groups that are subject to discrimination.⁴⁰² As Habermas notes: '[i]t is precisely the deliberatively filtered political communications that depend on lifeworld resources - on a liberal political culture and an enlightened political socialization'.⁴⁰³

³⁹⁸ Ibid 1394–97.

³⁹⁹ For a list of literacy rates among different countries see *CIA World Factbook* at <https://www.cia.gov/library/publications/the-world-factbook/fields/print_2103.html>

⁴⁰⁰ Caluwaerts and Ugarriza, above n 389, 211.

⁴⁰¹ For example, consociational models worked in Switzerland and the Netherlands, but failed in Iraq and Lebanon, despite a crafted institutional design. See Dahl, *On Democracy*, above n 367, 154.

⁴⁰² Addressing these issues is beyond the scope of this thesis, but it is important to acknowledge these issues when discussing deliberative democracy in such societies. See also Habermas, above n 239, 302.

⁴⁰³ Ibid.

2. Creating a deliberative environment

Some scholars, however, are more optimistic regarding the prospects of deliberation in divided societies. These scholars have described what deliberative democracy in divided society may look like and have identified some key principles and conditions for such a process to succeed.

O'Flynn, for example, emphasises principles of 'reciprocity and publicity' as necessary for deliberation in divided societies. The principle of reciprocity requires people to hold an opinion in full consciousness of the fact that it is just one among many opinions, and to aspire to justify their opinions accordingly.⁴⁰⁴ Reciprocity calls for a set of institutional mechanisms that make each position on the political spectrum take account of every other.⁴⁰⁵ In a divided society, each group needs to discuss what rights they should hold to and what interests they can share. Similarly, Dryzek states that: '[i]n a context that features myriad identities, religions, ethnicities, and nationalities, a speaker's rhetoric can try to appeal to the symbols valued by these groups to induce reflection on their part'.⁴⁰⁶ By the same token, when public deliberations are open and transparent, deliberating representatives need to show that they take seriously not just the interests of their own ethnic group, but also the interests of the society as a whole. A group cannot just turn to its own interests in order to justify its rights, but it must appeal to common principles that also apply to other groups. To insist that people should provide principled reasons for their proposals is not to ensure that some positions will triumph over others, but to give expression to individuals' standing as political equals.⁴⁰⁷ This shift is fundamental to the formation of a common civic identity that is able to bridge ethnic divisions.⁴⁰⁸ Representatives of each group are required to present their reasons in a transparent manner so that ordinary citizens are able to judge whether they would have arrived at the same decisions by a similar process of reasoning; 'publicity so

⁴⁰⁴ Rawls, *Political Liberalism*, above n 15, 60.

⁴⁰⁵ O'Flynn, 'Divided Societies and Deliberative Democracy', above n 364, 742.

⁴⁰⁶ Dryzek, 'Democratization as Deliberative Capacity Building', above n 351, 1381.

⁴⁰⁷ David Miller, *Citizenship and National Identity* (Wiley, 2000).

⁴⁰⁸ O'Flynn, *Deliberative Democracy and Divided Societies*, above n 354, 57–8.

conceived is crucially important to the development of trust in a deeply divided society'.⁴⁰⁹

O'Flynn also notes that in cases where there is a general acceptance of the need to bring a violent conflict to an end, principled arguments become highly important and 'mutual acceptance of reasonableness' is a central feature of any successful and enduring democratic transition:

To be sure, most, if not all, peace agreements begin life as pragmatic bargains. However, if those bargains are to provide a platform for sustainable peace, they must reflect something more than mere mutual advantage. In particular, they must also reflect a commitment to basic principles. This is not simply because bargains of this sort are prone to instability as balances of power shift. It is also because peace agreements are binding on citizens in general and hence, if they are to be considered democratically legitimate, must be justified on terms that everyone can broadly accept.⁴¹⁰

O'Flynn highlights the 1998 Belfast Agreement as an example of a pragmatic bargain: 'Irish nationalists endorsed it because it held out the promise of achieving a united Ireland, whereas British unionists endorsed it because it held out the best opportunity of reconciling nationalists to the union'.⁴¹¹ The important element that gave the Agreement its legitimacy in the eyes of both ordinary citizens and the international community, O'Flynn argues, is the commitment to principles of self-determination, democratic equality, tolerance and mutual respect.

O'Flynn outlines the factors necessary in order for conflicting groups to deliberate together, but he does not elaborate on how precisely to achieve this. While O'Flynn's insights are valuable, it is not clear if and how such constructive conditions can be replicated. First of all, it took several decades to reach a peace agreement in Northern Ireland. Second, the United Kingdom has an established democratic tradition, something that is lacking in many conflict zones. Another distinguishing factor is that in the Northern Irish case, the conflicting sides spoke the same language and shared a similar culture, while in other divided societies, conflicting groups often lack these similarities.

⁴⁰⁹ O'Flynn, 'Divided Societies and Deliberative Democracy', above n 364, 745.

⁴¹⁰ *Ibid.*, 741.

⁴¹¹ *Ibid.*

Another approach to democratic deliberation in divided societies is offered by Kanra. He suggests that in divided societies, instead of treating deliberation mainly as a decision making procedure (as most deliberative democrats do), deliberative democracy should be conceived more broadly, as a tool for 'social learning'. That is, deliberative democracy should be seen as a process in which an individual's autonomy is shaped through continuous mutual interactions. Deliberation so conceived creates a learning process between its participants, so that different groups learn from and about each other when deliberating together on common public issues.⁴¹² When divided groups are not pressed to reach agreement, they feel more comfortable listening to each other, thus developing mutual understanding which will eventually lead to agreement. Kanra bases his account of deliberative democracy on Habermas' communicative action theory,⁴¹³ and on the latter's emphasis on the process of learning through deliberation. Kanra then combines this with hermeneutic theory⁴¹⁴ to offer a 'binary deliberation model' which separates the social learning phase from the decision making phase of deliberation. This distinction, he claims, is essential for deliberation in societies divided along ethnic, religious and cultural lines. Kanra argues that in divided societies it is most important to develop a 'deliberative environment oriented to learning in which the primary role of dialogue is hermeneutic understanding'.⁴¹⁵ Kanra believes that a failure to distinguish between the social learning and the decision making aspects of deliberation does not assist divided societies, as different ethnic and religious groups cannot reach agreement under a 'Rawlsian framework' of deliberative democracy. According to Kanra, the Rawlsian justification for a deliberative framework:

overlooks the social learning aspect of deliberation ... undermines the actual potential of informal deliberative practices oriented to understanding and social learning more than decision-making ... is deprived of the benefits of a more reflexive and discursive deliberative practice, which continuously reconstructs itself through an open-ended, continuing communication process.⁴¹⁶

⁴¹² Bora Kanra, *Islam, Democracy and Dialogue in Turkey: Deliberating in Divided Societies* (Routledge, 2016).

⁴¹³ See Ibid 17.

⁴¹⁴ Gadamer's theory to be precise, see Ibid 21–6.

⁴¹⁵ Ibid 26.

⁴¹⁶ Ibid 14.

Kanra believes that 'Rawlsian deliberation' might work under circumstances where a practical solution is sought, but not in cases where foundational doctrinal views are disputed.⁴¹⁷

A similar approach is offered by Addis, who argues that questions of identity, not resources or power, are keeping groups in divided societies separated. Addis therefore offers deliberative democracy as a solution because: 'what has been imagined through stories and discourses can partly be reimagined through discourse as well'.⁴¹⁸ Addis views deliberation as a process 'through which the identities of the participants, not just the policies and institutions of the polity, are constructed and transformed'.⁴¹⁹

One problem with the approaches offered by Addis and Kanra is that their accounts of deliberative democracy significantly downplay deliberative democracy's aim to provide a method that can be used to arrive at legitimate and binding political decisions. Adopting Addis and Kanra's positions makes deliberative democracy seem more like a form of social engagement rather than a political tool that can help governments in real law-making. As mentioned, some major theorists of deliberative democracy hold that only binding decision making processes are part of deliberative democratic theory.⁴²⁰

In addition to theories and conceptions, empirical findings are also crucially important in discussing the prospects of deliberative democracy in divided societies. Few empirical studies have examined deliberative democratic initiatives in divided societies. In this regard, Steiner's book provides important empirical findings from actual deliberative forums conducted in several countries.⁴²¹ Some of these public forums took place among divided societies in Colombia and Bosnia-Herzegovina, and the results were quite positive, with people showing a willingness to listen to the other side and to arrive at practical solutions to common problems. However, it is difficult to apply findings from these experiments to real, large-scale deliberative forums. In Israel, evaluations of deliberative processes between Jews and Arabs have been mixed. While such

⁴¹⁷ Ibid 15.

⁴¹⁸ Addis, 'Deliberative Democracy in Severely Fractured Societies', above n 387, 69.

⁴¹⁹ Ibid 82.

⁴²⁰ Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 45; Hansen and Rostbøll, above n 8, 508; Nino, above n 2, 118.

⁴²¹ Steiner, above n 240.

interactions may ease tensions in daily interactions, they fail to advance and have real impact on policies.⁴²² The main problem with many of the studies conducted on deliberative democratic initiatives in divided societies is that participants in these 'mini-public' forums were not truly representative of their respective group, but rather volunteers. It is plausible that individuals who volunteer to take part in such experiments tend to be more moderate than the average person.⁴²³

Deliberative democratic theory therefore faces considerable challenges in divided societies. As Tierney summarises it:

Even deliberative democrats with a republican commitment to the feasibility of popular participation within a diverse community, such as Dryzek, recognize that deep-seated antagonisms within divided societies do pose a considerable epistemic challenge to republican deliberation. And indeed it is the case that the very possibility of cross-community deliberation in divided societies is a surprisingly underexplored area.⁴²⁴

The more divided the society in the kin-state is, the more likely it will attract the involvement of its diaspora communities. I will therefore explore the special challenges to democratic theories raised when diaspora populations are involved in divided societies.

3. From divided societies to diaspora communities

Divided societies often go hand in hand with large diasporic populations. Places that have experienced conflict between different ethnicities or religions often create large diaspora communities - people tend to leave the conflict area either forcefully or in search of a better life. This was the case for example with the Bosnian diaspora.⁴²⁵ Also, so long as the conflict that forced them out of their kin-state is prominent in the diaspora's collective memory, people in the diaspora will feel emotionally connected to the kin-state and try to effect changes to policies there.

⁴²² Aviad Rubin, 'Language Policy and Inter-Group Deliberation in Israel' in *Democratic Deliberation in Deeply Divided Societies* (Palgrave Macmillan UK, 2014) 151, 155.

⁴²³ Steiner, above n 240, 20.

⁴²⁴ Tierney, above n 8, 244.

⁴²⁵ As noted above however, such diaspora communities differ from diaspora communities that were created predominantly by economic migration, such as the Indian and the Chinese diaspora.

Generally, deliberative democratic literature discusses deliberation by and among citizens of a defined polity in a defined territory. As discussed above, it is questionable whether deliberative democracy can be applied to divided societies where deep ethnic and religious conflicts prevent the emergence of common civic identity necessary to conduct productive deliberation. This challenge is further complicated when considering divided societies with large diasporic populations. What if the society in question is not only divided in its territory, but the divisions extend beyond the country's borders, through different diaspora communities? It is also harder to construct a common civic identity when significant parts of the population live overseas.

Diaspora populations complicate the already complex problem of defining the relevant polity. The question of how to decide who constitutes the demos (and what authority should make this decision) is a longstanding problem in democratic theory, sometimes referred to as the 'boundary problem'.⁴²⁶ Few nations are ethnically or religiously homogeneous. Defining the relevant polity in a heterogeneous society raises controversial questions. Before initiating an election campaign or a referendum, one first must settle the fundamental question of defining the relevant polity in order to determine who will be entitled to vote in the process:⁴²⁷ As Tierney notes:

By even the most optimistic civic republican analysis, a constitutional referendum faces considerable, and in some cases perhaps insurmountable, challenges, in a divided society, since a constitutional referendum implies a pre-existing demos, the absence of which is precisely the dilemma of the divided society.⁴²⁸

These questions have immediate and practical implications for the participation of diaspora populations originating from conflict zones in elections or referendums in their kin-states. For example, if a kin-state plans to hold a constitutional referendum, it must decide whether diaspora people form a part of the relevant polity that should be consulted and involved in deliberations preceding such a referendum. In the case of

⁴²⁶ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 39; Robert A Dahl, *After the Revolution? Authority in a Good Society*. (Yale University Press, 1990) 46.

⁴²⁷ Tierney, above n 8, 58. See also Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting', above n 4, 2412.

⁴²⁸ Tierney, above n 8, 252.

countries such as Israel, Armenia and Ireland, the number of people who live in the diaspora is larger than the number of people who live in the kin-state. This means that questions of how to define the relevant demos and the inclusion of diaspora communities become even more important.

Deliberative democracy is based on citizens deliberating with each other on an equal basis and under fair terms. If we endorse such principles with a view to establishing a common civic identity that will transcend ethnic lines, then giving voice to 'outsiders' who are not involved in everyday life in the kin-state, and do not have to face the consequences of their actions, seems counterproductive.⁴²⁹ How can diaspora and kin-state people provide each other with reasons that 'everyone can reasonably accept'?

In the cases of the Jewish and the Armenian diasporas, for example, diaspora communities existed for centuries before the modern state was established, and so some diaspora communities exert substantial pressure and influence over politics in their kin-states.⁴³⁰ These states may want to leave some issues to be decided only by the people living within their borders, but it is unlikely that they can avoid the involvement of their diaspora communities. Diaspora communities should be engaged and involved, as they constitute a significant part of the people (as both diaspora communities and most people in the kin-state see it). As discussed above, diaspora communities may also be affected by certain decisions of the kin-state.⁴³¹ However, it is not clear how exactly diaspora people who are not citizens of the kin-state can be involved in democratic processes in the kin-state.

As Addis notes:

[D]espite the widespread recognition of the important role diasporas play in conflict perpetuation as well as conflict resolution in their homelands, there have been no serious attempts intellectually or institutionally to focus on how diasporas could be included in the process of constitutional settlement. It is an essential part of the constitutional settlement of severely fractured societies

⁴²⁹ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 44.

⁴³⁰ See above p 36.

⁴³¹ See above p 51.

that there are institutional mechanisms of including diasporas in the process.⁴³²

Even if cross-border deliberations can be designed and facilitated, questions arise as to whether they will be effective. Some argue that only when deliberation is restricted to a particular territory does it develop into mature and fruitful deliberation, as only people who live together and face common problems on an everyday basis can find common ground in addressing practical issues. Others argue, however, that territorially bounded deliberation is less important in today's age of communication and social media.⁴³³

One thing that can bring together people from the diaspora and the kin-state to deliberate together is a deep sense of solidarity. Some level of a sense of solidarity among citizens is necessary for a deliberative democracy to function.⁴³⁴ It is a sense of solidarity between people who hold different views that can convince them to come together, reason with each other, understand the other side's perspective and possibly change their minds. Solidarity may play a role in positioning diaspora people on an 'equal basis' with people who live in the territory, despite not being subject to the same rules.⁴³⁵

Some countries have already implemented methods to involve their diaspora communities in constitutional deliberations. For example, Mexico held an election among its diaspora population in order to assemble an advisory council of 115 people that would give advice to the Mexican government on a wide range of issues.⁴³⁶

In Israel, the Jewish People Policy Institute was founded in 2002 as an independent NGO that aims to ensure the thriving of the Jewish People by engaging in professional strategic thinking and planning on various issues concerning Israel and the Jewish

⁴³² Addis, 'Deliberative Democracy in Severely Fractured Societies', above n 387, 79.

⁴³³ Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1011.

⁴³⁴ Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 47.

⁴³⁵ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12.

⁴³⁶ Ibid.

diaspora.⁴³⁷ However, this body is merely a think tank that provides advice and recommendations. Surveys show that Israeli attitudes towards the involvement of diaspora Jews in Israeli politics are mixed. A 2012 poll showed that Israelis are in favour of founding an institution that will better represent diaspora issues in Israel: 56% of respondents were in support of creating a 'Jewish Parliament' that would represent diaspora Jews. Eighteen percent would give the body the right to propose legislation to the Knesset (the Israeli Parliament), 25% would give it mandatory consultative status, and 40% would give this body only voluntary consultative status.⁴³⁸ However, more oppose formal representation in the Knesset, with 63% opposing diaspora Jews electing 'a few' Knesset Members to represent their interest and 49% opposed to establishing a mechanism that would require the Knesset to debate issues relevant to diaspora Jews. Interestingly, Israelis also strongly oppose enabling Israeli citizens living outside Israel to vote in Israeli elections.⁴³⁹

4. Summary

In this chapter I have discussed the challenges facing deliberative democracy in divided societies, and in particular divided societies with large and influential diaspora populations. Despite some small-scale efforts,⁴⁴⁰ it is still largely the case that deliberation in divided societies is difficult and has not been established as a realistic and effective tool to overcome deep religious and ethnic divisions. In an attempt to address these difficulties faced by deliberative democratic theory, some deliberative democrats take a broader view of deliberative democracy and describe it as a constructive mechanism that can assist with facilitating social engagements in divided societies. However, such approaches neglect an important function of deliberative democracy – the ability to produce binding decisions.⁴⁴¹

⁴³⁷ See the Jewish People Policy Institute website at <http://jppi.org.il/links_for_header/alias-7/About_JPPI/>.

⁴³⁸ *B'nai B'rith World Center Seventh Annual Survey on Contemporary Israeli Attitudes Toward Diaspora Jewry* (B'nai B'rith World Centre, June 2012) <<http://www.bnaibrith.org/uploads/7/8/5/9/7859990/diasporasurvey2012.pdf>>.

⁴³⁹ *Ibid.*

⁴⁴⁰ For example Robert C Luskin et al, 'Deliberating across Deep Divides' (2014) 62(1) *Political Studies* 116.

⁴⁴¹ See Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State', above n 12, 45; Hansen and Rostbøll, above n 8, 508; Nino, above n 2, 118.

It is no surprise then that the few discussions about deliberative democracy in deeply divided societies have focused on enhancing deliberation among political elites.⁴⁴² As Maddison notes: ‘for many divided societies, deliberation remains out of reach in all but the most elite and structured contexts’.⁴⁴³ In the next chapter I suggest that in cases where popular democratic deliberation is neither feasible nor desirable, elite democratic deliberation models play a more constructive role. I explain in detail how constitutional courts in particular can function as effective elite deliberation bodies that can embody deliberative democratic ideals and promote deliberative democracy in the society as a whole. More specifically, I explain how constitutional courts can serve deliberative democratic ideals by successfully involving diaspora representatives in binding constitutional deliberations.

⁴⁴² Luskin et al, above n 440, 1.

⁴⁴³ Sarah Maddison, ‘When Deliberation Remains Out of Reach: The Role of Agonistic Engagement in Divided Societies’ in *Democratic Deliberation in Deeply Divided Societies* (Palgrave Macmillan UK, 2014) 189, 189.

IV. Elites, democracy and deliberation

In previous chapters I examined different approaches taken by deliberative democracy scholars. As discussed, many scholars believe that deliberation should be inclusive and involve as many citizens and diverse opinions as possible. I also explained why popular deliberation among ordinary citizens is sometimes unrealistic and even undesirable, especially in divided societies.⁴⁴⁴ This, I concluded, should lead us in some cases to consider and encourage elite deliberation by public representatives rather than by the masses. The following chapters constitute an original contribution to the theory of deliberative democracy. In this chapter I elaborate on elite models of deliberative democracy and explain how in certain circumstances it is elites who can initiate and engage in effective democratic deliberation, which ultimately promotes deliberation among the general public. The next chapters explain how constitutional courts in particular are able to fulfil this function, by considering the interests of diaspora people and involving diaspora representatives in their deliberations. I first discuss the important role played by elites in promoting democracy in general. I then move on to discuss specifically how elites may contribute to the promotion of deliberative democracy, especially in divided societies.

A. Elites and democracy

In some longstanding, stable democratic societies, effective popular deliberation may be possible. However, as explained in the previous chapter, there are good reasons to believe that popular deliberation may be impractical in cases of divided societies. Countries that are divided along ethnic or religious lines, and especially those with diaspora populations abroad, often suffer from other circumstances that are unfavourable to deliberation, such as violence, political instability and religious tensions.

⁴⁴⁴ Luskin et al, above n 440, 1.

The challenges posed to accounts of popular deliberation in divided societies have led some scholars to stress the importance of elite modes of deliberation by public representatives.⁴⁴⁵

The challenges deliberative democracy faces in divided societies derive from a more general problem: the problem of installing a fully-fledged democratic system in societies that are still recovering from years of conflict or despotism. In addressing this problem, one has to consider the crucial role of elites in promoting democracy in divided societies. I will therefore start this chapter by pointing out the positive role that can be played by local elites in establishing and maintaining democracy in divided societies. Understanding the role of elites in promoting *democracy* will also help to explain their role in promoting a *deliberative democracy*.

An elite (French for ‘the chosen’) is a potent minority, whose power exceeds its relative size.⁴⁴⁶ In ancient times these elites included, for example, kings and aristocrats. In modern democracies, politicians, the judiciary, academics, media and business moguls are all examples of elite groups who exercise power and influence over the lives of ordinary people.

From Ancient Greece through Medieval times and until today, scholars have regarded ruling elites as ‘good guardians’: that is, privileged agents who are more capable of attending to the people’s interests than the people themselves.⁴⁴⁷ The scepticism about ordinary people’s ability to participate in the deliberative processes echoes the traditional view of an ‘elitist democracy’ that was forcefully articulated by Joseph Schumpeter during the 1950s.⁴⁴⁸ Schumpeter viewed democracy as a ‘competitive struggle for the people’s vote’.⁴⁴⁹ According to his view, in a democracy elite groups compete for people’s votes, with the winning elite being granted a mandate to rule for a limited period of time. If the public is happy with the current ruling elite, it re-elects that elite. If the public is not satisfied, it elects a different elite. The public’s influence is

⁴⁴⁵ See Ibid 116.

⁴⁴⁶ See J.S. Maloy, ‘Elite Theory’, *Encyclopedia of political theory* (SAGE publications, 2010), Mark Bevir (ed), 414.

⁴⁴⁷ Ibid.

⁴⁴⁸ See Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Harper, 3d ed., 1950) chapter XXII.

⁴⁴⁹ Ibid 269.

thus limited to choosing the ruling elite by voting for its representatives every few years. This is not merely a descriptive account of democracy, but also a normative one: this account holds that governance and law making duties should be left to the elites because ordinary people are not qualified to carry them out properly.⁴⁵⁰

Though the Schumpeterian view is less popular today, many scholars still highlight the important role played by elites in facilitating a transition to democracy in undemocratic countries as well as sustaining democracy in democratic countries. Higley, for example, argues that long-lasting democratic regimes usually develop as a result of dominant elite classes who initiate and support them. Higley laments the failure of Western political thought to recognise the elite basis of any stable and liberal democratic political system:

Western political thought has generally failed to recognize the elite basis of democracy. Instead, it has naïvely urged democratic suffrage, free and fair elections, respect for personal liberties, and democratic constitutions on all countries of the world, most of which have deeply disunited elites that are engaged in dog-eat-dog political struggles. Much too blithely, in other words, Western thought has assumed that simply by adopting such measures countries will move from unstable and illiberal regimes to stable and liberal democracies. In particular, assiduous ‘democracy promotion’ efforts have tended to persuade policymakers in the United States and other Western countries that instituting competitive elections where they do not now occur is a relatively sure route to democracy.⁴⁵¹

Many examples from the last few decades support Higley’s point. The fall of communism allowed for free elections to be held in many former USSR countries, but holding free and democratic elections did not lead countries like Russia, Georgia and Ukraine to develop liberal democratic societies similar to Western democracies. Similarly, hopes that the Arab Spring would result in the establishment of democracies in the Middle East proved premature. For example, the first free parliamentary and presidential elections held in Egypt in 2011 and 2012 eventually led the country to turn back to dictatorial military rule. Similarly, the first free and democratic elections held in Gaza in 2006 were

⁴⁵⁰ See Heinrich Best and John Higley (eds), *Democratic Elitism New Theoretical and Comparative Perspectives* (Brill, 2010) 3; Christiano, ‘Democracy’, above n 234 [3.1.1]; Nino, above n 2, 80.

⁴⁵¹ John Higley, ‘Democratic Elitism and Western Political Thought’ in Heinrich Best and John Higley (eds), *Democratic Elitism: New Theoretical and Comparative Perspectives* (Brill Academic Publishers, 2010) 220.

also the last democratic elections to be held in Gaza to date, after the Hamas party won the election and took power. There are also more positive experiences, such as Tunisia and former communist countries such as Poland and Hungary, which managed to establish largely democratic societies soon after overthrowing former undemocratic regimes.⁴⁵² But these examples only demonstrate that merely conducting a free and democratic election process is not enough to transform a society into a democratic one. Other factors must be responsible for the fact that some societies transform more smoothly into democratic societies than others. In particular, the role of local elites in such societies should not be underestimated.

This is especially relevant in cases of divided societies or societies with large diaspora populations. Steen and Kuklys argue that in so-called 'ethnic democracies', where democracy legitimates the domination of indigenous majorities over ethnically distinct minorities, democratic elitism facilitates the co-option of minority leaders better than other, more participatory forms of democracy.⁴⁵³ Steen and Kuklys provide examples from Estonia and Latvia, where, similar to other newly independent countries in the post-Soviet era, the re-creation of a national identity has led majority leaders to portray ethnic minorities as disloyal and as endangering political stability. Both countries aimed in their early years of independence to segregate and repatriate Russian speaking minorities. Estonian and Latvian nationalists argued that after decades of what amounted in their eyes to 'cultural genocide' under Soviet rule, they had a right to protect their cultural heritages as Estonians and Latvians, respectively, from Russian influence. When these attempts to create a more homogeneous society proved unsuccessful, both countries attempted to reinforce a purer form of national identity by adopting restrictive citizenship laws. However, both countries fell under pressure from international organisations and eventually, the desire to join the European Union and

⁴⁵² Note however that the current regimes in these countries seem to adopt a much more conservative interpretation of democratic liberties than Western democracies.

⁴⁵³ Anton Steen and Mindaugas Kuklys, 'Democracy by Elite Co-Optation: Democratic Elitism in Multi-Ethnic States' in Heinrich Best and John Higley (eds), *Democratic Elitism: New Theoretical and Comparative Perspectives* (Brill Academic Publishers, 2010) 197.

NATO led political elites in those countries to pursue less restrictive boundaries of citizenship, despite popular nationalistic views.⁴⁵⁴

Based on empirical data, including interviews with Estonian and Latvian politicians and public servants, Steen and Kuklys suggest that:

Instead of brusquely excluding minorities, thus raising human rights issues and international opprobrium, and instead of granting minorities full citizenship, thus aggravating majority fears, a middle or 'third way' is open to elites. This consists of socializing and co-opting leaders of minority communities into power positions, in effect opening the practices and processes of democratic elitism to selected minority leaders.⁴⁵⁵

Estonia and Latvia therefore provide an example of the constructive role elites can play in the inclusion of minorities in a divided society.

Landau is another scholar who discounts the role of popular participation in democratisation processes. He argues that in some cases, popular participation in constitution making may hinder rather than help the constitutional process.⁴⁵⁶ Landau discusses examples of constitution making in Bolivia and Venezuela, where '[h]igh levels of civil society participation did not prevent the constitution from being used to impose a competitive, authoritarian regime'.⁴⁵⁷

Another theory which recognises the vital role of elites in establishing democracy in divided societies is Lijphart's 'consociationalism'. This is a model of democracy that is designed to work even in societies that are deeply divided according to ethnic, religious, or linguistic lines. Lijphart's model of 'consociational democracy' is based on the cooperation of elites from different groups through consociational structures (that is, power sharing structures). In such regimes, each group enjoys wide-ranging autonomy at the local level while state level institutions include representatives from different groups who share the power between them.⁴⁵⁸ These mechanisms are supposed to

⁴⁵⁴ Ibid 197.

⁴⁵⁵ Ibid 198.

⁴⁵⁶ Landau, above n 262, 934.

⁴⁵⁷ Ibid 969.

⁴⁵⁸ See Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, above n 395. Lijphart later modified his model and named it 'consensus democracy' in Arend Lijphart, *Patterns of Democracy* (Yale

create stable democratic regimes in divided societies. However, while such mechanisms worked in Switzerland, Austria, Belgium and the Netherlands, they were less successful in countries such as Lebanon and Iraq.⁴⁵⁹

In this part I have addressed the positive role elites can play in societies that are in the process of developing democratic institutions. But how do these general problems of democratisation relate specifically to deliberative democratic theory? I will elaborate on this in the next part.

B. Elite models of deliberative democracy

If, in some societies, elites play an important role in introducing and sustaining democratic practices, then elites can play a similar role in instituting deliberative democratic practices. In contrast to popular models, elite models of deliberative democracy focus on fostering deliberation among elite decision making bodies, such as the legislature and the judiciary. In societies where popular democratic deliberation is not practicable, elite deliberation can prove to be useful and promote popular deliberation in the long-run.

In the previous chapter I outlined the limitations of popular models of deliberation. One key limitation is the amount of time and extent of resources that can be practically invested in bringing together ordinary people to deliberate effectively. When discussing elite versus popular deliberation we should also keep in mind the advantages of deliberating in small groups. Deliberation in small groups of people is easier and more productive than deliberation in large groups. As a group gets larger we can expect a lower quality of deliberation among participants, with deliberations taking a more conversational character and rhetoric winning over reasoned arguments.⁴⁶⁰ This is especially true in decision making processes that have specific deadlines. If we want the deliberative process to produce a final binding decision under time constraints, then a

University Press, 2012). For a review of consociationalism and its critics see Rudy B Andeweg, 'Consociational Democracy' (2000) 3 *Annual Review of Political Science* 509.

⁴⁵⁹ See Dahl, *On Democracy*, above n 367, 154. For more about the necessary conditions for such institutions to work see above p 94.

⁴⁶⁰ See Tierney, above n 8, 211.

small and experienced group of professional deliberators will be more able to achieve this than a large group of ordinary citizens.⁴⁶¹

Another criticism raised against the popular view of deliberation is that most ordinary people cannot be expected to effectively participate in public deliberation, as they are often ignorant of the subject matter and do not have enough time or resources to invest in studying the subject in depth. Elites, on the other hand, are more likely to have access to such resources and so are better positioned to exercise effective deliberation.⁴⁶² This is part of the reason why democracies tend to adopt democratic models based on professional representative bodies rather than direct democracy. As Habermas notes, discourses and civilian groups, however desirable, cannot ultimately make decisions and so this important function is left to be executed by bureaucrats.⁴⁶³

Some scholars dispute other basic premises of popular deliberative endeavours, arguing that many ordinary people are not necessarily incapable of effective deliberation, but simply uninterested in participative politics. Hibbing and Theiss-Morse, for example, challenge the assumption that most people would want to participate in deliberations regarding public policy, referring to this assumption as an 'elite interpretation of popular desires'.⁴⁶⁴ Based on results from surveys and focus groups across the United States, they argue that most citizens do not wish to be more engaged in politics, but rather prefer experts and professionals to act on their behalf in a 'stealth democracy' where input from lay people is limited to the occasional ballot or referendum.⁴⁶⁵ Scholars admit that representational political bodies are unavoidable, as ordinary people often lack time, expertise and power to get personally involved.⁴⁶⁶ Similarly, Cutler *et al* note that

⁴⁶¹ With all other things being equal, see above p 85.

⁴⁶² This is merely a replication of the general argument raised by elite theorists of democracy against egalitarian and popular views. See Christiano, 'Democracy' above n 234 [3.1.1].

⁴⁶³ Jürgen Habermas, 'Further Reflections on the Public Sphere' in Craig Calhoun (ed), *Habermas and the public sphere* (MIT Press, 1992) 421.

⁴⁶⁴ John R Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: Americans' Beliefs About How Government Should Work* (Cambridge University Press, 2002) 1.

⁴⁶⁵ This echoes Schumpeter's views according to which democracy is a struggle between elites on the general public's support. See above p. 105.

⁴⁶⁶ See, for example, Nino, above n 2, 132.

'populists' who tend to oppose deliberation by elite bodies tend to be 'less well educated, less well off, less attentive to politics, and more risk averse'.⁴⁶⁷

That does not mean that people necessarily trust ruling elites. Hibbing and Theiss-Morse agree that there is great dissatisfaction with how politics is being conducted and that people often perceive elites as serving powerful interest groups rather than the interests of the general population. However, Hibbing and Theiss-Morse argue that rather than seeking more political influence for themselves, people want politicians to stop misusing their privileges, and promote the interests of the general public rather than yielding to pressure by lobbyists.⁴⁶⁸ For example, according to one survey, 62% of Americans agreed that their 'basic governmental structures are the best in the world and should not be changed in a major fashion'.⁴⁶⁹ Other surveys suggest that although ballot initiatives and referenda enjoyed large popular support, initiatives of a more participatory nature were less popular. For example, when faced with opportunities to exercise direct democracy in the United States in a more 'concerted and regularized fashion than the occasional ballot proposition', focus groups 'did not relish the prospects of being responsible for following and voting on all issues, and they had little faith that their fellow Americans could handle the task, either'.⁴⁷⁰ Interestingly, 65% of all respondents agreed that 'people just don't have enough time or knowledge to make decisions about important political issues'.⁴⁷¹

Recent data regarding popular participation in European referendums support the conclusions of Hibbing and Theiss-Morse. While Europe is seeing an increase in referendums, the median turnout for nationwide referendums in European countries is declining, falling to below 45%.⁴⁷² This is not only due to lack of time and knowledge.

⁴⁶⁷ Cutler, Fred, Richard Johnston, R. Kenneth Carty, André Blais, and Patrick Fournier, 'Deliberation, Information, and Trust: The British Columbia Citizens' Assembly as Agenda Setter' in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008) 166.

⁴⁶⁸ E.g., farmers, industrialists, unions, international corporations etc. Hibbing and Theiss-Morse, above n 464, 98.

⁴⁶⁹ Ibid 102.

⁴⁷⁰ Ibid 91.

⁴⁷¹ Ibid 113.

⁴⁷² See *Referendumania* (21 May 2016) The Economist <<http://www.economist.com/news/europe/21699146-direct-democracy-spreading-across-europe-not-always-good-thing-referendumania?force=scene%2Ffb%2Fte%2Fpe%2Fed%2Fpreferendumania>>.

People who participated in the surveys conducted by Hibbing and Theiss-Morse actually questioned the public's intelligence and its ability to get deeply involved in politics; they also raised concerns regarding people's motivations, claiming that many ordinary people are self-interested and narrow-minded.⁴⁷³ The barrage of public demonstrations and op-eds critical of the Brexit vote demonstrate just how widespread is the general distrust of ordinary people's ability to decide on major issues.⁴⁷⁴

Some scholars argue however that concerns over the abilities of ordinary people to deliberate effectively are overstated. Levy, for example, argues that various methods of 'deliberative voting' can mitigate concerns regarding voters' ignorance. For example, electronic voting can require a voter's engagement with information tutorials before casting his or her vote.⁴⁷⁵

Given the pitfalls of popular approaches to democratic deliberation, some theorists choose to emphasise the importance of 'elite deliberation' among judges and legislative assemblies over more popular and egalitarian approaches to deliberation.⁴⁷⁶ Even theorists who support popular models of democratic deliberation acknowledge the importance of elite models of democratic deliberation.⁴⁷⁷

John Rawls, for example, emphasises that public reason should be exercised by judges, government officials, and candidates for public office who have to decide on matters of constitutional essentials and basic justice.⁴⁷⁸ Rawls explains that the ideal of public reason is realised differently by elites and citizens. It is realised by judges, politicians and candidates for public offices when they 'explain to other citizens their reasons for supporting fundamental political questions in terms of the political conception of justice

⁴⁷³ Hibbing and Theiss-Morse, above n 464, 118,126.

⁴⁷⁴ See, for example, Uri Friedman, *Are Referendums Like Brexit a Disgrace to Democracy?* (27 June 2016) *The Atlantic* <<http://www.theatlantic.com/international/archive/2016/06/brexit-vote-referendum-democracy/488654/>>; David Lammy, *We Need a Second Referendum. The Consequences of Brexit Are Too Grave* (26 June 2016) *The Guardian* <<http://www.theguardian.com/politics/commentisfree/2016/jun/26/second-referendum-consequences-brexit-grave>>. For arguments in favour of popular participation and against such distrust see Levy and Orr, above n 8, 47.

⁴⁷⁵ See Ron Levy, "Deliberative Voting": Realising Constitutional Referendum Democracy, above n 268.

⁴⁷⁶ In *Democracy and Disagreement* for example, Gutmann and Thompson focus on public officials; for more on this see Tierney, above n 8, 4, 44.

⁴⁷⁷ See Levy and Orr, above n 8, 45.

⁴⁷⁸ See Peter, above n 270 [3.3].

that they regard as the most reasonable'.⁴⁷⁹ Ordinary citizens, on the other hand, realise the ideal of public reason by thinking of themselves as if they were in the shoes of these elites, and holding these elites accountable in the ballots.⁴⁸⁰

C. A nuanced view of elite deliberation

Many scholars highlight the limitations of elite democratic deliberation models. Levy, for example, examines a survey of attitudes and prejudices among constitutional elites in Australia and concludes that elites are 'potentially disruptive to the aspirations of deliberative constitutionalists'.⁴⁸¹

Even those who believe that governing elites should deliberate over and shape general laws may argue that particular issues should only be decided by the public and not by public representatives. For example, constitutional issues that involve value or moral judgements (such as abortion rights or same-sex marriage) are not the kind of ordinary lawmaking that can be entrusted with elites.⁴⁸²

Another main criticism of elite deliberation is that even if one acknowledges that it is superior to popular deliberation from a purely deliberative perspective, it still is not democratic. Elites may engage in better quality deliberations, for all the reasons discussed above, but can such deliberations be called 'democratic deliberations' if only a small number of people are able to participate in the deliberative process?

It is important to note from the outset that the two deliberative democratic models – the elite and the popular - are not mutually exclusive and in fact can be combined in several ways. Habermas, for example, emphasises in his deliberative democratic theory

⁴⁷⁹ John Rawls, *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Harvard University Press, 2001) 55.

⁴⁸⁰ Ibid 56. For a detailed explanation of the concept of 'public reason' and its criticisms see Jonathan Quong, 'Public Reason', *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2013/entries/public-reason/>>.

⁴⁸¹ Ron Levy, 'The "Elite Problem" in Deliberative Constitutionalism', in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, forthcoming).

⁴⁸² See Ron Levy, 'The Deliberative Case for Constitutional Referenda' (2017) 16(2) *Election Law Journal: Rules, Politics, and Policy* 213, 217.

the role of the general public as well as that of existing representative institutions. He envisages deliberation as a 'two-track' model, where elites and ordinary citizens play complementary roles: ordinary citizens express opinions and deliberate over general values in the public sphere while elites follow up and put these opinions into law within formal bodies of decision making.⁴⁸³ Elite deliberative bodies therefore should not be seen as a threat to popular deliberation, but rather as complementary and necessary part of a whole viable deliberative democratic system.⁴⁸⁴ As Mansbridge et al. explain, a 'deliberative system' is one where 'the entire burden of decision making and legitimacy does not fall on one forum or institution but is distributed among different components in different cases'.⁴⁸⁵ In such a system, a division of labour among different parts operates so that decisions are taken 'in the context of a variety of deliberative venues and institutions, interacting together to produce a healthy deliberative system'.⁴⁸⁶

Elite representative bodies should not be seen therefore as anathema to deliberative democracy but rather as a crucial part of it. Delegating public issues to be decided by professional representatives is potentially consistent with deliberative democratic ideals. According to Madison in the Federalist papers, elites, in the form of a senate,

refine and enlarge the public views by passing them through the medium of a chosen body of citizens [I]t may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.⁴⁸⁷

Much more recently, Urbinati notes that a 'deliberative form of politics favours representation'. She updates J.S. Mill to provide a representational deliberative democratic model in which legislators function as 'advocates' who deliberate and exchange reasons passionately.⁴⁸⁸ Urbinati argues that representational deliberative democracy benefits citizens in many respects and has both instrumental and intrinsic

⁴⁸³ Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, above n 239, 304; Levy, 'The Law of Deliberative Democracy: Seeding the Field', above n 10, 358.

⁴⁸⁴ See Mansbridge et al, 'A Systemic Approach to Deliberative Democracy', above n 8.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.2

⁴⁸⁷ James Madison, 'The Federalist #10' in *The Federalist* (1788).

⁴⁸⁸ Urbinati, above n 368, 761.

value. It has instrumental value in that it enables people to engage in activities outside of political deliberation. But representation also has intrinsic value in that it gives people a chance to 'step back from factual immediacy and to defer their judgment ... [It] enables critical scrutiny while shielding the citizens from the harassment of words and passions that politics engenders'.⁴⁸⁹

Other than the obvious example of parliaments, other representative bodies are often established to decide issues of public policy. For example, many parliaments have designated committees that are responsible for overseeing specific issues such as foreign affairs, economics, transport, environmental or health issues. The European Parliament, for example, has 22 standing committees and other subcommittees and special committees to assist the European Commission in implementing European legislation.⁴⁹⁰ This practice is aimed at enhancing the quality of deliberation and producing more informed policy-making.⁴⁹¹ Again, this process is justified by the argument that certain issues might be dealt with more rationally if detached from electoral considerations and handed over to experts who can deliberate these issues behind closed doors.⁴⁹² Though this process is elite-driven, it is nevertheless deliberately designed to allow for intra-elite deliberation, consensus and compromise among different elite-groups at the national level.⁴⁹³

When discussing popular versus elite models of democratic deliberation, it should also be noted that deliberative democracy does not necessarily require the active participation of every citizen, on every matter. As discussed above, it is often not feasible to engage large groups of people in effective and productive deliberation. A deliberative democratic initiative can only involve a limited number of people. The number of people affected by a decision will always be higher than the number of people who can actually take part in the deliberative process. We should therefore choose deliberators carefully,

⁴⁸⁹ Ibid 768.

⁴⁹⁰ A full list is available at <<http://www.europarl.europa.eu/committees/en/parliamentary-committees.html>>.

⁴⁹¹ See Mansbridge et al, 'A Systemic Approach to Deliberative Democracy', above n 8.

⁴⁹² Since secrecy can improve the quality of deliberation, see Steiner, above n 240, 130.

⁴⁹³ See Jens Borchert, "'They Ain't Making Elites Like They Used To": The Never Ending Trouble With Democratic Elitism' in Heinrich Best and John Higley (eds), *Democratic Elitism: New Theoretical and Comparative Perspectives* (Brill Academic Publishers, 2010) 25, 32, n 1.

making sure that they are able to engage in high-quality deliberation, consider different opinions and adhere to fair procedures.⁴⁹⁴

Even citizens' assemblies, after all, are just another form of representation, in this case based on random selection.⁴⁹⁵ In a sense, the participants of a citizens' assembly become part of an elite group, as other members of the public are excluded from this assembly and are not able to influence its decisions. Moreover, as citizens' assemblies are brought into existence by elites, they can be manipulated by elites, for example through guidance by the moderators as well as other design choices.⁴⁹⁶

Just as elite bodies are not necessarily anti-democratic, large groups of ordinary citizens are not necessarily democratic, especially if we adopt some epistemic and substantive elements in our conception of democracy. For example, if a citizens' assembly fails to consider all points of view or to safeguard basic human rights, then it loses much of its democratic legitimacy. I endorse the view that in order for governance to be 'democratic', what is important is that a variety of positions and views held by different groups in society are discussed and addressed by the relevant representatives in their deliberations over a specific matter. This process should also be conducted in a transparent manner, as legitimacy is created when people who are unable to participate in the deliberative process can follow it and understand why the deliberative body arrived at a specific decision. As Steiner and Goodin each contend, deliberation does not necessarily have to involve an exchange of arguments between two (or more) people, but can also take place within oneself, away from social scrutiny, as an inward reflection on different arguments.⁴⁹⁷ This is why it is so important for deliberative sessions to be open and for the associated relevant material (such as transcripts, briefings etc.) to be available to the general public. In so doing, people who cannot attend the deliberative

⁴⁹⁴ See Parkinson, above n 279, 23.

⁴⁹⁵ Nino, above n 2, 152.

⁴⁹⁶ E.g., by choosing the location of the assemblies, their duration or the remuneration for attending them. See Mark E Warren and Hilary Pearse, 'Introduction: Democratic Renewal and Deliberative Democracy' in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizen's Assembly* (Cambridge University Press, 2008) 1, 14; Carolan, above n 264.

⁴⁹⁷ Robert E Goodin, *Reflective Democracy* (Oxford University Press, 2003); Steiner, above n 240, 50.

sessions or follow them in real-time can examine the different arguments presented in the sessions at their own convenience.

It is important however to ensure that different groups are adequately represented in the deliberative body, in order to increase the epistemic advantages of democratic deliberation. As Sunstein notes:

A system of deliberation is likely to work well if it includes diverse people – that is if it has a degree of diversity in terms of approaches, information and positions. Cognitive diversity is crucial to the success of deliberative democracy ...⁴⁹⁸

Especially in cases of divided societies, diverse bodies help to create legitimacy, as a body that includes only members of a certain group is less likely to be seen as legitimate by members of the under-represented group.

This leads us to consider the nature and composition of elite bodies themselves. Members of an elite class or group need not, and often do not, all belong to a particular ethnic or religious group. A body that contains members from multiple identity groups can still represent or reflect the different groups even though it is an elite body. In a proportional representation election system (for example, in Israel, Belgium, Germany and many other European countries), although members of parliament can be said to belong to an ‘elite’ group, they may effectively represent different groups in a society. Representational bodies can also sometimes include members of diaspora groups, as discussed above.⁴⁹⁹

When each group is able to elect a person they deem as ‘their own’ to the parliament, the result is a diverse parliament, which is arguably more representative than a group of citizens in a citizens’ assembly, who are selected according to statistical methods. Both processes may be subject to manipulation. For example, the composition of a citizens’ assembly can be manipulated by those who control the selection process⁵⁰⁰ and parliamentary elections through gerrymandering. What is important, however, is that a

⁴⁹⁸ Cass R Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (Oxford University Press, 2009) 142.

⁴⁹⁹ See above p 33.

⁵⁰⁰ See Carolan, above n 264, 742.

deliberative representational body has a diverse representation of ideas rather than just identities.

D. Summary

In this part I have discussed the advantages of elite deliberation over popular deliberation. My aim was not to dismiss popular deliberation altogether. Popular initiatives of deliberative democracy, such as citizens' assemblies and deliberative polling, can be useful and effective. However, the effectiveness of any deliberative approach depends on the specific circumstances. In divided societies or societies undergoing democratisation processes, there may be valid reasons to prefer elite deliberation by a small group of experts or representatives over popular deliberation by lay people.

It is also important to note that a tension between deliberative ideals and the praxis of deliberation will always exist: democracy cannot and should not consist only of deliberation, but rather deliberation should play an important role.⁵⁰¹ Both normative principles and empirical constraints must be taken into account. As Goodin, Pettit and Pogge note: 'what can feasibly be achieved in a certain area is just as central to normative concerns as questions about what is desirable in that area'.⁵⁰² As Landau argues 'constitution-making should often be dominated by a risk-averse calculation: domestic and international policymakers should focus on avoiding a worst-case outcome, rather than trying to reach an idealized first-best world of transformative, deliberative democracy'.⁵⁰³

In the next part I discuss the deliberative qualities of constitutional courts which can make them effective elite deliberation bodies. I will explain how some constitutional courts are able to engage with the different segments of the community, including diaspora groups, and encourage deliberation among the greater public. I conclude that

⁵⁰¹ See Steiner, above n 240, 1.

⁵⁰² Goodin, Pettit and Pogge, above n 306, xvi. See also Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, above n 236, 93.

⁵⁰³ Landau, above n 262, 980.

in divided societies with large diasporic populations, where popular deliberation is difficult to achieve, judiciaries can potentially function as effective deliberative democratic bodies.

V. Courts as deliberative democratic bodies

If we are looking for informed, trained deliberators who exchange carefully reasoned arguments in a non-coercive environment, then courts, especially constitutional courts in Western liberal democratic systems, immediately come to mind as natural deliberative bodies. Courts can embody most of the important deliberative principles discussed in the previous chapters: ideally, they deliberate in a mode committed in some respects to transparency, they hear expert opinions and have the opportunity to question them, and their rulings are based on exchanges of reasoned arguments. Given all of these deliberative qualities, many deliberative democratic theorists regard the court as a model for ideal deliberation.⁵⁰⁴ For example, Rawls described the US Supreme Court as an exemplar of public reason⁵⁰⁵ and Dworkin praised the Court's decision making process as one that is ruled by reasons rather than power.⁵⁰⁶ However, the fact that courts are arguably better situated to conduct effective deliberation would, if proven, not mean that all courts live up to such expectations. Some scholars dispute the idealised view of the Court's deliberative qualities, and others challenge the court's democratic credentials.

In this chapter I examine the deliberative advantages of constitutional courts as well as their deliberative weaknesses. I begin with broad observations and idealised points about how a court can be deliberative. I explain why constitutional courts in most Western liberal democratic systems are often more deliberative than other institutions. I contend that courts can be deliberative in two ways. First, the court as an institution is designed in a way that enables it to exercise a higher quality of deliberation, compared with other governance institutions, within its *own processes*. Second, courts often

⁵⁰⁴ See Gutmann and Thompson, above n 8, 45; Mendes, above n 15, 3.

⁵⁰⁵ Rawls, 'The Idea of Public Reason', above n 17, 95; Rawls, *Political Liberalism*, above n 17, 231–6. Although the idea of 'public reason' is not identical to 'deliberation', it does share some features and relies on similar justifications.

⁵⁰⁶ Dworkin, above n 17, 70.

instigate deliberation among the *general public*. I also address the issue of the courts' democratic value. I then synthesise this analysis into a set of detailed criteria that help to evaluate a specific court's deliberative level.

This chapter touches on many important topics in judicial studies such as judicial review, judicial power and theories of judicial decisions. This chapter does not aim to provide a thorough analysis of such issues, as this would go beyond the scope of this thesis. The aim of the chapter is rather to explain specifically what features can be employed by constitutional courts to promote the aims of deliberative democratic theory, as presented in previous chapters. The deliberative criteria presented in this chapter will be applied later to the case studies to examine the deliberative features that enable the Israeli Supreme Court to include and involve diaspora populations in its deliberations and decisions.

Although my analysis is relevant to different kinds of courts, my main focus will be on courts that act (or sometimes act) as constitutional courts. These are the courts that are or should be the most deliberative, as they deal with fundamental issues that concern a society as a whole. I will therefore refer mostly to constitutional courts in liberal democracies, or to high courts and supreme courts that act as constitutional courts in a specific jurisdiction.⁵⁰⁷

A. The deliberative qualities of constitutional courts

i. The role of constitutional courts

In most Western liberal democracies, the very nature of a constitutional court puts a deliberative onus on it. In order to decide on the constitutional issues that come before it, the court needs to engage with different opinions that exist within a society regarding core principles and values. Unlike legislators or citizens, who are more concerned with choosing between different practical policy options, the role of a constitutional court

⁵⁰⁷ The following analysis does not apply to countries with weak judicial independence, where constitutional courts can have serious deficiencies.

often includes engaging in questions of a political-philosophical character.⁵⁰⁸ We can therefore expect constitutional courts to exercise higher-than-average quality of deliberation than that of other public institutions. Indeed, the general attitude among both lay people and legal scholars is that constitutional courts should live up to such deliberative expectations.⁵⁰⁹

ii. Small group deliberation

As mentioned in previous chapters, small groups are generally more conducive to deliberation than larger groups.⁵¹⁰ A constitutional court is usually composed of no more than a dozen or so professional judges. This low number makes it easier for participants to negotiate, deliberate and arrive at a decision. Compare this with the parliament of a mid-sized nation, where each member must negotiate with potentially hundreds of other parliamentarians. Small groups also enable expertise. Judges are usually knowledgeable and experienced in the areas for which they are responsible.

One drawback of a small group of deliberators is that it is difficult to give voice to every viewpoint; some minorities may be underrepresented. A court that comprises judges from different segments of the society would be more deliberative than a court that comprises only members of one certain group.⁵¹¹ In order for a court to be able to produce a high level of deliberation, it needs to have judges from different backgrounds to allow for a plurality of viewpoints and perspectives.

iii. Reasoning and transparency

Another potentially deliberative advantage of the court is its transparent reasoning process. Courts partly deliberate in a forum committed to transparency, with some submissions and hearings open to the public. Court decisions are available to the public

⁵⁰⁸ Frank Michelman, *Brennan and Democracy* (Princeton University Press, 1999) 23.

⁵⁰⁹ See Levy and Orr, above n 8; John Ferejohn and Pasquale Pasquino, 'Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice' in W Sadurski (ed), *Constitutional justice, east and west : democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective* (Kluwer Law International, 2002) 21; Michelman, 'Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment', above n 278. For an in-depth analysis of specific issues concerning the role of the judiciary in a deliberative democracy see Levy and Orr, above n 8, chapter 3.

⁵¹⁰ See above p 109.

⁵¹¹ Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7(4) *Perspectives on Politics* 805, 810.

(and often online) and journalists are usually allowed into the court room. This allows the media to report on ongoing sessions and deliberations, further increasing public access. As discussed, in divided societies, transparent deliberative processes are important in order to confer legitimacy on the final decision. While politicians are not obliged to justify their decisions, and some cabinet decision making processes remain secret, courts are usually required to publish and justify their decisions, revealing the reasoning behind them.⁵¹² It is mainly this characteristic of providing reasoned arguments that has led many scholars to regard the court as an example of sound deliberation.⁵¹³ When reasons and explanations are provided, errors that were made during the process of deliberation and decision making can be discovered and challenged by future petitioners. Moreover, there is sometimes an option to appeal a court's decision or to apply for an additional hearing.

However, not all court processes are transparent. Deliberations and consultations between judges are generally not public. Also, in some sensitive cases, the whole court process is conducted behind closed doors. While this is the case, recall that under certain circumstances, there are possible advantages to conducting at least part of the deliberative process behind closed-doors.⁵¹⁴ Moreover, in some cases, other interests may necessitate a discrete process (e.g., national security, protection of minors).

The reasoning process employed by courts may differ across jurisdictions. Ferejohn and Pasquino differentiate between courts such as the US Supreme Court, which they deem as 'externally' deliberative, and European courts which they call 'internally' deliberative. An externally deliberative court means that deliberation is aimed at the general public, and consensus among the judges is not sought as a central aim. European courts are internally deliberative in the sense that judges make attempts to convince each other and produce 'a collectively reasoned decision'.⁵¹⁵

⁵¹² See Ibid 811; Gutmann and Thompson, above n 8, 15; Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy', 29.

⁵¹³ Gutmann and Thompson, above n 8, 45; Mendes, above n 15, 3.

⁵¹⁴ See above p 83-4.

⁵¹⁵ Ferejohn and Pasquino, 'Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice', above n 509, 35.

Another deliberative limitation of the courts is that judges, unlike politicians, are not formally accountable to the public and usually are not allowed to comment or give interviews regarding pending cases. This can be problematic from a deliberative point of view, as it limits the scope to challenge judges' opinions. However, the court's obligation to justify its decisions and the possibility of an appeal largely mitigate this problem.

Most judges, unlike politicians, do not have to run for re-election and so are more likely than politicians to change their positions and engage in principled reasoning.⁵¹⁶ In parliaments, a member of parliament representing a certain group in society who changes her mind and adopts a view different to that held by the majority in that group is often portrayed as a 'traitor'. But in truly deliberative bodies, this phenomenon should be encouraged and appreciated.⁵¹⁷ Changing one's mind can suggest to other members of that group that they might have also changed some of their opinions had they also participated in similar deliberations, being exposed to counter arguments and different views. Judges have more scope to change their minds than members of parliaments. However, there are also dangers in judges' lack of accountability, since a judge may become capricious or sluggish if she knows it is practically impossible to remove her from office.

The court's reasons must be linked to the facts of each case as well as to general legal rules, ensuring that a petitioner's right to present evidence and make legal arguments is respected in making a final judgment.⁵¹⁸ Providing reasoned decisions also fosters political participation, as members of the public can challenge a decision by submitting new cases based on the court's previous reasoning. For example, the US Supreme Court decision in *Brown v Board of Education*⁵¹⁹ encouraged more challenges to 'separate but

⁵¹⁶ Christopher Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2007) 98. In addition, Zurn (following Ely and Dahl) claims that because the judiciary is unelected it is best placed to resolve disputes between electors and the elected. See Christopher Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007) 47.

⁵¹⁷ See Carolyn M Hendriks, John Dryzek and Christian Hunold, 'Turning up the Heat: Partisanship in Deliberative Innovation' (2007) 55(2) *Political Studies* 362.

⁵¹⁸ Jerry L Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance' (2007) 76(1) *George Washington Law Review* 101, 107.

⁵¹⁹ *Brown v. Board of Education* 349 U.S.294 (1955) (Brown II).

equal' policies through the courts.⁵²⁰ Especially when dealing with constitutional issues, if the reasons provided are capricious or unsatisfactory, the ruling may be subject to an appeal or reversal in a future case.⁵²¹ For example, while the High Court of Australia will generally only overrule previous decisions in exceptional circumstances, it is much more inclined to do so in constitutional issues, especially when dealing with basic human rights and fundamental freedoms.⁵²²

Another incentive for courts to use reasoned arguments lies in their lack of real political power. Unlike politicians, judges cannot claim legitimacy based on the fact that the general public voted for them. The court therefore has to rely on persuasion through reason giving in order to render its decisions legitimate and authoritative.⁵²³ As Franck observes in the case of international courts:

The power of a court to do justice depends, rather, on the persuasiveness of the judges' discourse, persuasive in the sense that it reflects not their own, but society's value preferences.⁵²⁴ ... Like the law it applies, the Court's ability to pull states to compliance with its opinions depends on the general perception of the legitimacy and fairness of its opinion-forming process.⁵²⁵

However, due to its lack of political power, the court must be careful not to overstep its boundaries, otherwise it may be subject to attempts to limit the scope of its powers.⁵²⁶

Some critics argue that a court's 'reasoned' exchange of arguments sometimes consists of simple 'give and take' bargaining. However, much of the criticism laid against the process of 'bargaining' that takes place among judges is true of any group of deliberators that operates under time constraints and must produce a final and binding decision.⁵²⁷

⁵²⁰ See Peter Tolsdorf, 'If Separate, Then at Least Equal: Rethinking Brown v. Board of Education and De Facto Public School Segregation' (2005) 73 *The George Washington Law Review* 668, 661–2.

⁵²¹ See Mashaw, above n 518, 108.

⁵²² See Michael Kirby AC CMG, *Precedent - Report on Australia*, lecture at the International Academy of Comparative Law Conference (Utrecht, the Netherlands, 17 July 2006) p 6-7, available at <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf>.

⁵²³ Ferejohn, above n 248; Ferejohn and Pasquino, 'Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice', above n 509.

⁵²⁴ Franck, *Fairness in International Law and Institutions*, above n 319, 34.

⁵²⁵ *Ibid* 316.

⁵²⁶ See below n 716.

⁵²⁷ See Levy and Orr, above n 8, 55.

There is no evidence that a group of judges is any worse in this respect than a group of ordinary citizens. On the contrary, judges are more likely to engage in ‘reasoning’ rather than ‘bargaining’ for the reasons mentioned above. Moreover, as Nino noted, bargaining can actually contribute to the impartiality of the deliberative process, as it forces participants to attend to others’ interests as well.⁵²⁸ Many courts also allow dissenting opinions, which means that there is less pressure to ‘bargain’ in order to reach a unanimous decision.

Some scholars also point out that often the court uses a technical and legalistic form of juristic reasoning rather than principled moral political reasoning.⁵²⁹ The reasons behind courts’ rulings are also often hidden by professional jargon inaccessible to lay people.⁵³⁰ While it may be true that lower courts tend to rely more on technical legal reasoning, this is usually not the case with constitutional courts. For example, in many legal systems, a constitutional court must apply a tripartite proportionality test when deciding whether a certain law is constitutional: first, the court asks whether the law was established in order to achieve a legitimate aim; second, the court inquires whether it would be possible to achieve the same end through a less restrictive measure; and finally, the court balances the outcomes of the law against its possible costs.⁵³¹ Therefore, unlike lower courts, constitutional courts engage with moral and principled reasoning that involve normative and policy considerations.⁵³² However, as a result of following this tripartite test, constitutional decisions are often long and difficult to read through. In some cases, constitutional decisions are written in inaccessible prose which makes it difficult for lay people to understand the court’s reasoning. A deliberative democratic approach requires that courts attempt to write clearly, concisely and simplify their decisions so as to make their judgments comprehensible to the general public.

⁵²⁸ Nino, above n 2, 127.

⁵²⁹ Zurn, above n 516, 207,212.

⁵³⁰ See Sen, above n 18; Jeremy Waldron, above n 18.

⁵³¹ See Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2014) 47.

⁵³² *Ibid.*

iv. *Public trust*

A constitutional court cannot maintain its legitimacy and remain effective in its review of government decisions without enjoying high levels of public trust. As Cutler et al. demonstrated, trust is a major issue when assessing the prospects of a deliberative body to achieve legitimacy and support for its decisions.⁵³³

Critics of constitutional courts often portray them as distant ivory towers.⁵³⁴ Judges do not interact with the general public and, as mentioned, are often not allowed (according either to law or custom) to comment or give interviews about the cases they are involved in. In some countries, judges wear wigs that further separate them from ordinary citizens. These features are in contrast to politicians who are able to reach out and speak directly to their constituencies.

However, constitutional courts generally enjoy higher levels of trust than parliaments among the public; these findings are consistent over time and across various countries.⁵³⁵ In the United States for example, the Supreme Court enjoys a far higher level of trust than the Congress.⁵³⁶ Similar results are observed in Canada⁵³⁷ and Germany.⁵³⁸ In Israel, which has a different system of appointing judges,⁵³⁹ the results are similar: the Supreme Court enjoys higher levels of trust than politicians.⁵⁴⁰ Notably, the Israeli Supreme Court is the most trusted government institute among the Arab minority.⁵⁴¹

⁵³³ Cutler et al., above n 467.

⁵³⁴ See Stephen Breyer, 'Judicial Review : A Practising Judge's Perspective' (1999) 19 (May 1998) *Oxford Journal of Legal Studies* 153, 154.

⁵³⁵ See Hibbing and Theiss-Morse, above n 464, 99; Harry J Enten, *What Americans Think of the Supreme Court* (28 June 2012) *The Guardian* <<http://www.theguardian.com/commentisfree/2012/jun/27/what-americans-think-supreme-court>>.

⁵³⁶ See *Confidence in Institutions* (Gallup survey, 7 June 2015) <<http://www.gallup.com/poll/1597/confidence-institutions.aspx>>.

⁵³⁷ Kirk Makin, *Judges Garner Greater Trust than Politicians, Survey Finds* (9 April 2007) *The Globe and Mail* <<http://www.theglobeandmail.com/news/national/judges-garner-greater-trust-than-politicians-survey-finds/article1073477/>>.

⁵³⁸ Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 1997) 56–7.

⁵³⁹ See below on p 163.

⁵⁴⁰ See Hermann, Tamar, Ella Heller, Nir Atmor and Yuval Lebel, *The Israeli Democracy Index* (The Israel Democracy Institute, 2013) <<https://en.idi.org.il/publications/6175>>, 162.

⁵⁴¹ *Ibid* 41.

These results may be explained by several factors. First, it may merely reflect how poorly politicians are viewed in society, rather than an opinion about the judiciary.⁵⁴² Judges are not perceived to engage in partisan politics like politicians, they are usually less likely to be bribed, and their tenure gives them the freedom to maintain their integrity and decide according to their conscience. Another possible factor is constitutional courts' traditional function as protectors of basic human rights against government encroachments. The fact that constitutional courts usually enjoy high levels of trust may also indicate that the public appreciates the deliberative process that takes place when deciding constitutional cases.

v. Impartiality

Impartiality is another important element for creating an effective and successful deliberative process. Participants in a deliberative process should make decisions according to established principles and decisions should not change depending on the identity of the specific individuals affected by the decision. In a legal system, deviations from precedents require special justification, and so the risk that the court would be influenced by external or unjustified factors is diminished. The fact that a court is obliged to maintain coherence with the overall legal system and follow precedent therefore helps to maintain a certain level of impartiality which contributes to its deliberative value.⁵⁴³ The court is also separated, to some degree, from political constraints (the degree of such separation varies across different jurisdictions). Since judges do not rely on their constituencies for re-election, they are free to decide cases on their merits and not yield to changing public opinion. However, as discussed above, courts rely on public trust in order to maintain their legitimacy. Ruling consistently against popular public opinion may jeopardise the court's legitimacy and also encourage politicians to suggest judicial reforms.

Moreover, judges are not completely shielded from public opinion, and their decisions may be affected by current events. For example, a study by Hofnung and Margel examined the role of the Israeli Supreme Court in protecting human rights and limiting the state's action in terror-related cases. This study revealed how different political and

⁵⁴² See Professor Anand as quoted in Makin, above n 537.

⁵⁴³ See also Levy and Orr, above n 8, 44.

security conditions, such as fluctuating public opinion or the occurrence of deadly terror attacks, affect judges' tendencies to intervene with policies or actions of the state security authorities.⁵⁴⁴ These findings suggest that judges in the Supreme Court may not always adhere only to legal arguments and reasoning, but are also responsive to changing public opinion.

Some critics also highlight the fact that judges are often appointed based on their political affiliations. For example, Sen argues that because of the politicised procedure by which judges are appointed to the US Supreme Court, judges are not willing to engage in reasoned, open-minded deliberative discussions. Judges are appointed by the President because of their existing views and not because the President thinks they will change their minds.⁵⁴⁵ This may be true with respect to some courts, but it is not necessarily the case for all courts in all jurisdictions, with different systems for electing judges.⁵⁴⁶ Moreover, any group of deliberators, regardless of its election process, will consist of people who already hold certain political views. It is not feasible to form a deliberative body that consists of persons who are 'blank slates', with no political predispositions. What is important from a deliberative point of view is to make sure that the deliberative body consists of persons who hold different opinions prevalent among the general population. Electing a Republican jurist to serve as a judge in the US Supreme Court, for example, is not in itself a problem from a deliberative point of view. A problem would emerge in the case where the Supreme Court consisted only (or mostly) of people who are known to hold Republican views.

Participants in a deliberative body need to maintain an open mind and a degree of flexibility in order to be able to change their pre-disposed views in light of new evidence or arguments.⁵⁴⁷ As discussed above, judges may have greater flexibility to change their minds than, for example, parliament members, since they do not have to satisfy their constituencies in order to guarantee their re-election.

⁵⁴⁴ Menachem Hofnung and Keren Weinshall Margel, 'Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice' (2010) 7(4) *Journal of Empirical Legal Studies* 664.

⁵⁴⁵ See Sen, above n 18, 316.

⁵⁴⁶ See, for example, the review of the Israeli system on p 163.

⁵⁴⁷ See Hendriks, Dryzek and Hunold, above n 517, 362,371; Levy and Orr, above n 8, 127.

I do not contend that judges as individuals are inherently better deliberators than parliamentarians or citizens. I am also not arguing that courts are always more deliberative than parliaments. Rather, I contend that the court, as an institution, is in some cases a more suitable forum than parliaments or citizens' forums to successfully deliberate constitutional issues.⁵⁴⁸ This is the case, for example, in some divided societies. Even Waldron, who is sceptical of the alleged superiority of judges as impartial deliberators, admits that in societies where liberal ideals and democratic institutions are not well entrenched, the court may be better positioned to respect and uphold the rights of minorities due to its predisposition towards impartiality.⁵⁴⁹

B. Are courts democratic?

In the previous parts I explained why, and under what conditions, constitutional courts may serve as effective deliberative bodies. This part addresses the question whether the court is a model of *democratic* deliberation. Most scholars would agree that courts in and of themselves are not democratic. After all, most judges are not elected by the people and it is very hard to remove them from office. However, courts are democratic in other senses. Most importantly, they are democratic in the sense that they form a vital part of any democratic system.

A similar (though separate) line of criticism against courts is that they are non-representational, or that judges represent only some elite sections of the population.⁵⁵⁰

These criticisms echo the arguments raised against judicial review and therefore the responses to those criticisms are also relevant.⁵⁵¹ Going into this issue in depth is beyond the scope of this thesis, but I will briefly discuss some possible responses to these lines of criticism.

⁵⁴⁸ This point is related to the controversy over whether judges are evidently better than legislatures at protecting rights. See Lever, above n 511, 806.

⁵⁴⁹ See Waldron, above n 18, 1401.

⁵⁵⁰ See Nino, above n 2, 187-9.

⁵⁵¹ See Waldron, above n 18; Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26(4) *Oxford Journal of Legal Studies* 733; Lever, above n 511.

i. Democratic system

The court is indeed undemocratic in the sense that its judges are not chosen by the people. Unlike parliament members, judges are not directly and formally accountable to the public nor can they be replaced by the public if they become unpopular. However, the court is a democratic body in the sense that it is an integral part of a whole democratic system. Judges are usually appointed, albeit indirectly, by the representatives who themselves are elected democratically by the people. Many legal scholars have explained how constitutional courts fit well within a democratic system. Zurn, for example, defends constitutional review by the courts by reference to deliberative democratic theory:

Constitutional review discharges the function of procedurally protecting the political structures and the system of rights that make deliberative democracy possible, that is, protecting constitutional structures that ultimately ground the supposition that the decisional outcomes of democratic processes are legitimate.⁵⁵²

Most importantly, in democratic systems, the parliament is the body that is designed to be elected periodically by the people, as this is the body that is in charge of changing policies and enacting new laws. The court's function, however, is different to that of the parliament. The court's function is to safeguard against a temporarily over-zealous majority overstepping its authority and encroaching on basic rights and liberties that should be protected under a democratic political system.⁵⁵³ As some scholars note, the court acts as a necessary referee in the democratic process.⁵⁵⁴ The task of deciding whether a certain law conflicts with basic democratic principles has to be entrusted to a body which is situated outside the democratic election process. A court will not be able to fulfil its function and uphold the rule of law if its judges are elected in the same way as members of parliament.⁵⁵⁵

⁵⁵² Zurn, above n 516.

⁵⁵³ See Breyer, above n 534, 156.

⁵⁵⁴ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); Nino, above n 2, 200; Breyer, above n 534, 157. Note that this does not mean however that the court is necessarily an impartial referee – rather it fulfils a necessary function.

⁵⁵⁵ See Michael Coper, 'Court's Role in Democracy' in Michael Coper, Anthony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

In this context, it is useful also to highlight the main arguments raised in support of judicial review. Some scholars argue that judicial majorities are sometimes more reliable protectors of basic rights than popular majorities.⁵⁵⁶ Ackerman, for example, sees judicial review as preserving the will of the people, as expressed in a constitution, against a lower form of politics which takes place in regular times without the express will of the people.⁵⁵⁷ Rawls holds that as long as judicial decisions ‘reasonably accord with the constitution ... and with its amendments and politically mandated interpretations’ then judicial review can be said to originate in ‘the higher authority of the people’.⁵⁵⁸ Dworkin rejects the ‘majoritarian premise’ – namely, that democracy means favouring the majority of citizens. He holds a ‘constitutional conception of democracy’, according to which decisions should be made by institutions whose structure, composition and practices treat all members of the community with equal concern and respect.⁵⁵⁹ Just as many other appointed officials may take decisions that affect society as a whole (like an ambassador or chief of staff), an arrangement that gives judges the power of constitutional adjudication is not necessarily inegalitarian.⁵⁶⁰ Finally, even those who argue for legislative supremacy over judicial rulings acknowledge the important function played by the judiciary in a democratic system, namely, protecting fundamental rights.⁵⁶¹

The above arguments may help to explain why constitutional courts generally enjoy higher levels of trust than parliaments.⁵⁶² Scheppele, for example, argues that sometimes strong constitutional courts are more democratic than elected parliaments

⁵⁵⁶ See Jr William J. Brennan, ‘The Constitution of the United States: Contemporary Ratification’ (1986) 27(3) *South Texas Law Review* 433, 433–5; Michelman, ‘Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment’, above n 278.

⁵⁵⁷ See Bruce Ackerman, *We the People* (Belknap Press of Harvard University Press, 1991) 10–33; Nino, above n 2, 103–4.

⁵⁵⁸ Rawls, *Political Liberalism*, above n 17, 234. See Michelman, ‘Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment’, above n 278.

⁵⁵⁹ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, 1999) 1–38.

⁵⁶⁰ *Ibid* 28.

⁵⁶¹ See Jason NE Varuhas, ‘Courts in the Service of Democracy: Why Courts Should Have a Constitutional (But Not Supreme) Role in Westminster Legal Systems’ (2009) 3 *New Zealand Law Review* 481.

⁵⁶² See above p 127.

and elected executives.⁵⁶³ She argues that constitutions often enjoy wider public support than later legislation by self-interested legislators, and so constitutional courts ‘can be structured so that they have better access than the more conventional elected branches to what democratic publics want from democratic politics’.⁵⁶⁴ So even though courts are not democratic in a literal sense, when considering courts as part of a broader system of the rule of law, one understands that courts exercise an important democratic function.

ii. A reflective court

As discussed above, courts are not necessarily representational, as this is not one of their roles in a democratic system. However, a court can aim to be *reflective* of the society it represents – that is, to include people from diverse backgrounds among its judges. A body that engages in deliberation can be democratic as long as it is diverse, to some degree, and represents a variety of opinions and people from different backgrounds in the population. Such a ‘responsive’ or ‘reflective’ court, which expresses different constitutional interpretations that can be found among the public, fulfils a necessary function in a democracy.⁵⁶⁵

As members of parliament are elected by the public, they may claim that higher democratic legitimacy is attached to their decisions. But as Lever notes:

[J]udges, as well as legislators, can embody and foster democratic forms of representation, accountability and participation. There is, therefore, nothing distinctively democratic in favouring the latter over the former when the two conflict.⁵⁶⁶

Judges often represent important segments of the population. For example, a member of the Arab elite in Israel, who sits as a judge in the Israeli Supreme Court, can fulfil some of the required characteristics of a democratic representative: she shares some similar identity factors with her group members (religion, culture, language, history) and symbolises the group’s public presence in that particular institution. Moreover, she

⁵⁶³ Kim Lane Scheppele, ‘Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments’ in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law After Communism* (Central European University Press, 2005) 25.

⁵⁶⁴ *Ibid* 26.

⁵⁶⁵ See Michelman, *Brennan and Democracy*, above n 508, 57–60.

⁵⁶⁶ Lever, above n 511, 807.

brings to deliberations views and perspectives unique to this group – a feature that adds to the epistemic advantage of the deliberative body.⁵⁶⁷ It may be true that this particular individual does not fully represent the common majority view among this group in the same way as a member of parliament may. However, from a deliberative perspective, this can count as an advantage. In a deliberative body, a group representative is not expected to hold the view prevalent among her group. In true and effective deliberation, one is supposed to be able to depart from one's initial positions in the face of better arguments and new perspectives.⁵⁶⁸

It should also be noted that problems of over and under representation accompany any deliberative or elected body. Even the carefully crafted citizen's assembly in British Columbia was criticised for under representation of minorities.⁵⁶⁹ In parliamentary elections, representation can be dramatically skewed in some electoral systems. For example, the UKIP party that won 12% of votes in the 2015 elections in the United Kingdom ended up being represented by only one member of parliament.⁵⁷⁰

Democratic forms of representation, accountability and participation will vary across different courts and parliaments and different legal systems, depending on the specific circumstances. For example, a court's democratic value may be affected by the way in which judges are appointed. As Nino notes, a 'European style' constitutional tribunal with members who are periodically chosen by bodies that are representative of popular sovereignty is more democratically legitimate than a court whose members are only chosen by one branch of government.⁵⁷¹

However, diversity can be achieved under different systems of appointment. For example, the Israeli system of appointing judges prefers (from equally suitable candidates) those candidates who come from traditionally underrepresented sectors,

⁵⁶⁷ Parkinson, above n 279, 30–2.

⁵⁶⁸ Ibid 32.

⁵⁶⁹ See Michael Rabinder James, 'Descriptive Representation in the British Columbia Citizens' Assembly' in Mark Warren and Hilary Pears (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008).

⁵⁷⁰ See *2015 Elections Results* (BBC news) at <<http://www.bbc.com/news/election/2015/results>>.

⁵⁷¹ Nino, above n 2, 215.

like Israeli Arabs, new immigrants and women.⁵⁷² In the case of the US Supreme Court, Justice Breyer argues that '[l]ength of term and the appointment process tend to guarantee diversity of constitutional views';⁵⁷³ since judges are appointed by both Republican and Democrat presidents.

iii. Giving voice to non-citizens

When considering democratic principles, there is at least one important advantage courts have over most parliaments. A court can give voice to groups whose members are not citizens and therefore cannot vote. Recall that one of the deliberative democratic ideals is that all those who will be affected by a decision should take part in the deliberative process preceding that decision.⁵⁷⁴ A major problem with satisfying this requirement is that often people who will be affected by the decision include non-citizens such as migrants (legal and illegal), citizens of neighbouring countries and diaspora people.⁵⁷⁵ Such people are not only unable to participate in elections, they are also unable to participate in deliberative democratic initiatives such as citizens' assemblies, as it would be unusual to open such a process to them. A court, however, is able to apply a broad standing policy and thus accept petitions from any individual whose interest is affected by a specific decision made by the government. In addition to technical standing rules, judges can represent those who are not represented adequately in other venues. Unlike politicians, most judges do not rely on their constituencies for re-election and so they are more capable to address the concerns of people who cannot vote.⁵⁷⁶

In this sense, the court may have a serious democratic advantage over other deliberative forums such parliaments or citizens' assemblies. By including groups that otherwise are excluded from deliberations, the court expands the number of people who are able to

⁵⁷² See Itzhak Zamir, 'The Final Report of the Commission for Appointing Justices in Israel' (Jerusalem, 2001). See also 'The Judiciary: Section-by-section examination of the Basic Law' (summaries from The Knesset Constitution, Law, and Justice Committee, February 2004) English translation available at <http://knesset.gov.il/constitution/ConstP9_eng.htm>.

⁵⁷³ Breyer, above n 534, 154.

⁵⁷⁴ See above p 3.

⁵⁷⁵ There are other groups that are not able to participate in political processes, such as children and the mentally disabled, however my focus here is on non-citizens.

⁵⁷⁶ This is similar to Michelman's idea of judges taking account of the 'full blast of sundry opinion' (Michelman, *Brennan and Democracy*, above n 508, 60).

affect government decisions. This feature is critical in divided societies with large diaspora populations. I will show the important implications of extensive participation by non-citizens when I later discuss cases from the Israeli Supreme Court, which applies a broad standing policy.

iv. Summary

Ultimately, the legitimacy of a deliberative body rests on two pillars: reflection or representation of society on the one hand, and the quality of deliberation on the other. As explained above, the court's legitimacy does not emanate only from its deliberative quality, but also from the fact that it reflects the society it serves and enables groups of non-citizens who are not represented in parliament to be heard. Diversity is needed in order to represent different views and segments of the population. If people feel that no one in the deliberative body represents them, they will tend to distrust this body's decisions. But equally important is high-level deliberation, that is, deliberation by members who are open-minded and well informed on the subject matter.⁵⁷⁷ A court in a deliberative system operates as part of a complex network of institutions aimed at fostering democratic deliberation (e.g., legislatures, executive agencies, the media, organised advocacy groups, private and non-profit institution).⁵⁷⁸ Different institutions in a democratic system can be positioned differently on the spectrum of representation versus quality of deliberation. While the parliament, for example, tends to be positioned more on the representational end of the spectrum, the judiciary is placed more towards the deliberative end. This does not mean that the court is not in any sense democratic; on the contrary, it fulfils a vital function in maintaining a democratic system.

⁵⁷⁷ See James, above n 569, 107–108.

⁵⁷⁸ See Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy', above n 8, 1-2.

C. The court's role in promoting popular deliberation

The court's deliberative value extends beyond what takes place in the courtroom and among the judges. The counter-majoritarian power exercised by constitutional courts can potentially foster deliberation among the greater public.⁵⁷⁹

Friedman, for example, argues that by ruling over controversial cases such as abortion rights and racial segregation,⁵⁸⁰ the US Supreme Court has promoted public awareness and engagement on these issues.⁵⁸¹ By attempting to settle difficult political disputes, the US Supreme Court has revealed fundamental political and constitutional conflicts in society. Friedman argues that in many such cases, the Supreme Court's decision sparked public deliberation and encouraged political activists to further challenge issues that concern constitutional rights and public values. Thus, the Court kept the discussion going until a new kind of consensus or resolution was achieved. For example, progress with respect to same-sex marriage in the United States and Canada was made through court rulings.⁵⁸² The media plays an important part in this regard. Studies have shown that media coverage of the Supreme Court as an institution is largely favourable.⁵⁸³ Extensive coverage by the media of Supreme Court decisions can help to raise public attention to the issues deliberated over in court, which can promote further deliberation among the general public and result in further constitutional challenges and policy changes. Kong and Levy contend that exposing the arguments against same-sex marriage to judicial scrutiny in the United States and Canada helped to eliminate weak or unsupported arguments from public discourse:

In light of the available information about the circumstances of couples in same-sex relationships and the consequences of recognizing same sex marriages, and after reflection and reciprocal discussion about these facts and the relevant ethical questions, the

⁵⁷⁹ See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2010). See also John Ferejohn and Pasquale Pasquino, 'The Counter-majoritarian Opportunity' (2010) 13(2) *Journal of Constitutional Law* 353, 360.

⁵⁸⁰ *Roe v. Wade*, 410 US 113 (1973); *Brown v. Board of Education*, 347 US 483 (1954).

⁵⁸¹ Friedman, above n 579.

⁵⁸² See Levy and Orr, above n 8, 9, n 34; Hoi Kong and Ron Levy, 'Deliberative Constitutionalism', in André Bächtiger, John Dryzek, Jane Mansbridge and Mark Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, forthcoming).

⁵⁸³ See Bryna Bogoch and Yifat Holzman-Gazit, 'Mutual Bonds: Media Frames and the Israeli High Court of Justice' (2008) 33(1) *Law and Social Inquiry* 53, 54.

arguments in support of bans could not be maintained. Moreover, the judicial reasoning in these cases shaped political deliberation across the polity, and this catalytic force of judicial review attracts the deliberative constitutionalist's attention.⁵⁸⁴

Ferejohn and Pasquino analyse this phenomena in the European context. They argue that in Germany, Italy, Spain and France, constitutional courts act in a deliberative manner by generating dialogue with other governmental departments and among the general public.⁵⁸⁵

The court can also promote popular deliberation by producing rulings that safeguard political activism and freedom of speech. An example of this can be found in the position taken by the Israeli Supreme Court in several cases regarding Israeli election campaigns. Israel's election laws forbid anyone who expresses opinions that negate Israel's Jewish and democratic character or incites racism from running in parliamentary elections for the Knesset.⁵⁸⁶ The law was enacted in 1985 after the Central Elections Committee disqualified a far-right Jewish party and an Arab nationalist party from running for the Knesset. This decision was reversed by the Supreme Court, which ruled that the law at that time did not allow a political party to be barred on the grounds of racism.⁵⁸⁷ The Court suggested however that the law should be amended, and the Knesset amended it and added 'incitement to racism' as grounds for barring a party from participating in elections. Populist Knesset members have since made it a practice before each Israeli parliamentary election to try to disqualify some ultra-nationalist Jewish and Arab candidates and parties.⁵⁸⁸ Decisions to disqualify a candidate or a

⁵⁸⁴ See Kong and Levy, above n 582.

⁵⁸⁵ Ferejohn and Pasquino, 'The Countermajoritarian Opportunity', above n 581; Ferejohn and Pasquino, 'Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice', above n 509. See also above p 123 regarding their distinction between 'externally' and 'internally' deliberative courts.

⁵⁸⁶ S 7A to *Basic Law: The Knesset (1958)* 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; (2) incitement to racism; (3) support of armed struggle, by a hostile state or a terrorist organization, against the State of Israel'. Full English translation of the law is available at <https://knesset.gov.il/laws/special/eng/basic2_eng.htm>.

⁵⁸⁷ EA 3/84 *Neiman v. Chairman of the Elections Committee* [1985] IsrSC 39 2(225).

⁵⁸⁸ See for example *Panel bars Arab MK, far-right candidate from Knesset elections* (February 12 2015) The Times of Israel <<http://www.timesofisrael.com/panel-bars-arab-mk-far-right-candidate-from-knesset-elections/>>.

political party are made by the Central Elections Committee, which is composed of Knesset members. However, these decisions must also be approved by the Israeli Supreme Court. The only political party that was ever banned by the Supreme Court from running in parliamentary elections under this law was the Jewish far-right Kach party which was disqualified from participating in the 1988 and 1992 elections.⁵⁸⁹ In the vast majority of cases, the Supreme Court has reversed decisions made by the Central Elections Committee and allowed extreme candidates and parties to run in elections for the Knesset.⁵⁹⁰

In related decisions, the Israeli Supreme Court also set aside resolutions to lift parliamentary immunity from Arab Knesset members who allegedly expressed support for terrorist organisations.⁵⁹¹ In his judgment, Chief Justice Barak noted that parliamentary immunity is essential in order to guarantee the right of all citizens to full and effective political representation. Barak stressed that this is essential mainly with respect to citizens who are members of minority groups, in order to guarantee a free marketplace of ideas and opinions:

Substantive immunity protects the right of all citizens to have their opinions and outlooks heard, through their elected representatives, in the various frameworks of public debate in general, and in parliament in particular. This protection is essential mainly for citizens who are members of minority groups in society. In this sense, substantive immunity also furthers civil equality, in that it protects even the right of members of minority groups in society to full and effective political representation, and it protects them by

⁵⁸⁹ EA (election appeal) 1/88 *Neiman v. Chairman of the Elections Committee* [1988] IsrSC 42 4(177). EA 2858/92 *Movshovitz v. Chairman of the Elections Committee* [1992] IsrSC 46 3(541); The Court has disqualified a radical left party in 1965, before the law was in place. See Mordechai Kremnitzer, 'Disqualification of Lists and Parties: The Israeli Case' in András Sajó and Lorri Rutt Bentch (eds), *Militant Democracy* (Eleven International Publishing, 2004) 157, 157. See also Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Bloomsbury Publishing, 2014) chapter 4.

⁵⁹⁰ See, for example, Election Confirmation 11280/02, *Central Elections Committee v. Ahmed Tibi*; Election Confirmation 50/03, *Central Elections Committee v. Azmi Bishara*; Election Appeal 131/03, *Balad – The National Democratic Assembly v. Central Elections Committee* (15.5.2003).

⁵⁹¹ See HCJ 11225/03 *Bishara v. Attorney-General* (1.2.2006) English translation available at <http://elyon1.court.gov.il/Files_ENG/03/250/112/v08/03112250.v08.pdf>. Knesset Members have the right of parliamentary immunity, which ensures that a Knesset Member will not bear criminal or civil responsibility for any act which he or she performed in order to fulfil his or her duty. See *Knesset Members Immunity, Rights and Duties Law* (1951) English translation available at <https://www.knesset.gov.il/description/eng/eng_work_chak1.htm>.

protecting the member of the Knesset, who represents their interests and their opinions, against the power of the majority.⁵⁹²

The Court in these cases overruled resolutions made by the Central Elections Committee or the Knesset Ethics Committee (both are democratically representative bodies, as they are composed of members of the Knesset). The Court repeatedly took the position that political ideas that the majority may deem as extreme and disturbing are nevertheless legitimate in a democratic society:

[S]ubstantive immunity is essential in order to guarantee a free marketplace of ideas and opinions. Here too this immunity is especially important when we are speaking of opinions and ideas that are offensive or outrageous, and it is especially required for elected representatives who express opinions that are regarded by most of the public as such. Indeed, 'freedom of expression is also the freedom to express dangerous, offensive and perverse opinions, from which the public recoils and which the public hates'.⁵⁹³

The Court has reiterated in these cases that laws that enable disqualification of a party or a candidate from election to parliament should be interpreted in a very narrow and limited way and applied only in the most extreme cases.⁵⁹⁴ One of the reasons the Court provided in justifying its position was that some minority groups may feel excluded from the political process if their favourite candidates are disqualified.⁵⁹⁵ By allowing these candidates to run and be elected, even people with extreme views are encouraged to take part in the democratic process.⁵⁹⁶

Having interpreted the law very narrowly, the Court has made it practically impossible to disqualify a party or a candidate. By allowing candidates that hold extreme views, both from Arab groups and Jewish groups, to run for parliament, the Supreme Court has sent a message that the best way to address controversial ideas is through free speech and public deliberation. On one hand, it is questionable whether extreme political views are able to comply with the deliberative democratic requirements of reciprocity and

⁵⁹² See HCJ 11225/03 *Bishara v. Attorney-General* (1.2.2006), President Barak [8].

⁵⁹³ *Ibid* (citing HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* (1987) IsrSC 41(3) 255, [21] p. 279).

⁵⁹⁴ See EA (election appeal) 1095/15 *Elections committee v. Zoabi* (10.12.2015), President Naor [8].

⁵⁹⁵ *Ibid* [5, 64].

⁵⁹⁶ See also Sunstein, above n 498, 150.

equality. On the other hand, this approach may be seen as deliberative in that it is more inclusive and allows more groups to take part in political deliberation.⁵⁹⁷ It also requires that extreme views be met by countervailing, more rational and deliberative ideas.

Court decisions in controversial issues can also produce deliberative democratic initiatives among the general public. An example of such an outcome followed a series of rulings by the Israeli Supreme Court during the 1990s regarding the relationship between the Jewish state and the Jewish religion.⁵⁹⁸ Repeated petitions to the Court challenging religiously motivated laws and policies have led secular and religious Israelis to come together to try to reach an agreement over issues relating to the role of religion in the public sphere such as the opening of businesses on the Sabbath (Saturday) and Kosher food regulations. One such deliberative initiative culminated in the 'Gavison-Medan Covenant' – an attempt for a social covenant between religious and secular Jews in Israel.⁵⁹⁹ This covenant was co-written by Ruth Gavison, a law professor from the Hebrew University, and Rabbi Yaacov Medan. This was a novel method of dialogue that took place between two persons working one-on-one rather than in a larger forum. Working together, Professor Gavison and Rabbi Medan were able to reach an agreement on all of the controversial issues regarding the relationship between the state and the Jewish religion. They compensated for the non-representation of other groups by sharing the details of their evolving agreements to various focus groups and public figures for feedback, incorporating comments into the final text of the Covenant.⁶⁰⁰ Although the Covenant was not adopted by Israeli politicians, it still inspires attempts to reach an acceptable compromise on this issue.⁶⁰¹

⁵⁹⁷ O'Flynn, 'Divided Societies and Deliberative Democracy', above n 364, 743.

⁵⁹⁸ These rulings reversed or withheld various religiously motivated laws concerning marriage, burial, Kosher food regulations, opening of business on Saturdays, conversions to Judaism etc. For a detailed review of these cases and issues see Shimon Shetreet, 'The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel' in Winfried Brugger and Michael Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer Berlin Heidelberg, 2007) 87.

⁵⁹⁹ See Yoav Artsieli, *The Gavison-Medan Covenant Main Points and Principles* (The Israel Democracy Institute, 2004) <<http://en.idi.org.il/media/1353278/GavisonMedanCompact-MainPrinciples.pdf>>.

⁶⁰⁰ See the Covenant website at <<http://gavison-medan.co.il/english/about-the-covenant/>>; <<https://gavison-medan.co.il/english/the-action-group/>>.

⁶⁰¹ See, for example, Jeremy Sharon, *Cabinet Passes Responsibility For Tel Aviv Shabbat Laws Back To Deri* (29 January 2017) The Jerusalem Post <<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Cabinet-passes-responsibility-for-Tel-Aviv-Shabbat-laws-back-to-Deri-479935>>.

In this part I have shown how the court can foster democratic deliberation among the general public. In the next part I will provide a list of criteria that can be used to assess deliberative levels of different courts.

D. Evaluating the deliberative quality of courts

I have explained how courts can play an important role in a deliberative democracy, especially when divided societies and diaspora populations are involved. However, the fact that courts are better situated to conduct effective deliberation does not mean that all courts live up to such expectations.⁶⁰²

How exactly should one evaluate a specific court's 'deliberativeness'? Analysing whether a constitutional court is deliberative or not requires scrutiny of its structure, as well as the content and context of specific decisions.⁶⁰³

Mendes, for example, offers a three-tier test to evaluate a constitutional court's deliberative level. Each tier examines specific deliberative parameters in a different stage of a case proceeding before the court.⁶⁰⁴ As Mendes summarises:

[A]n ideal-type deliberative court, put straightforwardly, is one that maximizes the range of arguments from interlocutors by promoting public contestation at the pre-decisional phase; that energizes its decision-makers in a sincere process of collegial engagement at the decisional phase; and that drafts a deliberative written decision at the post-decisional phase.⁶⁰⁵

In the next sections I supplement Mendes' three criteria to provide a comprehensive list of deliberative features that can be used to evaluate a court's deliberative level. I use these evaluative criteria in the next chapter when discussing cases from Israeli Supreme Court.

⁶⁰² Mendes, above n 15, 92.

⁶⁰³ Ibid 104.

⁶⁰⁴ Ibid 103.

⁶⁰⁵ Ibid 107.

i. Accessibility

Standing requirements (*locus standi*) determine who can bring cases to the court and under what circumstances. For example, the Israeli Supreme Court standing requirements are much more liberal than that of the US Supreme Court: people do not have to prove that they have been personally injured in order to bring a case before the Israeli Supreme Court.⁶⁰⁶ The court's accessibility also comes into play during proceedings, affecting, for example, how easy it is to submit expert or *amicus curiae* opinions. A more accessible court will in one sense be more deliberative. Mendes believes accessibility contributes to the stage of 'Public Contestation', when written and face-to-face interaction among interlocutors (such as lawyers, witnesses or experts) and judges takes place. In this stage, a deliberative approach aims to bring about the actual involvement of as many interested actors as possible in presenting arguments to the court. A deliberative court will pay close attention to such parties, listen to their arguments and discuss them seriously.

It should be noted however that accessibility has its costs. Various problems may arise if the court takes on too many cases, especially on issues that are political in nature.⁶⁰⁷ The court may become swamped with petitions, proceedings may take years to conclude and a court that encroaches too much on the executive and legislative branches may motivate politicians to limit its powers to intervene in policy issues.⁶⁰⁸

ii. Reflective court

For a constitutional court to be able to produce a high level of deliberation, it needs to be reflective of different groups in society. It can do so partly by having judges from different backgrounds so as to allow for a plurality of viewpoints and perspectives. A court that comprises judges from different segments of the society will be more likely to produce different viewpoints and fruitful deliberations among its judges than a court that comprises only members of one particular group.⁶⁰⁹ It will also be more likely to

⁶⁰⁶ See Emily Singer Hurvitz, 'Future of the AUMF : Lessons From Israel's Supreme Court' (2014) 4(2) *American University National Security Law Brief* 43, 55, 59.

⁶⁰⁷ See below p 162.

⁶⁰⁸ See below n 716

⁶⁰⁹ Lever, above n 514, 810.

produce dissenting opinions which are also important from a deliberative perspective (as discussed below).⁶¹⁰

iii. Style of the rulings

A deliberative constitutional court will produce thorough and clear judgements that engage with different views, without needlessly resorting to legalistic language.⁶¹¹ It concerns the literary style of the final written decision delivered by the court. To accord with deliberative principles such as transparency and publicity, the court must communicate its decision clearly and coherently to the general public. It is not enough to say what the answer is according to law. The court should try to engage in its judgement with different points of view in a comprehensive way. The decision needs to acknowledge and respect dissenting opinions and leave room for 'new deliberative rounds' in case the circumstances change or new facts will be discovered.⁶¹² However, complying with all the above may result in long and complex judgments. This may be counterproductive, as long judgments may discourage laypersons from reading through and follow the court's reasoning. The need for short, clear judgments must be balanced with the need to provide well-reasoned judgments.

iv. Dissenting opinions and intra-court dynamics

Effective deliberation requires judges to listen and address their peers' arguments, and explain why they adhere or dissent from the views of their colleagues.⁶¹³ In this context, dissenting opinions can play an important role in promoting democratic deliberation. Particularly in divided societies, the importance of dissenting opinions should not be underestimated. Dissenting views can give voice to minority groups and indicate to the majority that minority opinions can also be reasonable and legitimate.

The power of one single judge to impede a decision may be obstructive and encourage bargaining rather than deliberation. It is also true that sometimes a dissenting opinion can provide the minority with the language of further resistance, especially in divided

⁶¹⁰ For more on the benefits of 'reflective' courts see above p 133 and below p 164.

⁶¹¹ Mendes calls this 'Deliberative Written Decision'. See Mendes, above n 15, 103-7.

⁶¹² Mendes, above n 15, 110.

⁶¹³ Mendes calls this 'Collegial Engagement' which refers to the interaction that occurs between the judges before making a decision (as opposed to the first stage where the judges collect arguments from outside players). See Mendes, above n 15, 103-7.

societies, and especially if the dissenting judge is affiliated with that minority group. However, allowing dissenting views can often alleviate the tension between different groups in a divided society. Dissenting voices also help to bolster the legitimacy of the majority opinion by showing that counter arguments were taken into account before being rejected. Sometimes, a dissenting view can sow the seeds for future reversal of a decision based on what was previously a minority view. For example, Justice John Marshall Harlan's dissenting opinion in *Plessy v. Ferguson*⁶¹⁴ inspired those who fought against racial segregation, ultimately leading to the reversal of *Plessy v. Ferguson* in *Brown v. Board of Education*.⁶¹⁵ Dissenting opinions are examples of the deliberative principle that a majority decision is merely an unavoidable break in an ongoing discussion that records an interim result in the discursive process.⁶¹⁶ Moreover, in some cases, a dissenting opinion in a judgment may reflect a majority opinion among the general public (for example, if a majority in court decides to limit the governments' powers to surveil or punish terrorism suspects). In such cases, it is even more important to have such views expressed and acknowledged in a dissenting opinion.

v. *Dialogue between the court and other institutions*

Another deliberative tool that a court can use is to give the legislator a 'second chance' to deliberate over and change (or reaffirm) a particular law that may be deemed unconstitutional. This 'weak-form' of judicial review allows for an inter-branch dialogue between courts and legislatures. Various jurisdictions adopted 'reasonable limitations' or 'legislative override' clauses that allow legislatures to respond to judicial rulings.⁶¹⁷ As Nino argues, through such measures 'judges would have an active role in contributing to the improvement of the quality of the process of democratic discussion and decision,

⁶¹⁴ *Plessy v. Ferguson*, 163 US 537 (1896).

⁶¹⁵ See Charles Thompson, *Plessy v. Ferguson: Harlan's Great Dissent* (1996) Brandeis School of Law Library <<https://louisville.edu/law/library/special-collections/the-john-marshall-harlan-collection/harlan-s-great-dissent>>.

⁶¹⁶ Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, above n 239, 179; Hansen and Rostbøll, above n 8, 508.

⁶¹⁷ For more on the subject of 'weak-form' judicial review see Mark Tushnet, 'Dialogic Judicial Review' (2009) 61(2) *Arkansas Law Review*, 205; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2012); Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016); Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press, 1996); Emmett Macfarlane, 'Dialogue or compliance? Measuring legislatures' policy responses to court rulings on rights' (2013) 34(1) *International Political Science Review* 39, 40.

stimulating public debate and promoting more reflective decisions'.⁶¹⁸ However, as the court relies heavily on public trust for its legitimacy, such measures should be used very cautiously and only on rare occasions. Otherwise, the court risks backlash from parliamentarians.

vi. Effects on public deliberation

As discussed above, the court is also able to promote deliberation among the greater public. This is more likely to happen when there is extensive media coverage of court cases, and so the relationship between the court and the media is an important factor when evaluating a court's public deliberative effects. When court cases receive broad media coverage, there is more chance that public deliberation will ensue. To promote effective deliberation, the media should make an effort to provide the public with sufficient information through extensive, balanced and detailed coverage.⁶¹⁹ News articles and opinion columns that cover the proceedings and the parties' different arguments help the public to follow the reasoning behind the judges' decisions.

E. Summary

In this chapter I argued that even though courts are far from perfect, constitutional courts in Western liberal democracies can and often do uphold a number of important deliberative qualities. Constitutional courts can be deliberative in two broad senses: one is the deliberation which takes place in the court itself, and the other is the deliberation which the court fosters inter-institutionally and among the general public. I have also set out a framework for assessing the deliberativeness of a court. In the next chapter I use the deliberative criteria presented in this chapter to examine the deliberative democratic nature of the Israeli Supreme Court.

⁶¹⁸ Nino, above n 2, 216.

⁶¹⁹ See Jacob Rowbottom, 'Deliberation and Mass Media Communication in Election Campaigns' (2013) 12(4) *Election Law Journal: Rules, Politics, and Policy* 435.

VI. Case study – The Israeli Supreme Court

In the previous chapters I provided conceptual background. I outlined diaspora theory and explained what diasporas are, why diaspora people often identify with their kin-states and how both diaspora communities and kin-states influence each other. I then reviewed deliberative democratic theory and explained its main principles. I identified gaps in the literature and problems associated with the implementation of deliberative democratic theory to divided societies and societies with large diaspora populations. I also discussed the roles of elites and courts in promoting and maintaining democracy. I further explained why elite models of democratic deliberation are perhaps more suitable than popular models when addressing divided societies with large diasporic populations.

In this chapter I examine how the theories and ideas discussed in previous chapters might materialise in the real world. This chapter demonstrates in practice my analysis of diaspora theory and deliberative democracy through case studies from the Israeli Supreme Court. I look closely at the deliberative qualities (and faults) of the Israeli Supreme Court. I then show how these deliberative features have been exhibited in specific cases in which the Israeli Supreme Court dealt with constitutional issues that involved the Jewish diaspora and other groups of non-citizens.

I start by providing relevant background on Israel's relationship with the Jewish diaspora. I explain why Israel makes an interesting and relevant case study for demonstrating the different ways in which diaspora people can influence their kin-state politics. I also provide a historical overview of the Israeli Supreme Court in order to explain how it has developed certain unique deliberative features. I consider the deliberative democratic advantages of these features as well as their disadvantages. I explain how these deliberative features enable different groups of non-citizens, such as diaspora Jews, to effectively participate in constitutional deliberations and affect Israeli government policies. I also discuss the problems that arise as a result of such an involvement. I examine in detail specific rulings of the Israeli Supreme Court in constitutional cases that were of particular concern to members of the Jewish diaspora.

In some of these cases, Jewish groups from the diaspora were directly involved or represented in the proceedings either as petitioners or respondents. In other cases, Jewish diaspora organisations provided funding and support for Israeli NGOs to challenge legislation and government policies in the Supreme Court. I also demonstrate here how other groups of non-citizens, such as Palestinians and asylum seekers, have used the Court to challenge Israeli laws and policies. Finally, I explain how these different cases have contributed to deliberation among the greater Israeli public.

The cases from the Israeli Supreme Court support several key points I make in this thesis. First, these cases show how diaspora communities can affect political life in the kin-state through legal activism⁶²⁰ rather than by voting. Second, the cases show how a deliberative court can embody principles of democratic deliberation within a divided society. Third, the cases show how the court fosters democratic principles by allowing groups of non-citizens to participate in deliberations regarding constitutional issues.

A. Background – Israel and the Jewish diaspora

i. Why Israel?

There are a number of reasons why Israel is an interesting and relevant case study for demonstrating the different ways in which diaspora people can influence their kin-state politics. First, Israel is a relatively new country, albeit seen by its founders as a modern reincarnation of the ancient Jewish kingdoms that existed in the same area during the first millennia B.C.⁶²¹ It was therefore established as a national home for all Jews worldwide and was consumed from its inception with its relationship with the Jewish diaspora.⁶²² The fact that about half of the global Jewish population lives outside Israel makes the relationship between Israel and its diaspora significant and complex. Second, Israel was established as a democracy with liberal tendencies but with a significant

⁶²⁰ That is, the process of petitioning the Supreme Court in order to change certain government policies.

⁶²¹ See Robin Cohen, *Global Diasporas: An Introduction* (Taylor & Francis e-Library, 2001) 115.

⁶²² See *The Declaration of The Establishment of The State of Israel* May 14, 1948. English translation available at <http://www.knesset.gov.il/docs/eng/megilat_eng.htm>.

religious character; it has always contained substantial religious and ethnic minorities.⁶²³ As discussed above, the tension between the kin-state's connection to its national diaspora and its accommodation of ethnic minorities within its borders is typical in countries with dominant diasporic populations.

Finally, Israel presents a fully developed example of the range of permutations available in the evolution of the relationships between diaspora communities and their kin-states.⁶²⁴ The interaction between the State of Israel and the Jewish diaspora is often viewed by other diaspora communities and their kin-states as a model to be emulated.⁶²⁵ For example, the Irish Minister for Diaspora Affairs has recently outlined a proposal for 'an orientation course on what it is to be Irish' aimed at young people from the Irish Diaspora, 'similar to the Israel Taglit-Birthright scheme which has seen more than 400,000 young Jewish people visit Israel over the past 15 years'.⁶²⁶ Looking at the relations between Israel and the Jewish diaspora can therefore be useful in gauging future developments in other relationships between countries and their diaspora populations.

ii. Israel as a Jewish state

Israel was established as a national home for all Jews worldwide.⁶²⁷ As the putative nation state of all Jews, Israel's commitment to the help and protection of Jews has been clearly manifested in several laws, for example: the 'Law of Return' provides immigration privileges to people of Jewish heritage;⁶²⁸ another law provides for the prosecution of crimes against Jews during the Nazi regime (before Israel was

⁶²³ When Israel was created in 1948, about 14% of its population was of Arab ethnicity. Today, the Arab minority amounts to about 20% of Israel's population, most of them are Muslim (see *The Arab Population in Israel* (Israel Central Bureau of Statistics, Statistilite no. 27, 2002) <<http://www.cbs.gov.il/statistical/arabju.pdf>>.

⁶²⁴ Shain, above n 5, 129.

⁶²⁵ Ibid 130; Cohen, above n 621, 51; Safran, above n 31.

⁶²⁶ Kenny, above n 157.

⁶²⁷ See *The Declaration of The Establishment of The State of Israel* May 14, 1948. English translation available at <http://www.knesset.gov.il/docs/eng/megilat_eng.htm>.

⁶²⁸ *Law of Return 5710-1950*. An English translation available at <<http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>>.

established),⁶²⁹ and another law purports to apply Israeli penal law to acts outside Israel against the life, person, health, freedom or property of a Jew or the property of a Jewish institution.⁶³⁰ Such laws represent a commitment by the State of Israel to the Jewish people, wherever they reside. However, Israel has also always been a home to a substantial Arab minority, as well as other minorities.⁶³¹ Israel's declaration of independence promised to 'ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex' and appealed to the 'Arab inhabitants of the State of Israel' to 'preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions'.⁶³²

Originally, Israeli law remained silent with regard to the state's official national character. However, in 1992, Israel was for the first time defined in one of its basic laws as a 'Jewish and democratic state'.⁶³³ Rather than providing clarification, this newly introduced definition only raised questions and tensions regarding the relationship between the 'Jewish' and the 'democratic' elements of Israeli society.⁶³⁴ Over the years, right wing Knesset members have attempted to amend the basic law so as to strengthen the state's Jewish character, while left wing Knesset members have tried to emphasise the state's democratic character.⁶³⁵

⁶²⁹ *Nazis and Nazi Collaborators Punishment Law* 5710-1950. English translation available at <<http://www.mfa.gov.il/MFA/MFA-Archive/1950-1959/Pages/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571.aspx>>.

⁶³⁰ *Penal Law* 5737-1977, s 13(b)(2).

⁶³¹ See above n 623.

⁶³² *The Declaration of The Establishment of The State of Israel* May 14, 1948. English translation available at <http://www.knesset.gov.il/docs/eng/megilat_eng.htm>.

⁶³³ According to s 7A.A of *Basic Law: The Knesset (1958)*: '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 goals 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 ...'. Full English translation of the law is available at <https://knesset.gov.il/laws/special/eng/basic2_eng.htm>.

⁶³⁴ For more on this, see Asher Ma'oz (ed), *Israel as a Jewish and Democratic State* (The Jewish Law Association, 2011).

⁶³⁵ For recent attempt see Daniel Eisenbud, *Hundreds Protest 'Jewish State Bill' at PM's Residence in Jerusalem* (29 November 2014) *The Jerusalem Post* <<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Hundreds-protest-Jewish-state-bill-at-PMs-residence-in-Jerusalem-383184>>; Uriel Lynn, *No to the Nation State Law* (23 December 2014) *The Jerusalem Post* <<http://www.jpost.com/Opinion/No-to-the-nation-state-law-385552>>; Oded Revivi, *What's Wrong with the Jewish Nation State Law?* (12 January

iii. Jewish diaspora and the State of Israel

When Israel was established in 1948, only 650,000 Jews resided in its territory, most of them of European background. This number represented less than 10% of the global Jewish population at that time.⁶³⁶ Between 1948 and 1951, Israel's population more than doubled as a result of massive immigration of Jewish refugees from Arab and Muslim countries in the Middle East.⁶³⁷ Following the collapse of the Soviet Union in the early 1990s, around one million people of Jewish origin migrated to Israel from former Soviet Union countries.⁶³⁸ Today, 69 years after Israel's establishment, Israel is home to more than six million Jews, which makes it the largest Jewish community in the world. However, just over 50% of the world's Jewry still live outside Israel.⁶³⁹ The biggest Jewish communities outside Israel are in the United States (5,700,000), France (467,500) and the United Kingdom (290,000).⁶⁴⁰

From their very early days in the 19th century, Zionist endeavours in Palestine received financial support from the Jewish diaspora.⁶⁴¹ Today, many members of the Jewish diaspora see themselves as connected to Israel to various degrees.⁶⁴² Generally, Jews who live in the diaspora are not Israeli citizens and therefore cannot vote in Israeli elections. To acquire Israeli citizenship and be eligible to vote in Israel, a Jewish person (or her spouse and children) must immigrate to Israel and be registered as an Israeli resident.⁶⁴³ Diaspora Jews are nonetheless involved in Israeli politics. For example,

2014) The Jerusalem Post <<http://www.jpost.com/Opinion/Whats-wrong-with-the-Jewish-nation-state-law-383365>>.

⁶³⁶ See Michael Lipka, *The continuing decline of Europe's Jewish population* (9 February 2015) Pew Research Center <<http://www.pewresearch.org/fact-tank/2015/02/09/europes-jewish-population/>>.

⁶³⁷ See Danny Ben-Moshe, 'Jewish Immigration to Pre-State and Modern Israel' in Mark Avrum Ehrlich (ed), *Encyclopedia of the Jewish diaspora : Origins, Experiences, and Culture, Volume 1* (ABC-CLIO, 2009) 328, 329–30.

⁶³⁸ Ibid 330.

⁶³⁹ See *Annual Assessment 2015-2016, Executive Report to the Government of Israel*, above n 61, 16.

⁶⁴⁰ Ibid 16–7.

⁶⁴¹ Shain, above n 5, 54.

⁶⁴² See Shmuel Rosner, *Agreeing to Disagree : Jewish Peoplehood – Between Attachment and Criticism* (The Jewish People Policy Institute, 2012) <http://jppi.org.il/uploads/Agreeing_to_Disagree-Jewish_Peoplehood_Between_Attachment_and_Criticism.pdf>.

⁶⁴³ See *Knesset Elections Law (Consolidated Version) – 1969*, s 26. For an English summary of Israeli election laws see <http://www.knesset.gov.il/elections16/eng/laws/summary_eng.htm> Theoretically, any Jew (as defined by *the Law of Return*, see p 31) can immigrate to Israel, receive citizenship and vote. However, this process takes time, and one has to be registered as a resident in her local council to be able to vote.

numerous Jewish organisations (most notably the Jewish Agency, World Jewish Congress, the American Israel Public Affairs Committee, the New Israel Fund and J-Street) donate money to Israeli NGOs and their representatives meet frequently with Israeli government officials. Jewish millionaires also provide financial support to various Israeli political groups.⁶⁴⁴ The involvement of Jewish organisations in Israeli politics will be discussed in more detail in the case studies section, where I focus on diaspora Jews' involvement in constitutional cases deliberated in the Israeli Supreme Court.

Due to historical, cultural and demographic reasons, the Orthodox Jewish religious streams gained a monopoly over the religious establishment in Israel and accumulated considerable political power domestically. On the other hand, liberal streams of Judaism such as the Reform and the Conservative movements (the 'Progressive streams') have dominated Jewish communities in the diaspora, but do not have a significant presence in Israel. For example, 53% of Jews in the United States identify as Reform or Conservative while only about 5% of Jews in Israel identify as either Reform or Conservative; and while Orthodox Jews make up 22% of Israeli Jews, the share of American Jews who identify as Orthodox is only 10%.⁶⁴⁵

The reasons for this phenomenon are beyond the scope of this thesis, but are related to the fact that in Israel's early days, the vast majority of Israelis were secular, with a small Orthodox minority. (Due partly to high birth rates, Israel's Orthodox Jewry rose markedly in number in later years.) Most importantly, Jews in Israel do not need to be actively religious in order to feel 'Jewish'. Because in Israel the majority of the population is Jewish, Jewish people living in Israel are already connected to Jewish tradition and culture. For example, Hebrew is the official language, Jewish holy-days are official public holidays and businesses are closed on Saturday ('Shabbat') and open on Sunday. Therefore, Jews in Israel who seek to be actively involved in religious communities tend to be Orthodox. In contrast, Jews in the diaspora need to be actively involved in a Jewish community in order to remain and feel Jewish, and so non-Orthodox Jews actively

⁶⁴⁴ See Shain, above n 5, 54–100.

⁶⁴⁵ See *American and Israeli Jews: Twin Portraits From Pew Research Center Surveys* (27 September 2016) Pew Research Center <http://www.pewforum.org/2016/09/27/american-and-israeli-jews-twin-portraits-from-pew-research-center-surveys/?utm_content=buffer77a78&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>.

participate in Jewish activities that are normally affiliated with a Jewish synagogue or community. In other words, non-Orthodox Jews in Israel have the option to be secular Jews, while for Jews in the diaspora it is much more difficult to be secular and stay connected to Jewish tradition and culture. A 'secular Jew' in America or Australia, for example, will generally simply identify as an American or an Australian if she does not at least sometimes take part in Jewish community ceremonies and services, such as at a local Jewish community centre. In addition, as most Jews in the diaspora live in peaceful, well-established, Western liberal democracies, they tend to hold liberal values and so are more inclined to choose Progressive Jewish communities rather than Orthodox ones.⁶⁴⁶

This incongruity, where most diasporic Jews belong to Progressive Jewish streams, while most Israeli Jews are either secular or Orthodox, is a source of tension and conflict between the Jewish diaspora and the Israeli government.⁶⁴⁷ This will be demonstrated in some of the case studies discussed below.

Despite these tensions, both communities tend to feel a strong connection to each other. For example, a majority of American Jews say that they are either 'very' or 'somewhat' attached to Israel and that caring about Israel is either 'essential' or 'important' to what being Jewish means to them.⁶⁴⁸ In turn, most Israeli Jews say that American Jews have a positive impact on the way things are going in Israel and that a thriving diaspora is vital to the long-term survival of the Jewish people.⁶⁴⁹

B. The Israeli Supreme Court

In this part I provide background on the Israeli Supreme Court and explain its significance as a major political institution in Israel. Israel's Supreme Court has played a key role in

⁶⁴⁶ See Shain, above n 5, 73, 78; 'A Portrait of Jewish Americans - Findings from a Pew Research Center Survey of US Jews' (*Pew Research Center*, 2013) <<http://www.pewforum.org/files/2013/10/jewish-american-full-report-for-web.pdf>>; *American and Israeli Jews: Twin Portraits From Pew Research Center Surveys*, above n 645.

⁶⁴⁷ See Shain, above n 5, 65; Rosner, above n 642, 8; Jeremy Sharon, *Conservative Jewish Leader Says Israel Alienating Diaspora Jewry* (18 May 2014) *The Jerusalem Post* <<http://www.jpost.com/Jewish-World/Jewish-News/Conservative-Jewish-leader-says-Israel-alienating-Diaspora-Jewry-352621>>.

⁶⁴⁸ See *American and Israeli Jews: Twin Portraits From Pew Research Center Surveys*, above n 645.

⁶⁴⁹ *Ibid.*

shaping the contours of Israel's democracy. Since the 1980s, the Israeli Supreme Court has gained a global reputation for its 'judicial activism' and penchant for deliberating cases that involve not only legal, but also political and moral issues.⁶⁵⁰

The Israeli Supreme Court has nationwide jurisdiction and receives thousands of petitions each year.⁶⁵¹ In practice, the Court has almost no control over its docket, compared, for example, to courts in the United States and Canada where jurisdiction is mainly discretionary.⁶⁵² Apart from being the highest court of appeals on rulings of lower tribunals, it also functions as a high court of justice, hearing petitions against any government body or agent as a court of first and last instance.⁶⁵³ In this capacity, the Supreme Court exercises judicial review over decisions of government branches. As Israel does not have a formal constitution, judicial review is based on certain 'basic laws' and Supreme Court case law.⁶⁵⁴ According to Israeli law, the Supreme Court has powers 'in matters in which it considers it necessary to grant relief for the sake of justice and which are not within the jurisdiction of any other court or tribunal'.⁶⁵⁵ Importantly, the right to petition the Supreme Court as a high court of justice in such matters is not limited only to Israeli citizens; any person whose right was violated by an Israeli official or authority can seek relief from the Supreme Court as a high court of justice.

⁶⁵⁰ Assaf Meydani, *The Israeli Supreme Court and the Human Rights Revolution: Courts as Agenda Setters* (Cambridge University Press, 2011). By 'judicial activism' I mean that judges (especially in constitutional courts) are more willing to decide constitutional issues and to invalidate legislative or executive actions, sometimes by creatively interpreting laws according to their own views or preferences. See Kermit Roosevelt, 'Judicial Activism' (*Encyclopedia Britannica*, 2013) <<https://www.britannica.com/topic/judicial-activism>>.

⁶⁵¹ Bogoch and Holzman-Gazit, 'Mutual Bonds: Media Frames and the Israeli High Court of Justice', above n 583, 58.

⁶⁵² Keren Weinshall-Margel, 'Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel' (2011) 8(3) *Journal of Empirical Legal Studies* 556, 566.

⁶⁵³ See Suzie Navot, *Constitutional Law of Israel* (Kluwer Law International, 2007) 140–1.

⁶⁵⁴ See *Ibid* 156. After Israel gained independence, the Knesset enacted a series of 'Basic Laws', relating to some fundamental features of the government. These laws were created with the intention that they would eventually form a Constitution. See *Ibid* 35–8.

⁶⁵⁵ See s 15(c) to *Basic Law: The Judiciary (1984)*. English translation available at <https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm>.

The Court is composed of 15 judges and it normally sits in panels of three. However, in matters that involve fundamental constitutional issues or other issues of particular importance it sits in panels of five, seven, nine or eleven judges.

Historical and cultural circumstances gave rise to a dominant Supreme Court that has found itself well situated to deliberate over contested political issues.⁶⁵⁶ One important factor in this regard was that many of the first judges appointed to the Court were prominent Jewish legal scholars who were educated in Europe and wanted to implement in the young country the legal doctrines they absorbed from Europe's established democratic institutions.⁶⁵⁷ Another reason for the Israeli Supreme Court's gradual accumulation of power was the absence of a formal Israeli constitution. When the country was founded in 1948, Israel's Declaration of Independence provided the basic formation of the new state and called for the drafting of a constitution. However, decades passed and, for various political reasons, a constitution was never drafted. The Israeli Supreme Court therefore often found itself responsible for shaping the young nation's formative legal norms.⁶⁵⁸

However, it was not until the 1970s that the Supreme Court became more heavily involved in controversies regarding public life. This process continued through the 1980s and climaxed in the 1990s, making the Israeli Supreme Court famous as a principal advocate of political pluralism in Israel.⁶⁵⁹ Studies have found a sharp increase in the volume and success of organised interest group litigation before the Court since the 1980s.⁶⁶⁰ One study, for example, reviewed 2,869 petitions filed in the Supreme Court

⁶⁵⁶ See Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011).

⁶⁵⁷ See Ido Porat, 'The Use of Foreign Law in Israeli Constitutional Adjudication' in Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Bloomsbury Publishing, 2013); Martin Edelman, 'The Judicial Elite of Israel' (1992) 13(3) *International Political Science Review / Revue internationale de science politique* 235, 241.

⁶⁵⁸ For more on this issue see Navot, above n 589; Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Bloomsbury Publishing, 2013).

⁶⁵⁹ See Gad Barzilai, 'Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective' (1998) 5(2–3) *Israel Affairs* 15; Ofrit Liviatan, 'Judicial Activism and Religion-Based Tensions in India and Israel' (2009) 26(1995) *Arizona Journal of International and Comparative Law* 583.

⁶⁶⁰ See Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press, 2013) 39–40; Yoav Dotan and Menachem Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements' (2001) 23(1) *Law & Policy* 1, 11–15.

against the government between 2000 and 2006, and found that the Court became involved in 18% of cases.⁶⁶¹ Aharon Barak, who served as the President (Chief Justice) of the Supreme Court from 1995 to 2006 (having served as a Justice of the Supreme Court from 1975) was key in shaping the Supreme Court's dominant role in Israel's political culture.⁶⁶² The Supreme Court under Barak as Chief Justice attracted international plaudits as well as criticism.⁶⁶³ Barak relied on certain 'basic laws' that the Israeli Parliament had introduced in 1992 to give semi-constitutional protection to basic human rights such as freedom of professional occupation or trade, human dignity and liberty.⁶⁶⁴ Barak considered the passing of these laws to be a turning point in Israel's constitutional legal history, dubbing it a 'constitutional revolution'. During Barak's tenure as Chief Justice, the Israeli Supreme Court started to apply new standards of judicial review, based on the doctrines of reasonableness, rationality of the decision-making process, and proportionality.⁶⁶⁵ Barak's vision and leadership were instrumental in turning the Israeli Supreme Court into one of the most judicially activist constitutional courts in the world, challenging government regulations and parliamentary laws.⁶⁶⁶

C. The deliberative features of the Israeli Supreme Court

In this part I discuss the specific deliberative qualities of the Israeli Supreme Court, applying the criteria presented in the previous chapter. Analysing in depth the different features of the Israeli Supreme Court, their advantages and disadvantages and their transformation over the years is beyond the scope of this thesis. Rather the object of

⁶⁶¹ Assaf Meydani, 'The Intervention of the Israeli High Court of Justice in Government Decisions: An Empirical, Quantitative Perspective' (2011) 16(3) *Israel Studies* 174.

⁶⁶² See Dan Izenberg, *Landmark Cases* (14 September 2006) The Jerusalem Post Magazine <<http://www.jpost.com/Magazine/Features/Landmark-cases>>.

⁶⁶³ See Navot, above n 653, 37; Richard A Posner, *Enlightened Despot* (April 2007) The New Republic <<http://www.newrepublic.com/article/enlightened-despot>>; Martin Edelman, 'The Judicialization of Politics in Israel' (1994) 15(2) *International Political Science Review* 177.

⁶⁶⁴ See *Basic Law: Human Dignity and Liberty* (1992). English translation available at <http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm>; *Basic Law: Freedom of Occupation* (1994) English translation available at <http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm>.

⁶⁶⁵ Yoav Dotan and Menachem Hofnung, 'Legal Defeats--Political Wins: Why Do Elected Representatives Go to Court?' (2005) 38(1) *Comparative Political Studies* 75.

⁶⁶⁶ See Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*, above n 660, 15–39.

this part is to explain how certain features of the Israeli Supreme Court contribute to constitutional deliberations within Israeli society and make it possible for non-Israeli citizens to challenge Israeli laws and policies.

i. Accessibility

As discussed above, one may argue that the more people are able to participate and bring cases to the court, the more deliberative the court is. During the 1990s, access to the Israeli Supreme Court became fast, easy and inexpensive.⁶⁶⁷ This was enabled mainly through the broadening of standing and justiciability requirements so as to allow for more litigants and more issues to be brought before the Court.

1) Standing requirements

Probably the most conspicuous deliberative element of the Israeli Supreme Court is its very liberal right of standing (*locus standi*). Standing rules determine who can bring cases to the court and under what circumstances. In US courts for example, a plaintiff is required to show that she suffered personal injury caused by the defendant's conduct and that this injury can be corrected with the requested remedy.⁶⁶⁸

Until the 1980s, a similar approach existed in Israel. A petitioner against the State in the Supreme Court had to prove that she suffered a specific harm as a result of the State's action in order to have standing before the Court; a personal interest in a public matter was not enough. During the 1980s and the 1990s, the Supreme Court expanded the right of standing to such a degree that some argue that the Court has essentially abolished any standing requirements.⁶⁶⁹

⁶⁶⁷ Ibid 39.

⁶⁶⁸ *Allen v. Wright*, 468 US 737, 751 (1984) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 US 464, 472 (1982)). See Hurvitz, above n 606, 53.

⁶⁶⁹ See Eileen Kaufman, 'Deference of Abdication : A Comparison of the Supreme Court of Israel and the United States in Cases Involving Real or Perceived Threats to National Security' (2013) 12(1) *Washington University Global Studies Law Review* 96, 108. The reasons for this process are beyond the scope of this thesis. Mautner, for example, argues that this was a counter-reaction by the 'old elites', represented by the Supreme Court, against the rise of new groups in Israeli society, following the 1977 elections in which, for the first time, the Likud party (liberal-conservatives) has defeated the Labour party. See Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press, 2011); Menachem Mautner and Evelyn Gordon 'On the Supreme Court, and Others' (2009) 37 *Azure* <<http://azure.org.il/include/print.php?id=509>>. See also Daniel Friedmann, *The Purse and the Sword : The Trials of Israel's Legal Revolution* (Oxford University Press, 2016).

The Court now recognises 'public petitioner' standing in cases of public importance and receives petitions from NGOs and individuals even on matters of principle where there is no specific person who has suffered specific harm. As former Justice Procaccia explained in 2003:

In our case law, we have greatly extended the standing of a public petitioner in matters of a public nature that concern the rule of law, the enforcement of constitutional principles, or where intervention is necessary to repair a substantial error in government operations. The status of the public petitioner has been recognized even where the public petitioner cannot claim to have been personally affected or harmed.⁶⁷⁰

Importantly, one does not need to be an Israeli citizen in order to be able to seek justice from the Israeli Supreme Court. What is required in order to submit a petition is that the petitioner has an appropriate cause of action.⁶⁷¹ That is, if a person's rights under Israeli law have been violated by an Israeli government authority or official, that person can go directly to the Supreme Court in its capacity as a high court of justice and seek a remedy.

One obvious deliberative benefit of such standing rules is that it increases the accessibility of the Court and opens it to more individuals and organisations. Of course, the benefits of lax standing policies come at a cost. The judicial system can become overloaded and litigation can interfere with government policies and reduce efficiency. However, in cases of divided societies, the benefits of having an active court that gives voice to underrepresented groups and enjoys high levels of trust by all sectors of the public may be worth that price.

For example, the broad standing approach taken by the Court also has what we may call a positive chilling effect on extreme political activists. Some radical political activists have realised they may get more media coverage and better practical results by submitting cases to the Court than by organising violent protests. An example of how

⁶⁷⁰ H CJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Central Elections Committee for the Sixteenth Knesset* (23.1.2003) Justice Procaccia [7]. Full English translation available at <http://versa.cardozo.yu.edu/opinions/association-civil-rights-israel-v-chairman-central-elections-committee-sixteenth-knesset>.

⁶⁷¹ This was originally intended to allow Palestinians access to the Supreme Court in cases they were harmed. See *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law Vol. 1* (Israel Supreme Court, 2005), 7 <http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/terrorism_law.pdf>.

the accessibility of the Court helps to divert protest from violent to deliberative democratic avenues can be found in the legal battles surrounding the annual gay parade in Jerusalem: 'Jerusalem Pride—Love Without Borders'.⁶⁷² While gay parades in Tel Aviv have been held uninterrupted for many years, in Jerusalem gay parades faced strong opposition from religious groups. Over the years however, the battle over gay parades in Jerusalem was partly transposed to the Court, which ruled on several occasions that the parade should be allowed to take place, albeit in a specified area of the city.⁶⁷³ The fact that extreme religious activists chose to go to the Court, rather than trying to disrupt the parade violently, can be seen as a deliberative victory.⁶⁷⁴ It is difficult to imagine Ultra-Orthodox Jews sitting down together with gay activists in an attempt to reach an agreed compromise regarding the route of a gay parade in Jerusalem. Yet, this is effectively what happens in the Supreme Court each year, when both sides meet in Court before the parade takes place and eventually accept a compromise regarding the route and extent of the parade.⁶⁷⁵

2) *Amicus curiae*

The expansion of the right of standing was accompanied by a greater willingness by the Court to accept submissions and hear opinions of individuals who are not parties to the proceedings. In 1996, the Supreme Court started to accept submissions from third parties and NGOs as *amicus curiae*⁶⁷⁶ and even encouraged NGOs to join litigation and

⁶⁷² See *Legal Struggle: History of JOH* (The Jerusalem Open House for Pride and Tolerance, 2016) <<http://joh.org.il/index.php/english/legal-struggle-history-of-joh>>.

⁶⁷³ See for example HCJ 9089/06 Marzel and Ben-Gvir v. The Chief of Jerusalem District (27.12.2006); HCJ 5277/07 Marzel and Ben-Gvir v. The Chief of Jerusalem District (20.6.2007); HCJ 5317/08 Marzel and Ben-Gvir v. The Chief of Jerusalem District (21.7.2008).

⁶⁷⁴ This approach has not completely stemmed all violence. There have been two stabbing incidents at the Jerusalem gay parade over the last 12 years. However, this was reportedly due to police incompetence as both attacks were carried out by the same individual, who acted alone, see *Jerusalem Gay Pride Stabbing: Ultra-Orthodox Yishai Schlissel Jailed for Life* (26 June 2016) BBC News <<http://www.bbc.com/news/world-middle-east-36634148>>.

⁶⁷⁵ See *Marzel Declares 'Holy War' against Gay Parade* (18 September 2006) Ynetnews <<http://www.ynetnews.com/articles/0,7340,L-3305417,00.html>>.

⁶⁷⁶ *Amicus curiae* ('friend of the court') is a procedure in which the court invites a third party, which is not a direct party to the court proceeding, to make a submission or otherwise express its opinion on the case.

present their perspectives on constitutional issues.⁶⁷⁷ In the words of former Chief Justice Dorit Beinisch:

[I]n order to fulfil its role in a democratic society, the court needs to offer an effective, reliable address for those who seek justice. That is why I believe the court ought to open its gates to petitioners and allow relatively broad access. Standing requirements need to be liberal This is why human rights groups and other NGOs advocating for the rule of law have standing in our court [F]or the same reasons it opened its doors, the Supreme Court of Israel has avoided dismissing cases on grounds of threshold arguments, such as non-justifiability.⁶⁷⁸

3) Justiciability

The concept of justiciability refers to whether a court, especially a constitutional court, considers a specific case as appropriate for judicial determination, based on the substance of the dispute. In some cases, a court may decide that an issue is non-justiciable because it is political in nature and better fitted for determination by other bodies, such as the government or the legislator.⁶⁷⁹

As mentioned above, since the 1980s, the Israeli Supreme Court has accepted cases that other courts may have found too political.⁶⁸⁰ It did so by using more flexible justiciability doctrines than those applied, for example, by the US Supreme Court.⁶⁸¹ For example, the Israeli Supreme Court ruled over the question of whether there exists an 'Israeli Nationality'.⁶⁸² The Court also gave rulings in issues that concern military operations. For

⁶⁷⁷ See Meydani, above n 650, 73; Israel Doron and Manal Totry-Jubran, 'Too Little, Too Late? An American Amici in an Israeli Court' (2005) 19(1) *Temple International and Comparative Law Journal* 105.

⁶⁷⁸ Justice Dorit Beinisch, former President of the Supreme Court of Israel in *UK Lawyers for Israel Conference*, (London, July 7th, 2014) p 7-8. The full speech is available at <<http://www.uklfi.com/wp-content/uploads/The-Israeli-Legal-System-and-the-Role-of-the-Supreme-Court-July-2014.docx>>.

⁶⁷⁹ See Geoffrey Lindell, 'Justiciability' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2007).

⁶⁸⁰ See Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*, above n 660, 35–8.

⁶⁸¹ See Hurvitz, above n 606, 59; Kaufman, above n 669, 96–7, 117.

⁶⁸² CA 8573/08 *Ornan vs. Ministry of Interior* (2.10.2013) ('*Ornan*') English translation of excerpts of this ruling available at <<http://versa.cardozo.yu.edu/opinions/ornan-v-ministry-interior>>. For more on this case see below p 196.

example, the Court discussed the use of targeted killings.⁶⁸³ As Friedmann notes, although other countries use targeted killings, no court in any other country has seen fit to intervene in this issue.⁶⁸⁴ Overall, the Israeli Supreme Court decides on the merits of around 1500 cases a year, compared with only about 100 cases considered by the courts in the United States and Canada respectively.⁶⁸⁵

4) The costs of accessibility

The deliberative criterion of 'accessibility' requires that a court openly engage with as many interested parties as possible, and allow different kinds of petitioners to bring their grievances to the court. One can therefore argue that the more issues that are allowed before a court, the more deliberative that court is. Lax justiciability requirements will enable more democratic deliberation, as people would be able to bring before the court issues that otherwise may be deemed 'too political'. However, it is impossible to thoroughly deliberate each and every case. Time and resources are limited and it is possible that the deliberative qualities of a constitutional court may be weakened if a court attempts to deal with too many cases.

In the case of the Israeli Supreme Court, the changes in standing and justiciability requirement resulted in a variety of problems. For example, the broad standing and justiciability requirement caused the Court to be flooded with petitions.⁶⁸⁶ As a result, the time between the Court's hearing of a case and its handing down of a decision may now take several years. The Court's expansion into areas that were once considered non-justiciable has also caused backlash from politicians who in response have attempted to limit the Court's power and influence.⁶⁸⁷ There are also those who criticise the broad standing and justiciability policies on normative grounds. Some argue that the Court's intervention in military processes and operations has tied the hands of military

⁶⁸³ HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel* (13.12.2006) English translation available at <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf>. For more examples of rulings in security issues by the Israeli Supreme Court see Hurvitz, above n 606, 59; Friedmann, above n 669, 175-182.

⁶⁸⁴ Friedmann, above n 669, 179.

⁶⁸⁵ Weinshall-Margel, above n 672, 566.

⁶⁸⁶ See Friedmann, above n 669, 56.

⁶⁸⁷ See below n 716.

commanders and obstructed counter-terrorism efforts.⁶⁸⁸ Segev argues that by hearing ‘public petitioners’ on issues of ‘general public importance’, the court deviates from its function as the protector of individuals, and transgresses into public debates that ought to be deliberated and decided by public representatives.⁶⁸⁹

While there are challenges that may arise from an open court, one can still argue that the benefits of having an accessible constitutional court exceed the costs, especially in divided societies with large diaspora populations. As discussed above, the Israeli Supreme Court offers a place to sublimate violence and discord in Israeli society, which otherwise might be expressed through deeper, more violent, forms of division. The accessibility of the Supreme Court also allows for the inclusion of diaspora Jews in constitutional deliberations, as discussed in the next chapter.

ii. Appointment of judges

A court’s deliberative potential is also shaped by the system of appointing its judges. One can expect that a politicised appointment system will result in a more partisan court. Some argue that the unique system of appointing judges in Israel neutralises some issues that would otherwise undermine the deliberative qualities of a court.⁶⁹⁰ As noted by Edelman: ‘Israeli leaders have deliberately sought to create a judicial system insulated from an otherwise highly politicized society’.⁶⁹¹ The independence of the judges in the Israeli Supreme Court is guaranteed by several features: (i) the process by which they are appointed; (ii) their term of office; (iii) the fact that they are not subject to any other authority or person; and (iv) immunity from criminal liability for any act performed under their judicial role.⁶⁹²

Supreme Court judges are appointed with tenure, serving until they reach the age of 70. They are not dependent on the support of politicians for re-election. Judges are not

⁶⁸⁸ See Friedmann, above n 669, 181.

⁶⁸⁹ See Joshua Segev, ‘In Defense of the Traditional Right of Standing’ (2006) 49(2) *Hapraklit* 499 [in Hebrew].

⁶⁹⁰ For how the Israeli system differs from other common law countries see Ron Levy, ‘Judicial Selection Reform in Comparative Context’ (2007) 40(2) *University of British Columbia Law Review* 591.

⁶⁹¹ Edelman, ‘The Judicial Elite of Israel’, above n 657, 238.

⁶⁹² Navot, above n 653, 148.

appointed directly by the executive or legislative branch, but rather by a special Judicial Selection Committee. This Committee is composed of nine members: three Supreme Court Justices, two cabinet ministers, two members of parliament (one from the coalition and one from the opposition) and two lawyers from the Israeli Bar Association (usually representing the largest parties of the Bar). Friedmann claims that the three Supreme Court judges hold too much power over the Committee appointments:

[I]n practice the court's sitting justices ... served as a de facto nominating board that for all practical purposes usurped the power of the statutory committee. ... [T]he justices were able to manoeuvre the nominating process in a way that allowed them to determine, in almost every case, who their colleagues would be.⁶⁹³ ... [I]t transpired that ... the Judicial Selection Committee was not much more than a rubber stamp. The real decisions were made by the sitting justices.⁶⁹⁴

However, the Committee's composition makes it almost impossible for any particular group of members to promote appointments without gaining some support from other Committee members. The government controls only three seats (two cabinet ministers and one Knesset member), and the judges, even though in practice they always vote collectively as one block, do not have a majority and must form a 'coalition' with other members of the Committee in order to approve an appointment. This can cause problems, as occasionally the Committee is unable to reach an agreement and appointments of necessary judges become overdue. However the advantage of this method is that Committee members must reach a consensus and no political side is able to exclusively control the appointments.⁶⁹⁵

iii. Reflective court

I explained in the previous chapter why judges cannot fully represent all the different groups in a society. However, reflection of different groups and opinions within the society is important for effective democratic deliberation and for producing legitimacy. Although it is not a directly representative body, the Israeli Supreme Court is designed

⁶⁹³ Friedmann, above n 669, 197.

⁶⁹⁴ Ibid 204.

⁶⁹⁵ For more on the Israeli system of appointing judges See Bryna Bogoch and Yifat Holzman-gazit, 'Promoting Justices : Media Coverage of Judicial Nominations in Israel' (2014) 4 *Oñati Socio-legal Series* 631, 636.

to be reflective of the different major groups in Israeli society. As of March 2018, out of a total of 15 judges, four are women, four are religious Jews, and one is a Christian Arab. One judge, Neal Hendel, grew up in the Jewish diaspora before immigrating to Israel from the United States. Naturally, the bigger the quorum, the more reflective the Court can be of different viewpoints in society.⁶⁹⁶

Edelman describes how, over the years, efforts have been made to appoint judges from different backgrounds. For example, as most judges were male and of Ashkenazi decent (that is, of European Jewish background), there were deliberate attempts to appoint women and judges of Sephardi decent (that is, Jews of Middle Eastern or North African background).⁶⁹⁷ However, judges and members of the Selection Committee always made it clear that 'diversity' considerations are subordinate to legal expertise and that all judges were appointed for being excellent jurists.⁶⁹⁸

Friedmann claims that Supreme Court judges in the Judicial Selection Committee have treated the Court as a 'family' and blocked attempts to appoint to the Court judges who held different judicial philosophies to those held by Chief Justice Barak (e.g., conservatives who are against judicial activism).⁶⁹⁹ While this may have been true in the past, it seems that this is no longer the case. In the last round of appointments in 2017, the Committee approved the appointment of four new judges, two of which are considered to be conservatives.⁷⁰⁰

iv. Dissenting opinions and intra-court dynamics

Another deliberative criterion is the court's incidence of dissenting opinions. Dissenting opinions give voice to minority views and remind the majority that other opinions are also possible and legitimate. Occasionally in constitutional cases, a minority view in the court may represent a majority view in society.

⁶⁹⁶ See Navot, above n 653, 148.

⁶⁹⁷ Edelman, 'The Judicial Elite of Israel', above n 657, 239–40.

⁶⁹⁸ Ibid 240.

⁶⁹⁹ See Friedmann, above n 669, 204. See above n 650 for an explanation about 'judicial activism'.

⁷⁰⁰ See *All Shaked up: Israel's Justice Minister Imposes Four New Supreme Court Justices* (24 February 2017) The Economist <<http://www.economist.com/news/middle-east-and-africa/21717721-more-conservative-court-will-be-result-israels-justice-minister-imposes>>.

Studies have found a low level of dissent in the Israeli Supreme Court.⁷⁰¹ Shachar et al. found dissenting opinions in 5.8% of cases, which they describe as a low rate of dissent.⁷⁰² Eisenberg et al. have also found what they describe as a low level of dissent, albeit with higher levels of concurring opinions.⁷⁰³ These studies would suggest that the Israeli Supreme Court may – in one respect at least – be less deliberative than courts with higher rates of dissent. However, these studies need to be viewed in their context. The first study considered judgments dating before 1994, taking into account all cases that came before the Supreme Court, including criminal and civil appeals. In cases where the Court sits as High Court of Justice (which occurs in constitutional cases), the authors found a much higher dissent rate of 10.8%.⁷⁰⁴ Moreover, the second study examined only two years of data (2006-7) and while dissent rates were less than 2% overall, they were higher in discretionary cases.⁷⁰⁵

There has been no examination of the dissent rate specifically in constitutional cases, which are the most relevant cases for this thesis' assessment of the deliberativeness of the Court. As individuals and NGOs often try to challenge laws and policies of the Israeli government in the Supreme Court, many cases are dismissed at an early stage. I have examined the 15 cases in which the Supreme Court struck down a law (or a part of it) passed by the Knesset on the basis that it violated constitutional rights (see Appendix A at page 226). In nine of these cases there were dissenting opinions, which is a dissent rate of 60%. Seven of these cases had concurring opinions (46%) and only one case had neither a dissenting nor a concurring opinion. These findings suggest that one is likely to find dissenting and concurring opinions in major constitutional cases in the Israeli Supreme Court.

⁷⁰¹ Yoram Shachar, Miron Gross and Ron Harris, 'Anatomy of Discourse and Dissent in the Supreme Court - Quantitative Analyses' (1997) 20 *Tel Aviv University Law Review*, 749; Theodore Eisenberg, Talia Fisher and Issi Rosen-Zvi, 'Case Selection and Dissent in Courts of Last Resort An Empirical Study of the Israel Supreme Court' in Yun-chien Chang (ed), *Empirical Legal Analysis: Assessing the Performance of Legal Institutions* (Routledge, 2013).

⁷⁰² Shachar, Gross and Harris, above n 701, 750.

⁷⁰³ Eisenberg, Fisher and Rosen-Zvi, above n 701.

⁷⁰⁴ Shachar, Gross and Harris, above n 701, 752.

⁷⁰⁵ Eisenberg, Fisher and Rosen-Zvi, above n 701, 5.

In this respect, the approach of the Israeli Supreme Court is significantly different from other constitutional courts. In Canada, for example, the practice of the Supreme Court is to attempt to reach a consensus and to present a unified position.⁷⁰⁶ In some European constitutional courts (for example in the Italian, French and Belgian courts) dissenting opinions are not allowed and judges are required to reach a unanimous decision.⁷⁰⁷ In some cases, there may be a deliberative advantage in finding an overlapping consensus among judges. However in divided societies, when consensus is often hard to reach, it may be more deliberatively beneficial to give voice to minority views, even if they are ultimately rejected.

A study by Weinshall and Margel found that although court decisions in Israel generally correlate with the judges' prior attitudes and ideologies, this correlation is weaker than the correlation among judges in the United States and Canada.⁷⁰⁸ This suggests that it is not as easy to predict the decisions of Israeli Supreme Court judges based on their background. It seems that deliberation that takes place in the Court succeeds, at least sometimes, at changing judges' minds.

v. *Style of rulings*

Another deliberative criterion is that courts' rulings should be written in a clear and engaging manner so that the general public can understand them. One criticism raised against the deliberative quality of US courts is that they often avoid difficult moral questions and favour technical and legalistic forms of reasoning over principled philosophical reasoning as required by deliberative theory.⁷⁰⁹ The Israeli Supreme Court, however, often delves into such questions, and has gained a reputation for engaging in moral and philosophical reasoning.⁷¹⁰ Nevertheless, there are also those who criticise

⁷⁰⁶ Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (University of Toronto Press, 2008) 233. See also Weinshall-Margel, above n 672, 563.

⁷⁰⁷ Rosa Raffaelli, 'Dissenting Opinions in the Supreme Courts of Member States' (*European Parliament, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs*, 2012) <<http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf>>, 17. John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82(7) *Texas Law Review* 1671, 1693.

⁷⁰⁸ Weinshall-Margel, above n 672. The study examined, for example, whether religious judges tend to rule more conservatively in freedom of religion cases.

⁷⁰⁹ Sen, above n 18, 324.

⁷¹⁰ See Meydani, above n 650, 2, 18, 68.

the length and style of some of the Supreme Court's rulings. Rulings are often hundreds of pages long and some judges tend to write in a poetic or academic style, using phrases and references to old Jewish texts that few in today's society could follow easily.⁷¹¹ As one former judge of the Israeli Supreme Court described:

Judges digress from what is needed to decide on the case. They write too much and unnecessarily overquote things that are well known and agreed upon. They also address subjects that are not necessary for the judgment ('obiter') and develop theories where it is unnecessary. I think that is a contagious disease. Judges learn this from each other and they think there's something nice in it. Sometimes a judgment really is written nicely and interestingly, but it is not needed in order to deliver a ruling. If someone wants to write academic papers – go for it [S]ometimes there is no choice, but when rulings extend for hundreds of pages, even in major issues, it is unnecessary.⁷¹²

While the length of Supreme Court judgments has indeed expanded over the years, peaking in the mid-1990s, this trend started to reverse since the beginning of the 2000s.⁷¹³ The need for shorter judgments ought to be balanced against the need to provide well-reasoned judgments, particularly in constitutional issues. The judgments I review in the case study section, in my view, achieve this balance. The length of these judgments range between 10-80 pages. This seem reasonable considering the importance of the issues discussed and the desire to provide thorough justifications and allow for dissenting opinions. While long judgments in lower courts should be avoided, in constitutional courts there is often a genuine need to provide comprehensive reasons and detailed explanations.

vi. Dialogue between the court and other institutions

The Israeli Supreme Court's ability to strike down laws of the Knesset is a source of constant tensions between these institutions. As discussed earlier, Justice Barak considered some Israeli 'basic laws' to be de-facto constitutional laws that allow the

⁷¹¹ See Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*, above n 660, 39.

⁷¹² Eliahu Matza, former Vice President of the Israeli Supreme Court, as quoted in Noam Sharvit, *Judgments in Israel are too long, I think that is a contagious disease* (7 February 2005) Globes - Israel's business arena <<http://www.globes.co.il/news/article.aspx?did=881647>> (in Hebrew, translated by Shay Keinan).

⁷¹³ See Yoram Shachar, 'The Citation Space of the Supreme Court' (2008) 50(1) *Hapraklit* 29b [in Hebrew].

Supreme Court to overrule legislation or government policies that contradict these 'basic laws'.⁷¹⁴ Since the enactment of the basic laws for 'freedom of occupation' and 'human dignity and liberty' in 1994, the Israeli Supreme Court has struck down 15 laws enacted by the Knesset, arguing that each law (or a part of it) unconstitutionally violated a protected human right under the basic law. The most recent example was in September 2017 when the Court struck down a law that exempted Ultra-Orthodox Jews from mandatory military service.⁷¹⁵ There are repeated attempts by Knesset members to limit the Court's power to disqualify laws enacted by the Knesset.⁷¹⁶ The fact that politicians are aware of the Court's power and willingness to disqualify unconstitutional laws forces them to consider more carefully certain laws before they enact them. However, in some cases, politicians enact a law despite knowing that this law is going to be disqualified by the Court. In this way, politicians can demonstrate to their constituencies that they have made an effort to satisfy them, and it is the Court that prevents the politicians from fulfilling their promises.⁷¹⁷

Not surprisingly, the Supreme Court's approach and its rulings were often met with harsh criticism from opponents of 'judicial activism'.⁷¹⁸ The battle between the Court and the executive branch peaked in 2007 when Professor Daniel Friedmann, a strong critic of the Court's judicial activism, was appointed as Justice Minister. Friedmann was determined to promote certain reforms regarding the Court's authority to strike down Knesset legislation and the method of appointing judges to the Court. Friedmann's appointment and his plans were met with harsh criticism from both retired as well as

⁷¹⁴ Aharon Barak, 'A Constitutional Revolution: Israel's Basic Laws' (1993) 4(3) *Constitutional Forum* 83; Gideon Sapir, 'Constitutional Revolutions: Israel as a Case-Study' (2009) 5(4) *International Journal of Law in Context* 355.

⁷¹⁵ HCJ 1877/14 *The Movement for Quality Government in Israel v the Knesset* (12.9.2017). See Yonah Jeremy Bob, *Court Orders Government To Pass New Law Or Draft All Haredim* (September 12, 2017) The Jerusalem Post <<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Court-orders-govt-to-pass-new-law-or-draft-all-haredim-504901>>.

⁷¹⁶ So far, these attempts have been unsuccessful. See, for example, Jonathan Lis, *Israeli Ministers Pass Buck on Bill to Restrict Supreme Court's Power* (23 November 2015) Haaretz Daily Newspaper <<http://www.haaretz.com/israel-news/.premium-1.687745>>; Roni Sofer, *Government Approves Motion to Limit Supreme Court's Power* (7 September 2008) Ynetnews <<http://www.ynetnews.com/articles/0,7340,L-3593071,00.html>>.

⁷¹⁷ See, for example, Hezki Baruch, *Liberman: Supreme Court will '100% Certainly' disqualify Law* (30 January 2017) Israel National News <<http://www.israelnationalnews.com/News/News.aspx/224103>>.

⁷¹⁸ See Navot, above n 589, 198.

serving Supreme Court judges. Both the Court and the Justice Minister used the media in their public relations campaigns, and the Court's image was damaged as a result of this conflict.⁷¹⁹ For example, the then president of the Supreme Court, Dorit Beinisch, slammed Friedmann for his 'attempts to hinder the moves' of the Court, calling his proposals 'superficial' and arguing that the claim that the Court was trying to seize authority from the Knesset was baseless and misleading.⁷²⁰ Friedmann responded by saying that 'in the judge's eyes, the only legitimate form of intervention is "more power to them"'.⁷²¹

vii. Effects on public deliberation

Despite the tensions discussed above, most of the time the Court enjoys the support of the media and the public. As Bogoch and Holman-Gazit show, coverage of the Israeli Supreme Court by both elite and popular newspapers 'typically frames the Court as a powerful, rule-governed, effective protector of the citizen against corrupt, self-interested, or merely incompetent politicians and bureaucrats'.⁷²² They suggest that the supportive media 'provides legitimacy for the expansion of the Court's power at the expense of the other branches of government'.⁷²³

Media coverage is vital in order to encourage public deliberations regarding the Court's rulings. As discussed, cases deliberated in court can foster deliberation among the general public. Litigation before the Israeli Supreme Court is intensively covered by the media with reports and opinion pieces stimulating public debate over the issues being discussed at the Court. Due to such extensive media coverage 'interest groups could derive significant symbolic benefit as well as public exposure even when they did not win the litigation itself'.⁷²⁴

⁷¹⁹ See Friedmann, above n 669, 330–6.

⁷²⁰ *Friedmann under Fire for Plans to Cut Court Power* (15 November 2007) The Jerusalem Post <<http://www.jpost.com/Israel/Friedmann-under-fire-for-plans-to-cut-court-power>>.

⁷²¹ *Ibid.*

⁷²² Bogoch and Holzman-Gazit, 'Mutual Bonds: Media Frames and the Israeli High Court of Justice', above n 583, 55.

⁷²³ *Ibid.* 4.

⁷²⁴ Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*, above n 660, 39.

D. Summary

During the last 40 years, the Israeli Supreme Court implemented various practices that not only enabled but actually encouraged more individuals and organisations to bring their grievances to the Court. As a result of these legal policy changes, Israeli politicians, NGOs and individuals have increasingly turned to the Court, asking it to intervene in national affairs, government policies, and even parliamentary procedures.⁷²⁵ According to Dotan:

It seems that in Israel of the twenty-first century no words can describe the important role the HCJ [High Court of Justice] plays in public life. I am doubtful if there is another community so affected by and dependent upon the decision making of a judicial forum as is the political community in Israel affected by the HCJ. Similarly, there seems to be no other judicial forum so deeply involved in the economic, political and social arenas.⁷²⁶

Not everyone is convinced, though, that these changes are for the best. According to Friedmann:

The entire legal system is paying a heavy price for the Supreme Court's decision to assume, at its own initiative, a role entirely different from that assigned to it by the Knesset. It has presumed to become a constitutional court in a country that lacks a constitution.

Despite its occasional confrontation with the elected branches (and some might say because of it), the Israeli Supreme Court enjoys high levels of trust from the Israeli public as compared to other institutions such as the parliament, the military and the media.⁷²⁷ Notably, it is the most trusted institution among the Israeli Arab minority.⁷²⁸ Favourable media coverage of the Israeli Supreme Court and high levels of trust among the public

⁷²⁵ Dotan and Hofnung, 'Legal Defeats--Political Wins: Why Do Elected Representatives Go to Court?', above n 665; Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*, above n 660, 39.

⁷²⁶ Yoav Dotan, 'Pre-Petitions and Constitutional Dilemmas Regarding the Role of Government Lawyers' (2004) 7(1) *Mishpat Umimshal* 159 [in Hebrew] 159, 161. As translated and quoted in Meydani, 'The Intervention of the Israeli High Court of Justice in Government Decisions: An Empirical, Quantitative Perspective', above n 661, 175.

⁷²⁷ See Hermann et al, above n 540, 161.

⁷²⁸ Ibid 41. For more on the relationship between the Israeli Supreme Court and the Arab minority see Ilan Saban, 'The Arab-Palestinian Minority and the Supreme Court: A Portrayal (and Prognosis) Not in Black and White' (2005) 8 *Mishpat U'Mimshal* 23 [in Hebrew].

help to maintain the Court's image as an apolitical and independent watchdog of democracy and to reinforce its legitimacy. In this context, one can understand why so many individuals and organisations find the Israeli Supreme Court as a suitable arena for constitutional deliberations.

In the next chapter I review cases in which different petitioners attempted to change public policies and government actions through litigation in the Supreme Court. These examples focus on cases where the petitioners included individuals or NGOs that represented groups of non-citizens, such as diaspora people or illegal migrants.

E. Illustrative Cases

In the previous part I reviewed the deliberative qualities of the Israeli Supreme Court. In this part, I discuss key cases from the Israeli Supreme Court that demonstrate how these qualities are applied in practice and how a constitutional court can serve as an effective deliberative democratic body in a divided society. This part will show how, by taking cases to the Supreme Court, diaspora Jews (and other groups of non-citizens) managed to draw public attention to, initiate debates among the Israeli public on, and eventually change, Israeli government policies.

The issues raised in these cases concerned the interests and preferences of Jews who live in the diaspora, or other groups of non-citizens, and involved directly and indirectly individuals who were not Israeli citizens. They were involved in these cases as petitioners or respondents or by funding and assisting the individuals and NGOs who submitted or responded to the petitions. This involvement was made possible due to certain deliberative features of the Israeli Supreme Court. Although some deliberative features (such as accessibility) come at a cost, they have made the Court a largely effective vehicle for diaspora communities to influence kin-state policies.

The case studies allow us to observe how different deliberative democratic principles can be promoted by a constitutional court in a divided society with a large and influential diasporic population. These deliberative democratic principles are manifested through these cases in three major ways. First, by the types of cases brought before the Court

(including cases that are arguably non-justiciable because of their political nature). Second, by the nature of the petitioners that brought these cases to the Court, that is, non-citizen individuals and foreign and local NGOs. Third, by the kind of deliberation that took place in the Court when dealing with these cases: for example, the interactions between the judges and the litigants, the different opinions presented by the different judges and the effect of the decisions on public discourse. Not all cases exemplify all the deliberative features discussed above, and I will only discuss the relevant criteria that apply to each specific case.

Although I outline the relevant details of the various cases, the exact facts of each case and the content of the final rulings are not central for the contention of this thesis. Rather, the importance of these cases for this thesis is in demonstrating, first, the particular deliberative democratic features exercised by the Supreme Court when examining these cases; second, how due to these deliberative features, diaspora people and other groups of non-citizens were able to challenge Israeli laws and policies; and third, the effects of these cases on the relationship between Israel and the Jewish diaspora.

1. Women of the Wall cases

The case that has perhaps caught the most attention among diaspora Jews in recent years is the Women of the Wall ('WoW') case. WoW is an international group of Jewish women that since 1988 has been fighting a legal battle, with significant religious and social implications, for what it asserts is the right of women to pray at the Western Wall in Jerusalem while performing some unorthodox religious rituals.⁷²⁹ Situated at the heart of Jerusalem's old city, the Western Wall (the 'Kotel') is Judaism's most sacred site and is managed by the Israeli Jewish Rabbinate. As such, its synagogue-like plaza is run according to the rules of the Jewish Orthodox denomination, which means that the prayer areas are segregated for men and women. Members of WoW wish to perform

⁷²⁹ See Women of the Wall website at <<http://womenofthewall.org.il/about/>>. See also Frances Raday, 'Claiming Equal Religious Personhood : Women of the Wall's Constitutional Saga' in Burger Winfried and Karayanni Michael (eds), *Religion in the Public Sphere: a Comparative Analysis of German, Israeli, American and International law* (Springer, 2007) 255; Pnina Lahav, 'Up Against the Wall: Women's Legal Struggle to Pray at the Western Wall in Jerusalem' (2000) 16(1) *Israel Studies Bulletin* 19. For a collection of essays on the group and its battle, see Phyllis Chesler and Rivka Haut (eds), *Women of the Wall: Claiming Sacred Ground at Judaism's Holy Site* (Jewish Lights, 2003).

certain rituals at the women's section of the site which, according to Orthodox tradition, are reserved for men only. These rituals include, for example, wearing prayer shawls and reading from the Torah collectively and out loud. While WoW members perceive their right to perform such rituals at the site as a basic human right, many Orthodox Jews vehemently object to this and regard these acts as a provocation that amounts to 'blasphemy and a desecration of the holy place'.⁷³⁰

What is particularly important in the context of this thesis is the fact that a substantial percentage of WoW's original founders and many of its current members and supporters are Jewish women from the diaspora. The first service conducted by WoW occurred in 1989 following an International Jewish Feminist Conference held in Jerusalem. That group included American women and Israeli women who grew up in the diaspora (mostly North America) and only later immigrated to Israel.⁷³¹ These women wanted to pray together at the Western Wall in Jerusalem, following the traditions of their own prayer groups in North America.⁷³² However, when WoW members tried to conduct their services at the Wall, Orthodox men and women gathered around them in protest. In some cases, WoW activists were arrested and removed from the site by Israeli police for 'disturbing public order'.⁷³³

From the very early days of their fight, WoW saw the Israeli Supreme Court as the body that may be able to protect and guarantee their ritual rights. With the backing of major American Jewish organisations, WoW launched a series of legal proceedings designed to advance their cause and push the Israeli establishment to allow its members to

⁷³⁰ See *'Women of the Wall' Are Detained Praying at Kotel* (19 August 2012) The Jerusalem Post <<http://www.jpost.com/Jewish-World/Jewish-News/Women-of-the-Wall-are-detained-praying-at-Kotel>>.

⁷³¹ See WoW website at <http://womenofthewall.org.il/about/board-and-staff/>. Although women who immigrated to Israel are no longer diasporic Jews, at the time when the first petition was submitted to the Court some of them were still American residents. Also, as will be described below, they continued to receive major support mainly from diaspora Jews.

⁷³² Norma Baumel Joseph, 'Women in Orthodoxy: Conventional and Contentious' in Riv-Ellen Prell (ed), *Women Remaking American Judaism* (Wayne State University Press, 2007) 181, 198.

⁷³³ *'Women of the Wall' Are Detained Praying at Kotel*, above n 730. The exact offence was violation of *Protection of The Holy Places Law* (1967) which requires visitors at the Western Wall to pray according to "local custom".

perform their monthly rituals at the Wall. The Israeli Supreme Court ended up being heavily involved in their cause, giving three important rulings on the issue.

i. First ruling

The petitioners in the first case were four Jewish women residents of Jerusalem and six Jewish women residents of the United States who founded the International Committee for Women of the Wall.⁷³⁴ In that case, the Court eventually reached a mixed conclusion: on one hand, the judges held that members of WoW have the right to pray according to their custom next to the Western Wall and that their freedom of religion must be protected. On the other hand, the Court dismissed the petitions as it believed it was not suitable for the Court to treat this case as a regular legal dispute. As the case concerned questions of constitutional nature such as gender equality and religious freedom, the Court asked the Israeli government and the Knesset to re-evaluate the situation and provide a solution that would take into account both WoW's right to freedom of religion as well as the sensitivities of the Orthodox Jewish community.⁷³⁵ In accordance with the Court's orders, the government set up a committee that attempted to come up with agreed arrangements as to where exactly and under what conditions WoW could pray and perform their rituals. The committee included representatives of all religious streams as well as a representative from the Israeli Ministry of Diaspora Affairs.⁷³⁶ The committee decided against allowing WoW to pray at the Wall, but allocated to them an alternative site nearby.

⁷³⁴ HC 257/89, 2410/90 *Hoffman et. al. v. The Guardian of the Western Wall* [1994] IsrSC 48 (2) 263 ('*Hoffman v. The Guardian of the Western Wall*').

⁷³⁵ One of the Judges in this case was Justice Menachem Elon, who was also an Orthodox Rabbi. Although all judges reached a similar conclusion, Justice Elon's concurring opinion was ostensibly less supportive of WoW goals.

⁷³⁶ See Additional Hearing H CJ 4128/00, *Director of Prime Minister's Office v. Hoffman* [2003] IsrSC 47(3) 289 ('*Additional Hearing*') Justice Cheshin [32]. An unofficial English translation of the ruling is available at <<http://www.womenofthewall.org.il/wp-content/uploads/2016/04/Unofficial-Translation-BAGATZ-Decision-April-6-2003.pdf>>.

ii. Second ruling

Unhappy with the decisions of the committee, WoW petitioned the Supreme Court again. As in the first petition, Israeli petitioners joined forces with American petitioners.⁷³⁷ This time, the Court ruled more clearly in favour of WoW:

The first decision recognized, in practice, the basic rights of the plaintiffs to pray according to their custom in the prayer area near the Kotel, and the committees that dealt with the matter following the first decision did not do what was asked of them, according to the terms of the decision ...⁷³⁸

However, the judges handed the matter over to the government yet again, ordering it to find a solution that would allow WoW to perform their rituals at the Wall within six months. Some Ultra-Orthodox Knesset members tried to counter the Court's orders by proposing a law, in 2001, which would make it illegal for women to perform religious practices at the Western Wall. In the meantime, it became clear that the government and the Court had underestimated just how popular this case was among diaspora Jews. Although the law proposed by Ultra-Orthodox parliamentarians failed to pass in the Knesset, members of WoW continued to be detained by the police while performing religious rituals at the Wall.⁷³⁹ Such arrests caused anger and concern among some in the Jewish diaspora, which led Israel's Prime Minister, Benjamin Netanyahu, to intervene and ask the Chairman of the Jewish Agency⁷⁴⁰ to find a way to make the site more accessible to all streams of Judaism.⁷⁴¹

iii. Third ruling

The continued actions of WoW angered some Orthodox groups and a few Orthodox Knesset members pressured the State Attorney to appeal the second ruling and ask the

⁷³⁷ HCJ 3359/95 *Hoffman v Director-General of the Prime Minister's Office* [2000] IsrSC 54(2) ('*Hoffman v Director-General of the Prime Minister's Office* '), 345. The petitioners were Annat Hoffman, Haia Backermann and the International Committee for Women of the Wall.

⁷³⁸ *Hoffman v Director-General of the Prime Minister's Office*, above n 737, p 366.

⁷³⁹ See *Ibid*, for example.

⁷⁴⁰ The Jewish Agency for Israel is the largest International Jewish NGO in the world. For more on the Jewish Agency see below p 203.

⁷⁴¹ See Jodi Rudoren, *Israel to Review Curbs on Women's Prayer at Western Wall* (25 December 2012) *The New York Times* <http://www.nytimes.com/2012/12/26/world/middleeast/israeli-law-curbing-womens-prayer-up-for-review.html?_r=1>.

Supreme Court to hold an additional hearing. Leave to appeal was granted in 2003.⁷⁴² Interestingly, in the next hearing on the merits, an NGO named 'Am Ehad' (Hebrew for 'One People') asked to join the proceedings as *amicus curiae* in support of the State's appeal against WoW. This organisation claimed to represent a variety of Orthodox Jews living in Israel and in the diaspora who are concerned by WoW's intention to change 'well established prayer customs at the Western Wall'.⁷⁴³ By a slim majority of five against four judges, the Supreme Court ultimately overturned its previous decision and decided to endorse the State's solution, according to which WoW would not be allowed to hold their services at the Wall, but rather at a site near the Wall known as 'Robinson's Arch'.

iv. The battle continues

Despite the Supreme Court decision in the additional hearing, the legal battle continued. Members of WoW regularly continued to attempt to pray at the Wall and were arrested on several occasions. In 2013, WoW won an important ruling when the Jerusalem District Court held that the police had no cause for arresting WoW activists.⁷⁴⁴ Efforts to reach an agreement were finally successful in 2016, when the government decided to formally establish and recognise a pluralist prayer section at the Western Wall (albeit not in the main plaza) where women and men could pray together and perform non-Orthodox rituals (the '2016 compromise'). This decision was a compromise between Orthodox Jews that demanded that no non-Orthodox services should be held at the Western Wall, and WoW supporters who demanded that WoW members should be allowed to hold their services at the main plaza. Although the exact terms and schedule for implementing this arrangement remained unclear, it was undeniably a great achievement for WoW and their supporters. Leaders of WoW and other Jewish

⁷⁴² *Additional Hearing*, above n 736.

⁷⁴³ See *ibid*, Justice Cheshin [37-8]. The Court rejected the request to join the additional hearing as the court found 'Am Ehad' arguments are similar to the State's arguments.

⁷⁴⁴ CA 23834-04-13 *State of Israel v. Ras et al.* (24.4.2013). English translation available at <http://womenofthewall.org.il/wp-content/uploads/2012/06/Final-File_Women-of-the-Wall-Ruling_April-25-2013-2.pdf>. The judge explained that the Supreme Court recommendation that the women pray in Robinson's Arch did not prohibit the women from praying at the Western Wall in the women's section, and certainly it did not imply that this act was a criminal offense. The Judge further said that the section of the *Law of Holy Places*, which requires visitors at the Western Wall to pray according to 'local custom' should be interpreted pluralistically and not in a strict Orthodox Jewish manner (see sections 7-9 of the judgment).

progressive movements have declared that it was a ‘historic’ step to greater equality for non-Orthodox Jews, whether living in Israel or in the diaspora.⁷⁴⁵ However, in June 2017, following pressure from ultra-Orthodox parties in the coalition, the Israeli government decided to freeze the implementation of the 2016 compromise.⁷⁴⁶

v. *Deliberative features*

This case presents a good example of how the deliberative features of the Israeli Supreme Court discussed in the previous parts came into play and allowed diaspora Jews to influence Israeli politics and policies – albeit not necessarily with a clear ‘win’ for their own perspective or interests.

Standing requirements

As discussed above, broad standing rules increase the accessibility of the Court. They open the gate to more individuals and organisations who are able challenge government policies. In this case, the Court allowed non-Israeli residents and a foreign NGO (the International Committee for Women of the Wall) to be part of the proceedings and to petition against various Israeli officials and authorities.⁷⁴⁷ Even though the Court did not allow all NGOs to formally join the petition, it reviewed their submissions and addressed their arguments.⁷⁴⁸

Justiciability

As discussed, permissive justiciability requirements enable more issues that otherwise may be deemed ‘too political’ to be disused by a court. The WoW case is an example of such an issue, as it was apparent that accepting the petitioner’s position would anger a large group of Orthodox Jews and might cause a backlash from their representatives in

⁷⁴⁵ See Jeremy Sharon, *State Recognition of Rights of Non-Orthodox Won at Cost of Original Fight of Women of the Wall* (1 February 2016) The Jerusalem Post <<http://www.jpost.com/Israel-News/State-recognition-of-rights-of-non-Orthodox-won-at-cost-of-original-fight-of-Women-of-the-Wall-443447>>.

⁷⁴⁶ See Isabel Kershner, *Israel Suspends Plan for Egalitarian Prayer Area at Western Wall* (25 June 2017) The New York Times <<https://www.nytimes.com/2017/06/25/world/middleeast/benjamin-netanyahu-israel-western-wall-non-orthodox-jews.html>>.

⁷⁴⁷ The respondents in the different proceedings included the Israeli government, the Ministry of Religious Affairs, the Chief Rabbinate of Israel, the Ministry of Justice, the Israeli Police and others.

⁷⁴⁸ The Court did not allow all NGOs that asked to join the petition to formally join because some submissions did not add any new arguments to those already expressed by the government representatives. See *Director of Prime Minister’s Office v. Hoffman*, above n 737, Justice Cheshin [37].

the Knesset. Indeed, the Court was at first reluctant to intervene. Even though the Court heard the petitioners in the first ruling and was sympathetic towards their claims, the Court eventually chose not to issue explicit orders to the government and preferred to allow the government some time to reach a solution. The Court took unusual steps in order to try and reach a compromise that would relieve it from the uncomfortable situation of having to rule in favour of the petitioners, knowing that this would anger many public representatives in the government and in the Knesset. For example, during court proceedings in 2000, three judges of the Supreme Court joined representatives of WoW, the Israeli government, the police and the Antiquities Authority for a tour around the Wall in Jerusalem, trying to find an alternative suitable site for WoW.⁷⁴⁹ Only after the government failed to make any progress and the attempts to reach an agreed compromise failed did the Court start to actively intervene to rule on the merits of the case. The Court kept stressing that compromise was the preferred solution, and that the Court would have preferred to avoid ruling in favour of one of the parties, for example:

In the course of our deliberations we tried to bring the litigants' positions closer together; we tried but did not succeed.⁷⁵⁰

From our strong desire to attempt to find an appropriate solution, and a peaceful one, to the continuing dispute between the litigants, we decided that we too will visit 'Robinson's Arch'.⁷⁵¹

It saddens us that the litigants could not find a way to bridge over the gap between them and could not walk on the narrow bridge. It would have been possible and it would have been appropriate to find a suitable arrangement.⁷⁵²

We can see therefore that in this case the Court was somewhat ambivalent on the issue of justiciability. On one hand it accepted the petition and assumed justiciability, but on the other hand it tried to press the parties to reach a compromise so that it would not have to rule in one of the parties' favour. This approach is deliberative in the sense that it gives the parties a chance to present their arguments before the Court and encourage public debate. On the other hand, when a case is settled outside the courtroom, it gets

⁷⁴⁹ See *Hoffman v Director-General of the Prime Minister's Office*, above n 737, Justice Matza [28].

⁷⁵⁰ *Additional Hearing*, above n 736, Justice Cheshin [42].

⁷⁵¹ *ibid* [44].

⁷⁵² *ibid* [45].

less attention and media coverage, and there is no published ruling that explains how a decision was reached based on the different positions.

Dialogue between the court and other institutions

The Court gave three different rulings on the case, including one additional hearing – a rare process that is only reserved for highly sensitive cases. It reversed previous decisions and changed its position in response to government actions. By such measures, the Court actively contributed to the improvement of the process of democratic discussion and decision making.⁷⁵³ In the first ruling the Court asked the government to find a compromise that would take into account both sides' aspirations and sensitivities. As a result of the Court's orders, the government set up a special committee that included representatives from various Jewish streams, in Israel and the diaspora, in an attempt to find an agreed solution.⁷⁵⁴ As a result of the second ruling, Ultra-Orthodox parties in the Knesset attempted to change the law so as to completely forbid WoW activities at the Wall. It is possible that some Judges were concerned by these attempts, and these concerns led them to reverse the second ruling.

Style of the rulings

The rulings of the Court were long and the Court considered at length the arguments raised by both the petitioners and the respondents. Although long judgments may discourage ordinary people from reading them, in cases such as these it is important to balance length considerations with the need for each judge to engage respectfully with different viewpoints. The Court repeatedly stressed the importance of the Wall as a place of unity and worship for all Jews.⁷⁵⁵ The first ruling, for example, was 58 pages long. In his judgment, President Shamgar reiterated the importance of exercising patience and tolerance from both sides:

[W]e have repeatedly emphasized that the sons and daughters of a free society, which has dignity of humanity as a basic rule, are called upon to honour the personal feelings and sensitivities of the individual ... [W]e have stated that a free society limits setting restrictions on the serious choices of the individual and behaves

⁷⁵³ See Nino, above n 2, 216.

⁷⁵⁴ *Additional Hearing*, above n 736, Justice Cheshin [32].

⁷⁵⁵ *Ibid* [49].

with patience and tolerance and even attempts to understand the other, even regarding matters that do not seem to be acceptable or desirable in the eyes of the majority.⁷⁵⁶

This quote provides an example of how, in his ruling, Shamgar signalled to both communities that they need to be more considerate of each other. Shamgar asked the Progressive community to be more aware of Orthodox community sensitivities, while asking the Orthodox Community to be more tolerant of so-called 'undesirable' activities.

Dissenting opinions and intra-court dynamics

There was no consensus among the judges in the first and third rulings, which included concurring and dissent opinions. The second ruling was exceptional in that all three judges agreed that the government failed to provide a suitable solution within the timeframe set by the first ruling. The panels in the first and third rulings included religious judges (Orthodox Jews), who unsurprisingly took a different view to that of the other judges. This shows the importance of having a reflective Court that includes judges from different backgrounds. In their judgements, the Orthodox judges gave voice to views held by substantial parts of the Israeli society (albeit minority views), and so other judges had to address these views in their judgments. In addition, the fact that there were dissenting and concurring opinions is another indication of the Court's deliberative qualities.

Effects on public deliberation

The Court's rulings fostered deliberation over many issues, including the conflict between diaspora Jews and Israeli Orthodox Jews; gender equality in the religious context and religious pluralism in general. As litigation continued, public debate ensued and the rulings were widely discussed in the media. Numerous articles, radio interviews and television segments were and still are dedicated to the issues raised by this case.⁷⁵⁷ The continuous coverage in the media of the Court's rulings resulted in increased

⁷⁵⁶ *Hoffman v. The Guardian of the Western Wall*, above n 734, 354-5, from the unofficial translation of *Additional Hearing*, above n 736, Justice Cheshin [16-7].

⁷⁵⁷ WoW website lists hundreds of examples of such articles and interviews, see <<http://www.womenofthewall.org.il/in-the-news/>>. Note that this list contains only sources in English, there are many more examples available in Hebrew.

support for WoW from ordinary Israelis and politicians, as well as more demonstrations against them.⁷⁵⁸

vi. Diaspora influence on Israeli politics

It was clear from the start of this dispute that there was a huge difference in the attitudes towards WoW between diaspora Jews and Israeli Jews. For example, in a meeting with progressive Jewish Rabbis in the United Kingdom, the Head of the Jewish Agency⁷⁵⁹ said that since he had been tasked with tackling the issue of WoW, he had received tens of thousands of letters and emails from Jews in the diaspora, and less than a hundred letters from Israelis.⁷⁶⁰

Interestingly, Israel's secular society failed to support WoW, at least during the first years of their battle. Most Israelis remained indifferent to the legal battle that took place in the Israeli Supreme Court between groups of liberal diaspora Jews and Ultra-Orthodox Jews. Many Israelis saw this issue as an internal disagreement among religious communities and simply considered WoW and their battle as irrelevant to the daily lives of ordinary, secular Israelis.⁷⁶¹ As one WoW activist described it with frustration: 'secular Israelis do not see this as their problem; to them it's a bunch of crazy American ladies'.⁷⁶² While failing to gain substantial support from the general Israeli public, WoW enjoyed significant support from the Jewish diaspora, especially in North America, where the International Committee for Women of the Wall (ICWoW) was established. American Jewish feminists became key activists in the campaign to create a space for WoW members to worship publicly at the Wall.⁷⁶³ Even Supreme Court judges involved in the case were surprised to discover just how important and sensitive this issue was to

⁷⁵⁸ See, for example, *Loud protests as Women of the Wall mark 25th anniversary* (4 November 2013) The Times of Israel <<https://www.timesofisrael.com/women-of-the-wall-to-mark-25th-anniversary-amid-protests/>>. See also WoW website at <<http://www.womenofthewall.org.il/full-history/>>.

⁷⁵⁹ The Jewish Agency is the largest Jewish NGO in the world, see below p 205.

⁷⁶⁰ *Reform Rabbis Meet with Natan Sharansky* (25 April 2013) Press Releases - The Movement for Reform Judaism <<http://news.reformjudaism.org.uk/press-releases/reform-rabbis-meet-with-natan-sharansky.html>>.

⁷⁶¹ See Renee Ghert-Zand, *Where 'Rock Star' Anat Hoffman Turns Raging Feminist* (20 April 2013) The Times of Israel <<http://www.timesofisrael.com/where-rock-star-anat-hoffman-turns-raging-feminist/#!>>.

⁷⁶² Jodi Rudoren, *At Western Wall, a Divide Over Prayer Deepens* (22 December 2012) The New York Times <<http://www.nytimes.com/2012/12/23/world/middleeast/at-western-wall-a-divide-over-prayer-deepens.html>>.

⁷⁶³ Riv-Ellen Prell (ed), *Women Remaking American Judaism* (Wayne State University Press, 2007) 4.

diaspora Jews.⁷⁶⁴ For many American Jews, WoW members became very well-known and were seen as heroes of Jewish religious pluralism. Israel's Ambassador to the United States was flooded with complaints from diaspora Jews.⁷⁶⁵ As Rosner observed, the battle for religious freedom at the Western Wall is an 'Americanized and American-imported battle for religious moderation and tolerance'.⁷⁶⁶ According to one Jewish activist:

Diaspora Jews are more outraged by the treatment of Women of the Wall than Israelis, because they feel a deep connection to the Kotel, and they have grown up in countries with greater religious freedom... [O]ne expects Jews all over the world to support Israel [but] Israel must understand what's important to them, and this is important to them: the Kotel and women's rights.⁷⁶⁷

It is clear that the 2016 compromise came as a result of the extensive legal pressure exerted by WoW and their supporters in the diaspora.⁷⁶⁸ The Court was responsive to the significant attention this case received in the Jewish diaspora. The continuous support WoW received from North American Jewry and the Progressive Jewish movements around the world countered the political power of the ultra-Orthodox Jewish political parties in the Israeli government and forced Prime Minister Benjamin Netanyahu's hand. As Sharon noted:

The prime minister realised that the denial of rights and standing for non-Orthodox Jews at the Western Wall was an open and festering wound in Israel-Diaspora relations that threatened, along with other issues, the critical support of North American Jewry for the Jewish state [T]he feelings of alienation felt by significant elements of Diaspora Jewry when they came to the Western Wall, and their outrage at the treatment of non-Orthodox Jews in Israel, was ultimately something Netanyahu could not ignore.⁷⁶⁹

⁷⁶⁴ Interview by Shay Keinan with former President of the Supreme Court, Dorit Beinisch, 17.6.2015 [on file with author].

⁷⁶⁵ See Rudoren, above n 762.

⁷⁶⁶ Ghert-Zand, above n 761.

⁷⁶⁷ Melanie Lidman, 'Diaspora Jews Show Solidarity with Women of the Wall with "Shema Flashmob"' (23 October 2012) The Jerusalem Post <<http://www.jpost.com/Jewish-World/Jewish-News/Diaspora-Jews-stand-with-Women-of-the-Wall>>.

⁷⁶⁸ See Sharon, above n 745.

⁷⁶⁹ Ibid.

The ultra-Orthodox political parties managed however to push back, and to achieve the freezing of the 2016 compromise. This decision angered Jewish diaspora communities, and led the board of the Jewish Agency⁷⁷⁰ to cancel a gala dinner scheduled with Netanyahu in Jerusalem.⁷⁷¹ Dozens of Jewish Diaspora leaders vowed to fight the Israeli government's decision to retract its commitment to build an egalitarian prayer pavilion at the Western Wall.⁷⁷²

The WoW case is therefore an instructive example of how the Jewish diaspora used the deliberative features of the Israeli Supreme Court to promote interests and rights of diaspora Jews, despite strong resistance from powerful Orthodox politicians within the Knesset and the Israeli government. Through litigation in the Court, diaspora Jews managed to raise awareness of issues of religious pluralism in Israel. Due to the ongoing protests by diaspora Jews, and despite initial indifference, many Israelis have eventually joined in support of WoW.⁷⁷³

2. Conversion cases

Another sensitive issue that divides Israelis and diaspora Jews is the question of how one can become a Jew and join the Jewish people. This is an important issue as according to Israeli law, Jews and their families are entitled to immigrate to Israel and receive support and benefits from the government.

i. Background

The questions of 'who is a Jew' and how a non-Jew can convert to Judaism have been discussed among Jewish scholars for thousands of years and are still fiercely debated.⁷⁷⁴

⁷⁷⁰ The Jewish Agency is the largest Jewish NGO in the world, see p 205.

⁷⁷¹ See Harriet Sherwood, *Jewish diaspora angry as Netanyahu scraps Western Wall mixed prayer plan* (26 June 2017) The Guardian <<https://www.theguardian.com/world/2017/jun/26/jewish-diaspora-angry-as-netanyahu-scraps-western-wall-mixed-prayer-plan>>.

⁷⁷² See Raphael Ahren, *'In Knesset, Diaspora leaders vow to undo Western Wall decision'* (27 June 2017) The Times of Israel <<http://www.timesofisrael.com/in-knesset-diaspora-leaders-vow-to-undo-western-wall-decision/>>.

⁷⁷³ See Judy Maltz, *The New Orthodox Face of Women of the Wall* (19 April 2013) Haaretz Daily Newspaper <<http://www.haaretz.com/jewish-world/jewish-world-features/the-new-orthodox-face-of-women-of-the-wall.premium-1.516416>>; Jonathan Lis, *Female Israeli MKs Join Women of the Wall; No Arrests for First Time in Months* (12 March 2013) Haaretz Daily Newspaper <<http://www.haaretz.com/news/israel/female-israeli-mks-join-women-of-the-wall-no-arrests-for-first-time-in-months.premium-1.508895>>.

⁷⁷⁴ See, for example, Maimonides, *Isurei Biah*, 13:14. For recent discussions see Leonard J Greenspoon (ed), *Who Is A Jew?: Reflections on History, Religion, and Culture* (Purdue University Press, 2014).

In modern times, the debate has gained new significant ramifications. The 'Law of Return' provides that every Jew is entitled to immigrate to Israel, including the son, daughter or grandchild of a Jew (and their non-Jewish spouse).⁷⁷⁵ But the Law of Return is more than merely an immigration law; it has a constitutional status in Israel's legal system. The first Israeli Prime Minister, David Ben-Gurion, said during a debate on the Law of Return in the Knesset in 1950:

The Law of Return has nothing to do with immigration laws. It is the eternal law of Jewish history. This law establishes the national principle that led to the founding of the State of Israel.⁷⁷⁶

And as Justice Barak noted:

The Law of Return is one of the most important laws in Israel, if not the most important This is the key to entering the State of Israel, which constitutes a central reflection of the fact that Israel is not merely a democratic state, but also a Jewish state; it constitutes 'the constitutional cornerstone of the character of the State of Israel as the state of the Jewish people'[:] ... it gives expression to the 'justification... for the existence of the Jewish state'[:] ... it is an expression of the right of the Jewish people to self-determination.⁷⁷⁷

Due to its importance and significance, the Law of Return has been subject to numerous challenges and debates. For example, the term 'Jew' was originally not defined in the Law. This was due to the great difficulty in producing a unified definition of a 'Jew' that would be accepted by all Jewish religious denominations. This ambiguity eventually found its way to the Supreme Court. One seminal case involved a Catholic priest of Jewish origin, who challenged the government's refusal to recognise him as a Jew for the purpose of the Law of Return.⁷⁷⁸ In response to the Court's rulings on this issue, and in an attempt to resolve ambiguities, the Law of Return was amended by the Knesset so as to define the term 'Jew' as 'someone who was born to a Jewish mother or who

⁷⁷⁵ *Law of Return, 5710-1950*.

⁷⁷⁶ Knesset Proceedings, vol. 6 (1950), p 2036 (in Hebrew).

⁷⁷⁷ H CJ 3648/97 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728 [18].

⁷⁷⁸ See, for example, H CJ 72/62 *Rufeisen v. Minister of the Interior* [1962] IsrSC 16 2428; H CJ 58/68 *Shalit v. Minister of Interior* [1969] IsrSC 23(2) 477; for more on this issue see Navot, above n 653, 188; Ayelet Shacher, 'Citizenship and Membership in the Israeli Polity' in Douglas B Klusmeyer and Thomas Alexander Aleinikoff (eds), *From Migrants to Citizens: Membership in a Changing World* (Carnegie Endowment, 2000) 386.

converted, and who is not a member of another religion'.⁷⁷⁹ This definition only opened the door to more controversy. The Israeli Supreme Court inevitably had to consider the meaning of the term 'converted' and to decide what kind of conversion entitled the converted person to the right of immigration to Israel under the Law of Return. As Justice Barak explained:

Conversion for the purposes of the Law of Return is not merely a private action of a person vis-à-vis his Creator; it is not merely a private action of several people who wish to convert someone. Conversion for the purpose of the Law of Return is an act that enables a person to join the Jewish people. It has public ramifications in regard to the right of return and citizenship.⁷⁸⁰

In order to decide what kind of conversion is acceptable for the purpose of the Law of Return, the Court had to consider the different views among the main three Jewish denominations – the Orthodox, Conservative and Reform streams.

This task was not easy, as a key conflict between the different Jewish denominations revolves around the refusal by Orthodox Jews to recognise the Conservative and Reform streams (the 'Progressive' streams) as legitimate Jewish movements that have the authority to lead Jewish communities and convert non-Jews. While Progressive Jewish streams recognise conversions made by any Jewish Rabbi,⁷⁸¹ Orthodox Jews recognise only conversions made by Orthodox Rabbis. Due to the influential position of the Orthodox movement in Israel,⁷⁸² the traditional position of the Israeli authorities has been to recognise only Orthodox conversions. Unhappy with the status quo, new converts and diaspora organisations used the Supreme Court to pressure the Israeli government to change its policy and recognise Progressive conversions.

⁷⁷⁹ See *Law of Return (Amendment no. 2) 5730-1970*, which amended s 4B of the Law.

⁷⁸⁰ HC 1031/93 *Pessaro (Goldstein) v. Minister of Interior* P.D. 49(4), 661 (1995) p 747 [9]. This case involved a non-Jew who converted in Israel in the reform movement and later asked to immigrate to Israel based on the Law of Return.

⁷⁸¹ Although some Conservatives may not recognise Reform conversions.

⁷⁸² As explained above on p 152.

ii. Rodriguez case

The most notable case decided by the Supreme Court on the issue of non-Orthodox conversions was in 2005 in the Rodriguez-Tushbeim case (*'Rodriguez'*).⁷⁸³ This case dealt with a group of non-Jewish individuals who studied Judaism in Israel and went abroad for a short period during which they completed their conversion in a Jewish community. Upon their return to Israel, they applied to the Ministry of the Interior to be recognised as Jews so that they could immigrate to Israel under the Law of Return.

The Ministry of the Interior refused to recognise these conversions on the grounds that the converts did not join the community in which they finalised their conversion, but rather returned immediately to Israel after the conversion ceremony. However, the Supreme Court held, in a majority of seven against four, that the petitioners in *Rodriguez* converted outside Israel in a manner that satisfied the definition of the term 'Jew' under the Law of Return and therefore were entitled to immigrate to Israel. The Court did not decide the question of recognition of Progressive conversions that took place in Israel. With regard to conversions outside Israel, the Court decided that a conversion conducted in a recognised Jewish community in accordance with its own rules should be recognised for the purposes of the Law of Return, regardless of whether the convert joins that community after the conversion, whether she goes to another Jewish community outside Israel and afterwards immigrates to Israel, or whether she immigrates to Israel shortly after the conversion. In its decision, the Supreme Court essentially forced the government to recognise non-Orthodox conversions that were performed in the diaspora. It did not address, however, the issue of non-Orthodox conversions performed in Israel.

iii. Deliberative features

As with the WoW case, many deliberative features discussed in the previous chapter manifested in this case.

⁷⁸³ HCJ 2597/99 *Tais Rodriguez-Tushbeim v. the Minister of Interior* [2005] IsrSC 59(6) 721 (*'Rodriguez'*) English translation available at <http://elyon1.court.gov.il/files_eng/99/970/025/a29/99025970.a29.htm>. For previous related cases see HCJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [2002] IsrSC 56(2) 721; HCJ 264/87 *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* [1989] IsrSC 43(2) 723.

Standing requirements

The petitioners in *Rodriguez* came from various communities in the Jewish diaspora and were aided by Israeli NGOs supported by the Jewish diaspora. For example, one of the petitioners in *Rodriguez* was an NGO named the Israel Religious Action Centre (IRAC). This legal advocacy group is funded and supported by Jewish Progressive streams in the United States.⁷⁸⁴ This case is therefore another example of how the Court's expansive right of standing allowed non-citizens to challenge government policies.

Justiciability and interaction with other institutions

The Court decided on the subject matter even though this case clearly involved sensitive political issues. However, the Court also demonstrated an awareness of the Knesset's exclusive role. Justice Barak noted that the Court recognises that the questions raised in this case were not strictly legal questions but fundamental constitutional questions that ought to be deliberated further by public representatives:

[A]s long as the Knesset has not lawfully said anything on the subject, the problem of recognising conversion for the purpose of the Law of Return should be resolved within the framework of the interpretation of the Law of Return The main task of resolving these problems lies with the Knesset as the legislature The Knesset has adopted no position on this question We had no choice but to decide them.⁷⁸⁵

This declaration can be seen as a deliberative engagement with public opinion and potential objections to the Court's ruling. Critics of the court often argue that it improperly intervenes in moral issues, which, in a democratic society, should be decided by public representatives. In the excerpt above, Justice Barak addressed potential critics of the decision among the public and explained that the Court did not intentionally choose to intervene and change social norms. Rather, the Court merely fulfilled its designated role in interpreting the (possibly intentional) ambiguity in the law drafted by the public representatives.

⁷⁸⁴ See Israel Religious Action Centre website at <<http://www.irac.org/MovementPartners.aspx>>. Interestingly, the current executive director of IRAC, Anat Hoffman, is one of the founding members of 'Women of the Wall'.

⁷⁸⁵ *Rodriguez*, above n 783, 301.

Style of ruling

Justice Barak's ruling was a breakthrough ruling in that for the first time it gave official recognition to Progressive conversion. Justice Barak knew very well that any decision in this case would result in part of the Jewish people being disgruntled and critical of the Court. Accepting progressive conversions would anger the substantial and politically strong Orthodox groups in Israel, while rejecting the converts' petition would create serious tensions with the Jewish diaspora. While Justice Barak chose a compromise that was closer to the petitioners' position, he tried in his judgment to explain to the Orthodox group the reasons for the Court's decision. Barak decided to recognise progressive conversions that took place outside Israel, but remained silent on the question of recognition of progressive conversions that took place in Israel. To date, the legal status quo remains that only Orthodox conversions are legally available in Israel,⁷⁸⁶ but non-Orthodox conversions done overseas are recognised for the purpose of the Law of Return.

Dissenting opinions

Eleven Judges sat on the panel in *Rodriguez*. Most judges went to great lengths in the judgment to explain their reasons and engage with the positions of the other judges. While four Judges joined Justice Barak's judgment, two wrote concurring opinions and four wrote in dissent. The four dissenting Judges opined that the Court should not interfere with the Ministry of the Interior's decision. Justice Procaccia, for example, held that the government should be given more time to adopt a comprehensive policy that could regulate the conditions for recognising conversions outside Israel. Other dissenting Judges expressed the opinion that this was a matter better left to be decided by public representatives, rather than the Court. Justice Türkel, who was often perceived to be a 'religious' Judge, echoed some of the deliberative principles discussed in previous chapters when he called for extensive consultation with all sectors of the public:

The very important questions that have been brought before the court lie entirely within the spiritual realm, the sphere of religion and belief, and they are national and historical concerns. These

⁷⁸⁶ It is possible to convert with non-Orthodox communities in Israel, but these conversions are not recognised by the State of Israel for the purpose of the Law of Return.

questions have no legal solution and they cannot be resolved by a judicial determination [W]ere my opinion accepted, we would refrain from making a decision, and we would declare, as I proposed in *Naamat v. Minister of Interior*, that the decision ought to be made as ‘a result of a thorough study of all the opinions and beliefs of all the sectors of the public, and with a joint effort to reach a broad consensus’.⁷⁸⁷

The dissenting judges in this case gave voice to those who thought that some issues are better deliberated by the public, or by its elected representatives, than by the Court. Even though their opinions were ultimately not decisive in this case, they prompted the other judges to engage with these arguments and justify their decision (as we saw above in the excerpt from Justice Barak’s ruling).

Effects on public deliberation

As in the WoW cases, the proceedings and rulings in the conversion cases were extensively covered by the media and promoted public debate not only with respect to the specific conversion issue, but also with respect to other religion vs. state controversies and the broad relationship between Israel and the Jewish diaspora.⁷⁸⁸ This again shows the effect of Court proceedings in terms of sparking public debate over issues that may not otherwise be discussed or adequately covered by the media.⁷⁸⁹

Public debate over these issues helped to clarify the differences as well as the commonalities shared by Jews from different religious streams, and encouraged people to take an active part in supporting either one of the perspectives involved. Bogoch and Holzman-Gazit argue, however, that despite extensive coverage, some media outlets failed to present all possible angles of the issue. Bogoch and Holzman-Gazit sampled 40 articles, reports, editorials and opinion pieces that appeared in two Israeli newspapers during the weeks before and after the *Rodriguez* ruling. In their study, Bogoch and Holzman-Gazit found that while *Haaretz*, the elite newspaper, emphasized the idea of

⁷⁸⁷ *Rodriguez*, above n 783, 348.

⁷⁸⁸ See, for example, Bryna Bogoch and Yifat Holzman-Gazit, ‘Clashing Over Conversion: “Who Is a Jew” and Media Representations of an Israeli Supreme Court Decision’ (2011) 24(4) *International Journal for the Semiotics of Law* 423, 431; Amanda Borschel-Dan, *If Israel Toughens Its Conversion Laws, a Nail in the Coffin of Ties with Diaspora Jews?* (30 April 2015) *The Times of Israel* <<http://www.timesofisrael.com/conversion-reform-under-threat-activists-warn-of-ripple-effect/>>.

⁷⁸⁹ See Bryna Bogoch and Yifat Holzman-Gazit, ‘Clashing Over Conversion: “Who Is a Jew” and Media Representations of an Israeli Supreme Court Decision’, above n 788, 432.

Israel as a civic state, *Yediot*, the popular newspaper, emphasized the religious dimension of Israeli nationhood. Moreover, *Yediot* presented a wider range of views than *Haaretz*, which tended to support the Court's decision. According to Bogoch and Holzman-Gazit, both papers 'avoided addressing the basic question of whether religious authorities should control the definition of the character of Israel as a Jewish State'.⁷⁹⁰

iv. Diaspora influence on Israeli politics

The controversy over non-Orthodox conversions has been a source of tension between the Israeli government and Jewish communities in the diaspora for many years. In the late 1980s it led Conservative and Reform Rabbis in the diaspora to call for Jewish organisations to withhold donations to Israeli causes, and even to divest from Israeli bodies that do not recognise non-Orthodox movements.⁷⁹¹ The ruling in *Rodriguez* was welcomed by Jewish diaspora communities and was regarded as an important step towards equality and recognition of non-Orthodox Jewish streams. But even after *Rodriguez*, which recognised non-Orthodox conversions that were performed in the diaspora, the conversion issue remains a source of tension between Jewish communities in the diaspora and the Israeli government. Progressive Jewish communities in the diaspora still demand recognition of non-Orthodox conversions performed in Israel for the purpose of the Law of Return.⁷⁹²

The Judges in *Rodriguez* were well aware that the case had significant ramifications for the connection between the Jewish diaspora and the state of Israel. As Justice Barak said:

The term 'Jew' in the Law of Return gives rise to difficult problems The recognition of conversion that is performed outside Israel and in Israel gives rise to fundamental questions concerning the character of the State of Israel as a Jewish and democratic state. It concerns the relationship between the Jewish people in the

⁷⁹⁰ Bryna Bogoch and Yifat Holzman-Gazit, 'Clashing Over Conversion: "Who Is a Jew" and Media Representations of an Israeli Supreme Court Decision', above n 788, 443.

⁷⁹¹ See Shain, above n 5, 58; Chaim Gans, 'National Self-Determination: A Sub-and Inter-Statist Conception' (2000) 13(2) *Canadian Journal of Law & Jurisprudence* 185, 195.

⁷⁹² Rabbi Eric H Yoffie, *It's Time for Israel to Recognize Reform and Conservative Conversions* (12 July 2016) *Haaretz Daily Newspaper* <<http://www.haaretz.com/opinion/.premium-1.730421>>; Amanda Borschel-Dan, above n 788.

Diaspora and the State of Israel and the relationship between religion and state in Israel.⁷⁹³

Justice Barak referred to an earlier case, *Naamat v. Minister of Interior*, in which the Court had to decide who was entitled to be registered as a Jew in the Population Registry according to the Population Registry Law:

There is no importance to the connection between the convert and the community in which he converted. The relevant matter is that the Jewish community abroad carried out its accepted conversion practices with regard to the applicant. Indeed, what underlies the ruling in *Federation of Sefaradim Torah Guardians — SHAS Movement v. Director of Population Administration, Ministry of Interior* is the approach that the Jewish people is one people. A part of it is in Israel; a part is in one Diaspora community; a part is in another Diaspora community.⁷⁹⁴

The conversion cases demonstrate two key points. First, these cases demonstrate how the Court applied deliberative democratic principles in addressing the interests and opinions of diaspora people versus the conflicting opinions of powerful groups in Israeli society. Second, they show how the Jewish diaspora managed to promote its goals through litigation in the Supreme Court, against the position of the Israeli government.

3. Ethiopian Jews cases

This series of cases also concerns the Law of Return. However, while the previous two cases involved mainly North-American Jews fighting for their rights, these cases involve diaspora (and Israeli) Jews fighting for the rights of African Jews.

i. Background

A Jewish community has existed in Ethiopia for more than a millennium. Like Jewish communities elsewhere, the Jews in Ethiopia (known as 'Beta Israel') have suffered discrimination and persecution. In modern times, the Ethiopian government prevented Jews from leaving the country and immigrating to Israel.⁷⁹⁵ During the 1980s and early 1990s, the Israeli government ran two major clandestine operations that smuggled out

⁷⁹³ *Rodriguez*, above n 783, 301.

⁷⁹⁴ HCJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [2002] IsrSC 56 (2) 721, 751.

⁷⁹⁵ See David F Kessler, *The Falashas: A Short History of the Ethiopian Jews* (Routledge, 2012).

thousands of Ethiopian Jews to Sudan, from where Israeli planes were able to fly them to Israel.⁷⁹⁶

Members of the Beta Israel community have been recognised by the Israeli government as Jews. Another group in Ethiopia, called 'Falash Mura', have also claimed they are Jews by ancestry and thus entitled to immigrate to Israel.⁷⁹⁷ The Falash Mura are generally believed to be Jews who over the centuries converted to Christianity, disengaged from Beta Israel and assimilated to various degrees in Ethiopian society. Israel did not consider the Falash Mura as Jews since, unlike members of the Beta Israel community, Falash Mura people did not practise Judaism. Israeli authorities claimed that members of the Falash Mura, despite having some Jewish roots, were simply practicing Christians claiming Jewish heritage for the opportunity to immigrate to a developed country. The Israeli government was afraid that allowing immigration of the Falash Mura would encourage thousands of Ethiopians to claim Jewish heritage in an attempt to immigrate to Israel. Activists arguing for the rights of the Falash Mura claimed that the Falash Mura were Jews who were forced to convert to Christianity or had done so for pragmatic reasons without ever really abandoning their Jewish faith.⁷⁹⁸

What is particularly relevant for the purposes of this thesis is that the process of assisting Beta Israel as well as the Falash Mura communities and bringing them to Israel was facilitated and supported by a plethora of Jewish organisations from the diaspora, in particular the North American Conference on Ethiopian Jewry (NACOEJ).⁷⁹⁹ Over the years, organisations such as The Jewish Federation and the American Jewish Joint

⁷⁹⁶ See Stephen Spector, *Operation Solomon: The Daring Rescue of the Ethiopian Jews* (Oxford University Press, USA, 2005); Gadi Ben-Ezer, *The Migration Journey: The Ethiopian Jewish Exodus* (Transaction Publishers, 2005).

⁷⁹⁷ The name can be roughly translated as 'nomadic converts'. See Pietro Toggia and Abebe Zegeye, *Ethiopia in Transit: Millennial Quest for Stability and Continuity* (Routledge, 2013) 67.

⁷⁹⁸ For more on this issue see Tudor Parfitt and Emanuela Trevisan Semi, *The Beta Israel in Ethiopia and Israel: Studies on the Ethiopian Jews* (Routledge, 2013) vol. 19; Daniel Summerfield, *From Falashas to Ethiopian Jews: The External Influences for Change C.1860-1960* (Psychology Press, 2003); Kessler, 169.

⁷⁹⁹ See the North American Conference on Ethiopian Jewry website at <<http://www.nacoej.org/about-us/our-history>>.

Distribution Committee (JDC) have donated millions of dollars in aid, medical care and education to Falash Mura transit camps in Ethiopia.⁸⁰⁰

ii. Court cases

The support provided by various Jewish diaspora organisations to Ethiopian Jews included legal counselling and funding for Supreme Court petitions. In a number of court cases, Ethiopian citizens who were denied the 'right of return' by the Israeli Ministry of Interior on the basis that they were not Jews, challenged the decisions in the administrative court and in the Supreme Court as the High Court of Justice.⁸⁰¹ These cases provide further examples of individuals using the Supreme Court to dispute their categorisation by the Israeli government as 'non-Jews' as opposed to 'diasporic Jews'.

One of the most important cases in this regard was the case of *Ambao*, in which the Supreme Court exercised judicial review over government decisions regarding the operations to bring the Falash Mura people to Israel.⁸⁰² The petition was submitted by Mr. Ambao and 379 other individuals – all Falash Mura people who were still in Ethiopia. The petitioners also included Struggle to Save Ethiopian Jewry (SSEJ), an international organisation that lists among its goals urging 'the State of Israel to allow these Jews [in Ethiopia] to make Aliyah,⁸⁰³ reuniting them with their families in the Jewish homeland'.⁸⁰⁴ In addition to Israeli public figures, SSEJ includes many prominent diaspora Jews among its executives. For example, its Honorary Chairman was the political activist and Nobel Laureate Elie Wiesel and its legal counsel forum is headed by Harvard Professor Alan Dershowitz and the former Canadian Justice Minister Irwin

⁸⁰⁰ See for example Rachel Pomerance, *UJC to Raise Falash Mura Funds* (7 June 2005) Jewish Telegraph Agency - The Global Jewish News Source <<http://www.jta.org/2005/06/07/life-religion/features/ujc-to-raise-falash-mura-funds>>; Anshel Pfeffer, *Sa'ar Urges Gov't to Renew Aliyah of Falashmura, as Number of Requests Triples* (30 October 2014) Haaretz Daily Newspaper <<http://www.haaretz.com/jewish-world/jewish-world-news/.premium-1.623490>>.

⁸⁰¹ See for example: APA (Administrative petition appeal) 5417/13 *Dejitano v. Minister of Interior* (30.7.2014); HC 5943/11 *Bizoaihu v. Minister of Interior* (6.8.2014). The Israeli Supreme Court functions as an appellate court for the administrative matters court. It is common therefore for people who are denied entry to Israel or naturalisation in the country by the Interior Ministry to submit petitions to the Supreme Court challenging the decision of the Ministry.

⁸⁰² See HCJ 5904/03 *Ambao v. The Israeli Government* (13.6.2007) and HCJ 5904/03 *Ambao v. The Israeli Government* (21.3.2011) ('*Ambao*').

⁸⁰³ A Hebrew term that means 'immigrating to Israel'.

⁸⁰⁴ See Struggle to Save Ethiopian Jewry website at <<http://www.ssej.org/>>.

Cotler.⁸⁰⁵ The pressure that the petitioners exerted on the government through litigation in the Supreme Court resulted in a number of decisions by the Israeli government that allowed thousands of Falash Mura members to immigrate to Israel on humanitarian grounds.⁸⁰⁶

iii. Deliberative features

Dialogue between the court and other institutions

The key deliberative element in this case was the dynamic between the Court and the government. Over the course of seven years, the petitioners in *Ambao* continuously sought orders from the Supreme Court that would force the government to implement policies to resolve the status of the Falash Mura people remaining in Ethiopia. The Court responded by pushing the Israeli government to address the petitioners' concerns.⁸⁰⁷ In a series of rulings, the Court ordered the government to set deadlines for the completion of the review of requests by Falash Mura members to be brought into Israel and for the completion of transfers of those whose requests have been approved. The Court also ordered the government to provide details regarding the conditions in the Falash Mura camps in Ethiopia.⁸⁰⁸

These court cases also helped to raise media awareness and public debate over a subject that was not popular and would not normally have been extensively covered by the media.⁸⁰⁹

⁸⁰⁵ Ibid.

⁸⁰⁶ See *Ambao*, above n 802, (ruling from 21.3.2011); *Israel to Allow in 8,000 Falash Mura from Ethiopia* (14 November, 2010) BBC News <<http://www.bbc.com/news/world-middle-east-11753909>>; Pfeffer, above n 800; Omri Efraim, *64 Ethiopian Immigrants Brought to Israel* (11 October 2016) Ynetnews <<http://www.ynetnews.com/articles/0,7340,L-4865617,00.html>>.

⁸⁰⁷ See Dan Izenberg, *Falash Mura Aliya Finished, State Tells High Court* (January 13 2008) The Jerusalem Post <<http://www.jpost.com/Israel/Falash-Mura-aliya-finished-state-tells-High-Court>>; Ruth Eglash, *Supreme Court Agrees to Hear Petition on Falash Mura Aliya* (1 January 2008) The Jerusalem Post <<http://www.jpost.com/Israel/Supreme-Court-agrees-to-hear-petition-on-Falash-Mura-aliya>>.

⁸⁰⁸ A list of these decisions is cited by the court in *Ambao*, above n 802, for example, decisions given on 11.2.2007, 13.1.2008 and on 21.3.2011.

⁸⁰⁹ See for example Ilan Lior, *Israel Set to Greenlight Final Aliyah of Ethiopia's Falashmura Community* (14 November 2015) Haaretz Daily Newspaper <<http://www.haaretz.com/israel-news/.premium-1.685833>>; David M Elcott, *Enough Delays: It's Time to Bring the Falash Mura Home* (26 July 2016) Jewish Telegraph

iv. Diaspora influence on Israeli politics

The actions of the North American Jewish NGOs caused a rift between the Israeli government and some Jewish diaspora organisations.⁸¹⁰ One Israeli Minister said that American Jewish groups lobbying for increased immigration of the Falash Mura to Israel are doing so 'to earn money, collect donations and justify their existence' but are unwilling to bring these Ethiopians to their own communities in America.⁸¹¹

The legal pressure from international Jewish organisations was very effective in causing the government to change its policy and allow more Falash Mura people to immigrate to Israel.⁸¹² The case of the Falash Mura is therefore another example of the influence of the Jewish diaspora and their use of the Supreme Court to advance their interests. In this case, Jews from one diaspora community (North America) used the Israeli Supreme Court to pressure the Israeli government to change its policy with regard to another Jewish diaspora (Ethiopian Jews).

4. 'Israeli Nationality' case

The petitioners in this case were a group of Israeli citizens who asked the Court to order the Israeli Population Registry to register them as having 'Israeli nationality'.⁸¹³ This case did not involve the Jewish diaspora directly, as the petition was submitted by Israeli citizens. However, the issues raised in this case had ramifications for the rights of the Jewish diaspora.

i. Background

The Israeli Population Registry collects all kinds of information for statistical purposes. One of the categories used by the Registry is a person's 'nationality' (which, as discussed

Agency - The Global Jewish News Source <<http://www.jta.org/2016/07/26/news-opinion/opinion/enough-delays-its-time-to-bring-the-falash-mura-home>>; Timna Jacks, *Israel Says There Are No More Jews in Ethiopia. Thousands Left behind Disagree.* (28 August 2013) Tablet Magazine <<http://www.tabletmag.com/jewish-news-and-politics/142440/left-behind-in-gondar>>.

⁸¹⁰ See *Israelis and Jewish Groups Talk Numbers and Dollars on Falash Mura* (27 November 2003) Jewish Telegraph Agency - The Global Jewish News Source <<http://www.jta.org/2003/11/27/archive/israelis-and-jewish-groups-talk-numbers-and-dollars-on-falash-mura>>.

⁸¹¹ Haviv Rettig, Rebecca Anna Stoil and Ruth Eglash, Boim, *US Jews Won't Accept Falash Mura* (23 July 2008) The Jerusalem Post <<http://www.jpost.com/Israel/Boim-US-Jews-wont-accept-Falash-Mura>>.

⁸¹² See *Israel to Allow in 8,000 Falash Mura from Ethiopia*, above n 806; Pfeffer, above n 800; Efraim, above n 806; Jacks, above n 809.

⁸¹³ *Ornan*, above n 682, English translation available at <<http://versa.cardozo.yu.edu/opinions/ornan-v-ministry-interior>>.

above, is different from a person's citizenship status). This category relates to the person's religious or ethnic affiliation (i.e., Jewish/Arab/Muslim/Christian/Druze). The petitioners, 21 Israeli citizens with various religious and ethnic affiliations, asked to be registered as 'Israeli' nationals, instead of being registered as either Jewish, Muslim, Druze etc. The main petitioner was Uzzi Ornan, a 90 year old professor of computational linguistics at the Israel Institute of Technology in Haifa who ran an organisation devoted to the official recognition of Israeli nationality.⁸¹⁴ It was not the first time Ornan asked the Court to recognise an 'Israeli nationality' for the purpose of the population registry. As with previous cases, the Ministry of Interior denied the request on the basis that it did not recognise an Israeli nationality.⁸¹⁵

The petitioners claimed that with the establishment of the State of Israel, an Israeli nationality was created, and that this nationality does not include the Jewish diaspora. They argued that without a secular Israeli identity, Israeli policies inevitably favour Jews and discriminate against non-Jewish minorities. The petitioners referred to Israel's Declaration of Independence, according to which, they argued, diaspora Jews are not a part of the nationality established in Israel as the nationality comprises only members of 'the independent Hebrew nation in their land' and 'members of the Arab nation who reside in the State of Israel'.⁸¹⁶

The State (as the respondent) claimed that the question touches on deep academic and public controversies regarding the existence of a 'Jewish' nationality that is separate from Israeli citizenship. It argued that this issue should be resolved in public and academic discourse, and the Court was not the appropriate forum to discuss it. The State also added that the request was entirely symbolic and had no de-facto significance. The State's position was that there exists only Israeli citizenship, which is common to all Israelis, but there is no Israeli nationality. The State also argued that adopting an 'Israeli

⁸¹⁴ See Tia Goldenberg, *Supreme Court Rejects 'Israeli' Nationality Status* (4 October 2013) The Times of Israel <<http://www.timesofisrael.com/supreme-court-rejects-israeli-nationality-status/>>.

⁸¹⁵ It should be noted that this was not the first time this issue was brought before the Supreme Court. Others have tried in the past to ask the Court to register them as having Israeli nationality. See for example CA 630/70 *Tamarin v. State of Israel* [1972] IsrSC 26(1) 197.

⁸¹⁶ *Ornan*, above n 682, Justice Vogelmann [3]. See *The Declaration of The Establishment of The State of Israel* May 14, 1948. English translation available at <http://www.knesset.gov.il/docs/eng/megilat_eng.htm>.

nationality' might upset Arabs and other minorities that do not wish to be classified as part of an 'Israeli nationality'.

The Court ruled that the petitioners did not prove the existence of an 'Israeli' nationality, detached from Israeli citizenship. The Judges also noted that deciding that there is an 'Israeli' nationality would force different groups within Israeli society (such as Christians, Druze and Arabs) to adopt a foreign identity to which they may not wish to belong.

ii. Deliberative features

1) Justiciability

The petitioners were ordinary citizens, seeking a declaratory judgment regarding a political issue that had no real practical implications for them. The District Court of Jerusalem ruled that the issue was 'not judicial' and should be left to the legislators. The petitioners appealed to the Supreme Court, which unanimously declared that it was authorised to rule on the issue as it was in the realm of 'normative judgment'. Although the Supreme Court could have easily dismissed their claims on procedural grounds (as the District Court did), it chose to address the merits. This is another example of the Court's broad standing policy, but more importantly, it demonstrates the Court's willingness to participate and contribute to public debate in issues that some (including the lower court) argued belong to the legislative or academic realm. Even though the petitioners were not successful, the fact that these questions were deliberated in the Court attracted media coverage and encouraged public debate regarding these questions.⁸¹⁷ For example, Yedidia Stern (the Vice President of Research at the Israel Democracy Institute and a professor of law at Bar-Ilan University) and Jay Ruderman (prominent Jewish-American activist and philanthropist) have published an op-ed explaining why it was 'imperative for the State of Israel to distinguish between citizenship and nationality'.⁸¹⁸ Anita Shapira, a professor emeritus of Jewish history at

⁸¹⁷ See, for example, Revital Hovel, *Supreme Court Rejects Citizens' Request to Change Nationality from 'Jewish' to 'Israeli'* (3 October 2013) Haaretz Daily Newspaper <<http://www.haaretz.com/israel-news/.premium-1.550241>>; Goldenberg, above n 814; Jay Ruderman and Yedidia Stern, *Why 'Israeli' Is Not a Nationality* (3 March 2014) Jewish Telegraphic Agency <<http://www.jta.org/2014/03/03/news-opinion/israel-middle-east/op-ed-why-israeli-is-not-a-nationality>>; Dan Izenberg, *Supreme Court to Decide If There Is an 'Israeli Nation'* (7 March 2010) The Jerusalem Post <<http://www.jpost.com/Israel/Supreme-Court-to-decide-if-there-is-an-Israeli-nation>>.

⁸¹⁸ Ruderman and Stern, above n 817.

Tel Aviv University, described the attempt to claim a separate Jewish nationality from the Jewish religion 'very revolutionary' and cautioned that if an Israeli nationality is recognised in Israel, its Jewish essence will be lost and it could estrange diaspora Jews whose connection to Israel is based on religion.⁸¹⁹ Others criticised the Court's ruling. The prominent Israeli writer A.B. Yehoshua wrote that '[w]hen Israeli citizens define themselves as Jews - instead of Israelis - they weaken their link to the country and bar national identity from flourishing ... [w]e are only at the beginning of the struggle for the place of an Israeli identity in our lives'.⁸²⁰ One columnist even wrote that '[t]he verdict gives the impression of being ultra-conservative and the Supreme Court justices give the impression of being out of touch with the spirit of the age in which they live'.⁸²¹

2) Style of ruling

The Court discussed the petitioners' arguments at length and showed sympathy towards the arguments, despite ultimately rejecting them. As Justice Vogelman concluded in his judgement: 'I will clarify that denial of the appeal in no way detracts from the principled battle of the appellants, born of their personal convictions, and from the discourse that will continue in the public domain'.⁸²² Justice Melcer repeated the District Court's words with regard to the petitioners:

There is nothing in this decision to say that there is no Israeli nationality – in a person's heart, in the platform of a group of people, amongst a particular sector in the state. On the contrary, Professor Uzi Ornan, like the other petitioners, believes that he is a member of the Israeli nation. This belief deserves respect and appreciation from those who share his view and those who oppose it'.⁸²³

Also, despite denying the appeal, the Court decided to give no order for costs.⁸²⁴

⁸¹⁹ See Goldenberg, above n 814.

⁸²⁰ A.B. Yehoshua, *Defining Who Is an Israeli* (12 September 2013) Haaretz Daily Newspaper <<http://www.haaretz.com/opinion/.premium-1.546697>>.

⁸²¹ Rachel Neeman, *On Being an Israeli in Israel* (11 October 2013) Haaretz Daily Newspaper <<http://www.haaretz.com/opinion/.premium-1.551731>>.

⁸²² *Ornan*, above n 682, Justice Vogelman [27].

⁸²³ *Ibid*, Justice Melcer [11].

⁸²⁴ Usually, the Court orders the party who loses to pay the other party's legal costs. Sometimes the Court does not order to pay costs if it thinks that the losing party acted in good faith and raised valid points.

They style of the ruling in this case showed the Court's willingness to engage with a range of opinions and acknowledge that even small minority opinions are legitimate and deserve consideration. The judges also left the door open for future developments, namely, that over time circumstances may change and it might be possible then to prove that an Israeli nationality has been created.⁸²⁵

This case is an example of how the Court used deliberative principles to deal with a case that involved the interests of the Jewish diaspora and the interests of the State in maintaining its ties with diaspora communities. By choosing to take on the case and seriously discuss the petitioner's claims, the Court gave voice to minority views and helped to encourage public deliberation.

iii. Diaspora influence on Israeli politics

It was clear that accepting the petitioners' request would, at least on a symbolic level, disconnect the Jewish diaspora from the part of the Jewish people living in Israel. The Court was well aware of such implications. As Justice Vogelman said:

We are dealing here with a sensitive and moot issue which has accompanied the Jewish people for many years and the Zionist movement from its inception The implications of this discussion are immensely wide. This pertains to Israel's relations with diaspora Jews, and also to perceptions among the various groups within the State of Israel and the relations between them.⁸²⁶

This, among other reasons, led the Court to reject the position of the petitioners. As Ruderman and Stern wrote 'if the nationality of Jewish Israelis is defined as Israeli rather than Jewish, then the national bond we believe binds together Jews in Israel and Jews in the Diaspora would be severed'.⁸²⁷ This case is therefore an example of how the Court, in its deliberations, took into account the interests of diaspora communities, even though diaspora people were not part of the proceedings.

5. Diaspora funding of legal activism in Israel

The cases I have analysed involved the Jewish diaspora, either directly or indirectly. In the first three cases, diaspora Jews were parties to the proceedings, either as petitioners

⁸²⁵ See *Ornan*, above n 682, Justice Melcer [8].

⁸²⁶ *Ibid*, Justice Vogelman [18].

⁸²⁷ Ruderman and Stern, above n 817.

or as respondents. In the last example, the issues raised in the case concerned particular questions that directly affect diaspora Jews. These cases demonstrated how the court engaged in deliberation that gave voice to diaspora Jews, who are non-citizens and who have no official direct way to participate in political processes in Israel.

However, Jews in the diaspora use the Israeli legal system to become involved in Israeli society and promote their views and values in other areas that are not related to diaspora issues per se. The following cases provide examples of how Jewish diasporic communities and Israeli political NGOs have joined together in using the Court to challenge various Israeli laws and policies. The cases I discuss in this section show how Jewish organisations in the diaspora fund and support Israeli NGOs in submitting petitions to the Supreme Court in order to intervene in issues that do not directly concern the Jewish diaspora, but rather touch on Israeli society in general. These interventions are possible due to the fact that Israeli NGOs and political activists have access to the Court because of its broad standing and justiciability policies and its receptiveness of *amicus curiae* submissions.

i. Background

As discussed above, some NGOs are the most experienced and successful litigators in the Israeli Supreme Court.⁸²⁸ International Jewish organisations donate millions of dollars each year to a plethora of Israeli NGOs. This provides invaluable support to the activities of these NGOs. One noticeable example is the New Israel Fund (NIF). The NIF is a left-leaning Jewish NGO based in New York that aims to ‘promote a vision of Israel as a just, democratic and egalitarian society’.⁸²⁹ Over the past 30 years, it has granted more than 250 million US dollars to more than 850 organisations in Israel.⁸³⁰ As the NIF states on its website: ‘there is hardly any significant socially oriented organisation today in Israel that does not owe its existence to the New Israel Fund’.⁸³¹

⁸²⁸ See above p 155.

⁸²⁹ See *New Initiatives for Democracy* on NIF website <<http://www.nif.org/what-we-do/new-initiatives-for-democracy/>>.

⁸³⁰ A detailed breakdown of NIF grants to Israeli NGO’s based on NIF financial statements can be found on NGO Monitor website at <http://www.ngo-monitor.org/article/new_israel_fund/>.

⁸³¹ See New Israel Fund of Canada website at <<https://www.nifcan.org/issues-projects/civil-human-rights/>>.

Submitting petitions to the Israeli Supreme Court has become one of the most common and effective means of political activism employed by Israeli NGOs that are NIF grantees. As discussed earlier, the Israeli Supreme Court has in recent decades adopted a very permissive, even encouraging, approach towards submissions from NGOs and human rights groups. Indeed, these organisations have submitted numerous petitions to the Court challenging various laws and government practices that allegedly violate constitutional rights. For example, one NIF grantee 'Rabbis for Human Rights' has been involved in many petitions representing Palestinians on various issues such as access to private lands, policy planning and home demolitions.⁸³² Another NIF grantee - 'Kav La'Oved' ('the Worker's Hotline' in Hebrew) - has submitted many petitions concerning the protection of workers' rights. One of the cases it submitted to the Supreme Court resulted in the granting of social and health benefits to foreign workers in the nursing care sector.⁸³³ Notably, the Israel Religious Action Centre, which was one of the petitioners in the conversion cases discussed above, is also an NIF grantee.⁸³⁴ In fact, NIF grantees often collaborate in submitting joint petitions to the Supreme Court.⁸³⁵ In the next sections I will provide examples of such cases. First, I discuss a key case in which an NIF grantee assisted an Israeli Arab citizen to challenge the Israeli government and a major international Jewish organisation. Second, I discuss how other NIF grantees assisted Palestinians and illegal migrants, who are not Israeli citizens, to challenge Israeli policies at the Supreme Court.

⁸³² See Rabbis for Human Rights website at <<http://rhr.org.il/eng/about-legal-department-2/>>.

⁸³³ HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* (30.3.2006). English summary available at <<http://versa.cardozo.yu.edu/opinions/kav-laoved-worker%E2%80%99s-hotline-v-governm ent-israel>>.

⁸³⁴ See the Israel Religious Action Centre website at <<http://www.ira.org/OurSupporters.aspx>>.

⁸³⁵ See for example HCJ 2072/12 *The Coalition of Women for Peace, et al v. The Minister of Finance* (15.4.2015) challenging a law that imposed sanctions on those who call for an economic boycott of the settlements or of Israel; HCJ 8276/05 *Adalah et al v. The Minister of Defence* (12.12.2006) regarding compensations for Palestinians who were injured in military conflicts; HCJ 9132/07 *Gaber Albasiuni Ahmed et al v. the Prime Minister* (30.1.2008) regarding the limited supply of fuel and electricity to the Gaza Strip (English translation is available at http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf). For more on the involvement and effects of Israeli NGOs in petitions to the Supreme Court see Meydani, above n 650, 73.

ii. *Ka'adan case*

This case involved Adel Ka'adan, an Israeli Arab who had been barred from joining Katzir, a cooperative Jewish community settlement in the south Galilee in the north of Israel.⁸³⁶ The land on which Katzir was built was allocated by the State of Israel to a major international Jewish organisation, the Jewish Agency for Israel ('Jewish Agency'), which in turn transferred it to an agency that only sold plots to Jews. Ka'adan challenged this policy in the Supreme Court, sitting as the High Court of Justice, by arguing that this was unlawful discrimination. In response, the Jewish Agency (and other respondents) claimed that the Jewish settlement was a 'link in a chain of lookouts, intended to preserve Israel at large for the Jewish people' and that its existence is set to promote Jewish settlement in Israel, particularly in areas such as the Galilee where the Jewish population is sparse, thereby ensuring population dispersal and generally increasing Israel's security. The respondents also claimed that allowing Arab residents to join the community settlement would likely cause Jewish residents to leave, thereby effectively converting what was intended to be a Jewish settlement into an Arab settlement.⁸³⁷

In March 2000 the Supreme Court ruled that the Israeli Land Authority could not discriminate between Jews and Arabs in the allocation of state lands, even if the discrimination was made through the Jewish Agency, which leased the land from the Israeli Land Authority. The landmark decision came after more than four years of hearings and was hailed as an important step toward full equality for Israel's Arab citizens.⁸³⁸

1) *Deliberative features*

This case is another example of the Court's broad standing and justiciability policies. But what is most instructive in this case is the Court's style of ruling: the Court examined at length the principle of equality, stressing that, unlike individuals, the state cannot

⁸³⁶ HC 6698/95 *Ka'adan vs. Israel land administration, the Jewish Agency, Katzir et al* [2000] IsrSC 54(1) 258. English translation available at <<http://weblaw.haifa.ac.il/en/JudgesAcademy/workshop3/Documents/GS/7/28%20AADEL%20KAADAN%20V%20ISRAELI%20LAND%20ADMINISTRATION.doc>>.

⁸³⁷ See *Ka'adan*, above n 836, President Barak [27].

⁸³⁸ Alexandre (Sandy) Kedar, 'A First Step in a Difficult and Sensitive Road:" Preliminary Observations on *Qaadon v. Katzir*' (2000) 16(1) *Israel Studies Bulletin* 3.

discriminate between people according to their religion or nationality when selling its land (even though the discrimination was done indirectly, by a third party):

Equality is one of the State of Israel's fundamental values Indeed, the State is held to honour and protect every individual's basic right to equality. Equality lies at the very foundation of social co-existence. It is the 'beginning of all beginnings' It is one of the central pillars of the democratic regime.⁸³⁹

In his judgment, Justice Barak provided detailed arguments as to why Jews in particular should not discriminate against Arabs in a Jewish state. This complies with the deliberative principle of 'public reason' or 'reason that anyone can accept'. For example, Barak stated that because Jews used to be discriminated against in many countries throughout history, the State of Israel should be extremely careful not to discriminate against non-Jews.⁸⁴⁰ Barak used his judgment to address Jewish groups who may not be convinced by general principles of equality. He also explained that apart from the philosophical and moral arguments against discrimination, Jewish traditional law itself prohibits discrimination against non-Jews. Barak used references from the Bible and the Jewish Talmud to support his reasoning that non-Jews should not be discriminated in a Jewish state:

The principle of equality and prohibition of discrimination are embodied in the [Biblical] commandment 'Thou shalt have but one law, for the stranger as for the citizen'. This passage was construed by the Sages as requiring 'a law which is equal for all of you'.⁸⁴¹ It has been eternally sanctified in the Torah of Israel since it became a nation.⁸⁴² Similarly, Justice Elon insisted that 'Judaism's very foundation is the idea that the world was created in the Lord's image'.⁸⁴³ Thus begins the Torah of Israel, and from this we derive the basic approach to the value of human life, the equality and love to which each and every person is entitled by virtue of their very personhood'.⁸⁴⁴

⁸³⁹ *Ka'adan*, above n 836, President Barak [21].

⁸⁴⁰ *Ibid*, President Barak [24].

⁸⁴¹ Tractate Ketubboth, 33a; Babba Kamma 83b.

⁸⁴² HC 200/83 *Whatat v. Minister of Finance* IsrSC 38(3) 113, Justice Turkel [27] p 119.

⁸⁴³ Genesis, 1:27.

⁸⁴⁴ *Kaadan*, above n 836, President Barak [31].

Barak also explained in the ruling that the decision does not condemn or nullify previous acts made in the past, but rather relates only to the future, and is a first and careful step in addressing a complicated matter:

[I]t is of the essence to comprehend and keep in mind that we are taking the first step on a difficult and sensitive path today. It is therefore appropriate that we proceed with caution, to avoid stumbling; we will therefore proceed most carefully, from one case to the next, bearing in mind the circumstances of each particular instance. Though the road before us may be long, it is important that we always bear in mind, not only where we came from, but also where we are headed.⁸⁴⁵

Ka'adan brought an end to longstanding policies that enabled the Jewish Agency to promote exclusively Jewish settlements in Israel. Naturally, the ruling sparked an intense debate in the Israeli public and heated discussions in the media and the Parliament.⁸⁴⁶ The ruling attracted international attention and raised intense debates over Israel's Jewish and democratic characteristics.⁸⁴⁷

2) Jewish diaspora involvement

Ka'adan was aided throughout the Court proceedings by The Association for Civil Rights in Israel ('ACRI'), which filed the petition and was party to the proceedings. ACRI is the biggest NIF grantee in Israel⁸⁴⁸ and has filed many Supreme Court petitions over the years concerning various human rights issues.⁸⁴⁹ While the NIF was involved in the case through ACRI on *Ka'adan's* behalf, the Jewish Agency was involved as one of the respondents. The Jewish Agency is the largest Jewish NGO in the world. Founded in

⁸⁴⁵ Ibid, President Barak [37].

⁸⁴⁶ Uli Schmetzer, *Jews-Only Bill Roils Israel* (10 July 2002) Chicago Tribune <http://articles.chicagotribune.com/2002-07-10/news/0207100326_1_adel-kaadan-arab-galilee-jewish-state>; Laurie Copans, *Israel: Arabs Can Buy Jewish Land* (9 March 2000) Associated Press <<http://www1.jafi.org.il/papers/2000/march/apmar8.htm>>.

⁸⁴⁷ See Yakobson and Rubinstein, above n 102, 115; Steven V. Mazie, *Israel's Higher Law: Religion and Liberal Democracy in the Jewish State* (Lexington Books, 2006) 235; Kedar; Dan Izenberg, *High Court: Arab Family Was Unjustly Barred from State Land* (9 March 2000) The Jerusalem Post <<http://search.proquest.com.virtual.anu.edu.au/docview/319270937?pq-origsite=summon>>; Joel Greenberg, *Israeli Court Rules Arab Couple Can Live in Jewish Area* - (9 March 2000) The New York Times <<http://www.nytimes.com/2000/03/09/world/israeli-court-rules-arab-couple-can-live-in-jewish-area.html>>.

⁸⁴⁸ See NIF website at <<http://www.nif.org/what-we-do/grantmaking/>>.

⁸⁴⁹ See a list of ACRI legal achievements on their website at <<http://www.acri.org.il/en/2013/08/14/acri-legal-landmarks/>>.

1929, its main goal was the encouragement of immigration and absorption of Jews from the diaspora into Israel.⁸⁵⁰ The Jewish Agency still finances and operates dozens of programs aimed to assist millions of Israelis and Jews worldwide every year. Although based in Jerusalem, the Jewish Agency does not receive core funding from the Israeli government, but is funded by major Jewish communities, federations and donors from Israel and elsewhere around the world.⁸⁵¹ The settlement department of the Jewish Agency played a central role in the building of the State of Israel, establishing hundreds of settlements over the years all over Israel that accommodated new immigrants arriving to Israel from the Jewish diaspora.⁸⁵² In the State's responding affidavit (made by the Israel Land Administration and the Ministry of Construction and Housing) it was stated that the Jewish Agency operates as an extension of the Jewish People in the diaspora.⁸⁵³

The ruling raised concerns among Jews in Israel and the diaspora. Many were concerned that Israel's Jewish character was under threat.⁸⁵⁴ Such fears led many Israelis and Jews to support legal reforms that they considered would bolster Israel's 'Jewish' character.⁸⁵⁵ In the years following *Ka'adan*, the Supreme Court reaffirmed its policy in other cases, ordering other community settlements to justify their refusal to allocate land to Arab families.⁸⁵⁶ These cases were submitted to the Court by another NIF grantee, Adalah, an Israeli NGO that works to 'promote and defend the rights of Palestinian Arab citizens of Israel'.⁸⁵⁷

⁸⁵⁰ See the Jewish Agency website at <<http://www.jewishagency.org/aliyah>>.

⁸⁵¹ See the Jewish Agency 2012/2013 Performance Report available at <http://www.jafi.org/AnnualReports/Annual_Report_2013-2014.pdf?_ga=1.29069566.359727321.1428987572>.

⁸⁵² See Ze'ev Drory, *The Israeli Defence Forces and the Foundation of Israel: Utopia in Uniform* (Routledge, 2004) 49.

⁸⁵³ See *Ka'adan*, above n 836, Justice Barak [26].

⁸⁵⁴ See Joel H Golovensky and Ariel Gilboa, 'Is This Land Still Our Land? The Expropriation of Zionism' (2009) 36 *Azure* 26.

⁸⁵⁵ Lahav Harkov, *Making The Jewish State A Jewish State* (2013) Commentary <<https://www.commentarymagazine.com/article/making-the-jewish-state-a-jewish-state/>>; Shmuel Rosner, *Jewish and Democratic: Perspectives from World Jewry* (The Jewish People Policy Institute, 2014) <http://jppi.org.il/uploads/Jewish_and_Democratic_Perspective_from_World_Jewry.pdf>, 37–38, n 17.

⁸⁵⁶ See for example H.C. 8036/07 *Zubeidat v. Israel Land Authority* (9.9.2011).

⁸⁵⁷ See Adalah's website at <<http://www.adalah.org/en/content/view/7189>>. Notably, one of Adalah's founders and its current International Advocacy Director is Rina Rosenberg, a Jewish woman born and raised in New York.

iii. *Petitions by Palestinians*

1) Background

Israel captured the West Bank and Gaza from Jordan and Egypt, respectively, in the 1967 war, but has not annexed these territories (except for east-Jerusalem). After the war, Palestinian residents of these territories started to petition the Israeli Supreme Court (sitting as the High Court of Justice) against various acts of the Israeli military in those territories.

Over the past decades, the Israeli Supreme Court has considered thousands of petitions submitted by Palestinian individuals and NGOs regarding Israeli authorities' actions in the Palestinian Territories.⁸⁵⁸ One of the most notable examples of the Court's rulings on such issues was a series of rulings in which the Supreme Court, accepting Palestinian petitions, ordered the Israeli army to reroute and rebuild parts of Israel's security barrier so as to not violate the rights of Palestinian individuals.⁸⁵⁹ Another notable example was a petition against the Israeli government decision to limit the supply of fuel and electricity to the Gaza Strip.⁸⁶⁰ This petition was submitted to the Court during the 2008 Gaza war by Palestinian residents of Gaza and ten Israeli NGOs. The Court rejected the petition, but only after serious deliberations, concluding that the amount of fuel and electricity supplied to Gaza by Israeli conformed to international law.

2) Deliberative features

The Court's rulings in cases submitted by Palestinians demonstrate how it uses broad standing and justiciability requirements to expand democratic deliberation. First, the Court chose to rule on controversial cases that other courts may deem non-justiciable.

⁸⁵⁸ See David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94(885) *International Review of the Red Cross* 207; Michael Karayanni and Center for International Legal Education, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (Oxford University Press, 2014) vol 9; Daphna Golan and Zvika Orr, 'Translating Human Rights of the "Enemy": The Case of Israeli NGOs Defending Palestinian Rights' (2012) 46(4) *Law and Society Review* 781.

⁸⁵⁹ See for example H CJ 7957/04 *Mara'abe v. Prime Minister of Israel* (15.9.2005), English translation available at <http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf>; H CJ 2056/04 *Beit Sourik Village Council v. Israel* [2004] IsrSC 43 1099. For more on this see Geoffrey R Watson, 'Mara'abe V. Prime Minister of Israel. Case No. H CJ 7957/04' (2006) 100(4) *The American Journal of International Law* 895.

⁸⁶⁰ H CJ 9132/07 *Jaber Al-Bassiouni Ahmed and others v the Prime Minister* (30.1.2008). English translation available at <http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf>.

Second, the Court in these cases gave voice to non-citizens (in this case, Palestinians) who were not able to vote in Israeli elections or otherwise directly shape Israeli policies that affect them.

When Palestinians first started to submit petitions to the Court, it was unclear whether the Court was authorised to accept these petitions. In countries with legal systems similar to Israel's, such as the United States and Britain, the courts refrain from overseeing territories conquered in war.⁸⁶¹ Although the State could have contested the Court's jurisdiction to deal with petitions submitted by Palestinians on the grounds that they were submitted by 'enemy aliens' or because they related to acts performed outside Israel's sovereign territory, it decided not to do so and allowed these petitions to be heard.⁸⁶² The Court adopted this approach and ruled in these cases despite criticism in Israeli society from both sides of the political spectrum. Right wing groups described the Court's approach as interventionist and effectively restricting the Israeli security forces in their fight against terrorists.⁸⁶³ Left wing groups, on the other hand, depicted the Court's activities as 'legitimising the occupation' and facilitating Israeli settlement activities in the Palestinian Territories.⁸⁶⁴ Despite these criticisms, the Court has continued to hear petitions and give rulings over such issues.⁸⁶⁵ This practice allows Palestinians, who are not Israeli citizens and are not normally subject to Israeli law, to nevertheless seek justice from Israeli courts.⁸⁶⁶ This approach has reinforced democratic principles in Israel and in the territories under its control in a way that other Israeli institutions (e.g., the Knesset) have not been able to do.

⁸⁶¹ Friedmann, above n 669, 25.

⁸⁶² See Kretzmer, above n 858, 208–9.

⁸⁶³ See Friedmann, above n 669, 178–180.

⁸⁶⁴ See Gideon Doron, Arye Naor and Assaf Meydani (eds), *Law and Government in Israel* (Routledge, 2010) 52; Friedmann, above n 669, 27.

⁸⁶⁵ See for example H CJ 9949/08 *Hamad v. Minister of Defence* (22.12.2016); Tovah Lazaroff, *Court: Amona Outpost Must Be Razed by December 25* (14 November 2016) The Jerusalem Post <<http://www.jpost.com/Arab-Israeli-Conflict/Court-Amona-must-be-razed-on-December-25-472586>>.

⁸⁶⁶ See, for example Yonah Jeremy Bob, *Palestinian Municipalities Petition Israeli Court to Axe Settlements Law* (8 February 2017) The Jerusalem Post <<http://www.jpost.com/Arab-Israeli-Conflict/Palestinian-municipalities-petition-Israeli-court-to-axe-settlements-law-480938>>.

iv. Petitions by asylum seekers and illegal migrants

1) Background

Other examples of groups of non-citizens that have used the Supreme Court to challenge the constitutionality of Israeli laws and policies are illegal migrants and asylum seekers. A recent example of this was the series of rulings in which the Supreme Court struck down new legislation aimed at discouraging African migrants and asylum seekers from crossing the border from Egypt into Israel (the 'anti-infiltration' cases).

The petitioners in these cases were Sudanese and Eritrean individuals, along with five Israeli NGOs (including the Association for Civil Rights in Israel and the Hotline for Refugees and Migrants, both NIF grantees). The petitioners argued that both the process of detaining illegal migrants and asylum seekers and the period of detention were unconstitutional. In September 2013, the Supreme Court unanimously decided that the State's policy of holding the migrants for up to three years without trial was unconstitutional and ordered the government to free more than 2,000 migrants being held in the Holot detention centre.⁸⁶⁷ In response, the government moved swiftly and enacted new legislation that enabled it to continue detaining illegal migrants and asylum seekers.⁸⁶⁸ In September 2014, the Supreme Court struck down the State's migration policy for the second time.⁸⁶⁹ Seven of nine judges ordered the State to close the Holot detention centre within 90 days and ordered the authorities to cease enforcing certain limits on the detainees' movements. In this ruling the Court also found unconstitutional the holding of newly arrived illegal immigrants in the closed detention centre for a term exceeding one year (in a 6-3 majority). The government was disturbed by the decision.

⁸⁶⁷ HCJ 7146/12 *Adam v. the Knesset* (16.9.2013). English summary available at <<http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adam%20v.%20Knesset.pdf>>. See also Yonah Jeremy Bob, *Israel Cannot Detain African Migrants for up to Three Years without Trial*, *High Court Rules* (16 September 2013) *The Jerusalem Post* <<http://www.jpost.com/National-News/Court-overrules-government-policy-gives-state-90-days-to-free-detained-migrants-326263>>.

⁸⁶⁸ See Reuven Ziegler, *The Prevention of Infiltration Act (Amendment No. 4): A Malevolent Response to the Israeli Supreme Court Judgment* (The Israel Democracy Institute, 8 December 2013) <<http://en.idi.org.il/analysis/articles/the-prevention-of-infiltration-bill-a-malevolent-response/>>.

⁸⁶⁹ HCJ 8425/13, HCJ 7385/13 *Gebrselassie et al. v. The Israeli Government* (22.9.2014) ('*Gebrselassie*'). English translation available at <<http://www.refworld.org/docid/54e605334.html>>. See also Yonah Jeremy Bob, *High Court Strikes down State Migrant Policy for Second Time in One Year* (22 September 2014) *The Jerusalem Post* <<http://www.jpost.com/Israel-News/High-Court-strikes-down-state-migrant-policy-for-second-time-in-one-year-376054>>.

The Interior Minister, for example, said that he could not accept the verdict of the Court, that the Court had ‘made a mistake’ and that the Knesset would have to pass legislation preventing the Court from intervening on this issue.⁸⁷⁰ Indeed, the Knesset revised the law again, and in August 2015, the Court upheld the government’s new ‘anti-infiltration’ law, ruling that detaining immigrants at a detention facility was constitutional, but that the period of detention must be limited to a maximum of 12 months. The Court ruled the section of the law that allowed the holding of immigrants for up to 20 months to be disproportionate.⁸⁷¹ Nine justices ruled on this issue, with eight of them writing separate opinions. In its ruling, the Court rebuked the government’s slow pace in processing requests for asylum. The Court also ruled that the Knesset must come up with amendments to the legislation within six months, and temporarily limited the length of detention at Holot detention centre to 12 months. As a result of this ruling, all detainees at Holot who had been there for a year or more were released.⁸⁷²

2) Deliberative features

Dialogue between the court and other institutions

The ‘anti-infiltration’ cases demonstrate well the deliberative role the Court plays by its interaction with the legislative and the executive branches. The Court ruled over a controversial issue, striking down twice a law passed by the Knesset. The effects of these rulings were considerable as many detainees were released due to the legal actions taken by the different NGOs that were largely supported and funded by Jewish communities in the diaspora.

⁸⁷⁰ Newman, Marissa, In Dramatic Ruling, High Court Rejects Israel’s Policies on Illegal Migrants (22 September 2014) The Times of Israel <<http://www.timesofisrael.com/in-dramatic-ruling-supreme-court-rejects-israels-policies-on-illegal-migrants/>>.

⁸⁷¹ HCJ 8665/14 Desete v Minister of Interior (11.8.2015). English summary is available at <<http://hotline.org.il/wp-content/uploads/2013/12/Decision-11-August-2015-Summary-ENG.pdf>>. For more on this see Reuven Ziegler, *In the Land of Hidden Legislative Aims: HCJ 8665/14 (Detention of Asylum-Seekers in Israel- Round 3)* (The Israel Democracy Institute, 2015) <[http://en.idi.org.il/analysis/articles/in-the-land-of-hidden-legislative-aims-hcj-866514-\(detention-of-asylum-seekers-in-israel-round-3\)/](http://en.idi.org.il/analysis/articles/in-the-land-of-hidden-legislative-aims-hcj-866514-(detention-of-asylum-seekers-in-israel-round-3)/)>. See also Ilan Lior, *Israel’s High Court Rejects Part of Third Anti-Infiltration Law* (11 August 2015) Haaretz Daily Newspaper <<http://www.haaretz.com/israel-news/.premium-1.670645>>.

⁸⁷² See Ben Hartman and Harakov Lahav, *High Court Upholds Constitutionality of ‘anti-Infiltration Law’* (11 August 2015) The Jerusalem Post <<http://www.jpost.com/Israel-News/High-court-upholds-constitutionality-of-anti-infiltration-law-partially-agrees-with-NGO-petition-411814>>.

Accessibility

These cases also provide a good example of the Court's willingness to accept submissions from third party NGOs. In the first petition, two organisations submitted an *amicus curiae* brief to the Court: the United Nations High Commissioner for Refugees (UNHCR) made a submission in support of the petitioners, while another NGO, 'Kohelet Policy Forum' made a submission supporting the State's position.⁸⁷³ In the second petition, 'The Kohelet Policy forum' made a submission supporting the State, while another think tank 'The Concord Research Center for Integration of International Law in Israel' made a submission in support of the petitioners.⁸⁷⁴ In the third petition, two more NGOs joined: 'Eitan – Israeli Immigration Policy Center' supported the petitioners while 'The legal forum for Israel' supported the State.⁸⁷⁵ Allowing different NGOs from both sides of the political spectrum to join court proceedings and submit their opinions contributes to the deliberative process in that it demonstrates that the Court considers a variety of viewpoints presented by people who are going to be affected by its decision before delivering its decision.

I. Discussion and Summary

In the previous part, I have reviewed a range of cases in which groups of non-citizens were able to challenge government policies through litigation in the Supreme Court. The case studies demonstrate several points I have made throughout my thesis. First, the cases demonstrate the kind of conflicts that arise between diaspora communities and kin-state governments. Second, the cases show the deliberative democratic principles that were applied (to various degrees) during constitutional deliberations by the Israeli Supreme Court. Third, the cases illustrate that, through the use of such principles, a constitutional court can enable diaspora communities to be legitimately involved in

⁸⁷³ The Kohelet Policy Forum is a think tank founded by public figures and academics with background in constitutional law and social sciences and it strives to 'secure Israel's future as the nation-state of the Jewish people, to strengthen representative democracy, and to broaden individual liberty and free-market principles in Israel' see their website at <<http://en.kohelet.org.il/>>.

⁸⁷⁴ *Gebrselassie*, above n 869, Justice Vogelman [21-22].

⁸⁷⁵ See their websites at <<https://oneisraelfund.org/oif-projects/eitan/>>; <<http://www.haforum.org/>>.

constitutional deliberations in the kin-state and shape kin-state policies on fundamental and controversial issues.

1. Deliberative Court

Through these case studies, I have demonstrated how deliberative features discussed in the previous parts of this thesis have been exercised by the Israeli Supreme Court in cases that involved the interests of non-citizens.

i. Accessibility and justiciability

The case studies show how effective it is for Israeli NGOs and individual activists to initiate and pursue legal actions against government authorities, laws and regulations through the Israeli Supreme Court. A liberal interpretation of justiciability, broad standing policy and wide acceptance of *amicus curiae* submissions combine to encourage various organisations and activists to turn to the Court whenever they feel that their needs and aspirations are left unanswered by other democratic institutions.

The case studies discussed also demonstrate how the deliberative features of the Israeli Supreme Court allow groups of non-citizens to influence the laws and policies of the Israeli government. Assisted by Israeli NGOs, various groups of non-citizens, including people from the Jewish diaspora, Palestinians, asylum seekers and illegal immigrants, utilise the Israeli Supreme Court's deliberative democratic features to constitutionally challenge Israeli laws and policies.

As discussed above, there are those who criticise the Court's interventionist approach and point to various problems caused by the Court taking on too many cases, including on issues that are more political in nature.⁸⁷⁶ The Court has become swamped with petitions, and some cases are taking years to complete. Also, the Court's actions are perceived by many as encroaching too much on the powers of the executive and legislative branches. This has motivated politicians to take steps aimed at limiting the Court's powers to intervene in policy issues.⁸⁷⁷

⁸⁷⁶ See above p 162.

⁸⁷⁷ See above n 716

Some judges in the Court seem to agree that it would have been better if some constitutional issues were decided outside the Court. As Chief Justice Shamgar noted in the first WoW ruling: 'It is good to remember that the exclusive focus on resolution of difficult issues and problems before the court, the "miracle cure" of our generation, is not necessarily an appropriate solution and desired cure for all our ills'.⁸⁷⁸ Even Justice Barak, who once said that 'everything is justiciable',⁸⁷⁹ also said that:

As justices, our power is limited. Admittedly, every problem has a legal solution. But the legal solution is not the ideal solution for every problem. Not every problem that can be solved in the court should be solved in the court.⁸⁸⁰

However, in cases of divided societies with large diaspora populations, the costs of deliberating perhaps too many constitutional issues in court may be worth paying. Giving voice to underrepresented groups (e.g., diaspora people, illegal migrants) who cannot change policies that affect them in the same way citizens can (for example, through voting and running for parliament) may be worth the price accompanying an overworked court.

ii. Style of rulings

In the case studies we saw that the Court used deliberative rhetoric in its decisions, acknowledging that it deals with complicated matters of great political and constitutional importance. Excerpts from the rulings demonstrated the Court's deliberative style. In the judgments, the court engaged with the arguments of both parties and acknowledged that each side had its valid points. The Court often published long rulings with each judge explaining at length the reasons for her or his decision, therefore exercising a deliberative approach. The fact that these detailed reasons are published increases transparency and contributes to the legitimacy of the decisions. Long decisions, however, are also problematic in that they deter ordinary people from reading through and understanding the whole judgment. The decision in *Rodriguez*, for

⁸⁷⁸ *Hoffman v. The Guardian of the Western Wall*, above n 734, 354-5, from the unofficial translation of the third ruling available at <<http://www.womenofthewall.org.il/wp-content/uploads/2016/04/Unofficial-Translation-BAGATZ-Decision-April-6-2003.pdf>>, Justice Cheshin [16-7].

⁸⁷⁹ See Friedmann, above n 669, 74-77.

⁸⁸⁰ Aharon Barak, 'On National Unity' (2000) 23(3) *Tel-Aviv University Law Review (Iyyunei Mishpat)* 601, 604. As translated in the English version *Rodriguez*, above n 783, President Barak [31].

example, extended to over 80 pages and contained many references to past court decisions and to Jewish law sources which are not easily comprehensible by everyday Israelis.

The Court occasionally also made a substantial effort to help the parties reach a compromise. For example in the WoW case, the judges repeatedly stated that compromise was the preferred way to resolve the issue, and they even joined the parties for a tour in Jerusalem in an attempt to find a suitable site for holding WoW services. This approach was explained by Justice Barak:

The solution for the relationship between religion and state and healing the national rift requires a national compromise. Judges cannot bring about this compromise. We make our contribution in our judgments; we do our part in our constitutional approach that is based on a balance between competing values; the balance between the power of the majority and the right of the minority; the approach that human rights are not absolute, but relative; that it is permitted to violate them for a proper purpose, but not excessively; that democracy is tolerant, even of intolerance. All of these are essential, but insufficient, conditions for a national compromise. It requires the emotional strength of the whole people; it requires love of others, and not hatred of others; it requires bringing people closer together and understanding them, and not distancing oneself from them and pushing them away.⁸⁸¹

In this excerpt, Barak echoes some deliberative principles discussed in earlier chapters. Deliberative democracy is about inclusion of minority views and about listening to the other. By emphasising these principles, Barak sends a message to the different segments in Israeli society that constitutional litigation should be conducted with respect to each side's arguments and with willingness to accept that the other side might also have valid points.

When compromise was not possible, the Court on occasion produced a judgment that granted some small victory to the losing side. For example, in *Rodriguez*, the Court ordered the State to recognise Progressive conversions made in the diaspora, but did not change the status-quo regarding conversions made in Israel. This is a good example of what Sunstein calls an 'incompletely theorized agreement': in cases where there

⁸⁸¹ Barak, 'On National Unity', above n 876, 604.

exists strong principled disagreement within the public or among elites about what the law should allow and whether a certain practice is constitutional, progress can be made if people are able to agree on some practical measures. It is possible to remain silent on the bigger questions (e.g., who is really Jewish?) thus allowing each side to maintain his convictions, but at the same time to provide a practical solution that both sides can live with.⁸⁸²

iii. Dissenting opinions

The decisions in the case studies were rarely unanimous, with most decisions including concurring and dissenting opinions. In *Rodriguez*, for example, out of eleven judges, two wrote concurring opinions and four wrote dissenting opinions. Dissenting voices serve an important deliberative function: they allow minority views to be heard and enable a possible future reversal of the original judgment, based on previous dissenting opinion. Dissenting opinions also send a message that minority opinions that are ultimately rejected are nevertheless legitimate. This is important especially in divided societies where there is a greater risk in alienating minority groups that feel that their sentiments are not taken into consideration.

iv. Dialogue between the court and other institutions

The case studies showed the judicially activist nature of the Israeli Supreme Court, following the legacy of Justice Barak. Although the Court often stated that it did not want to interfere with government actions, it made it clear that it would intervene in cases where the government remained inactive or silent. In some cases, the court reinterpreted the law against current policies (as it did for example in *Rodriguez* and the *WoW* case). The clearest example of this approach was the 'anti-infiltration' cases, in which the Court disqualified twice a law that was legislated by the Knesset, forcing it to

⁸⁸² See Cass R Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2015) 74(1) Social Research 1. The Court did a similar thing in related rulings regarding the Israeli Population Registry. The religion and nationality details in the Population Registry are also a source of many petitions regarding questions of nationhood, religious affiliation, conversion and ethnicity. Over the years, many individuals have petitioned the Supreme Court and asked it to order the Israeli Population Registry to register them as Jews. In several decisions, the Court chose to treat the registry as merely a 'technical and statistical' data source, and therefore to allow people to register (almost) as they choose, so as to prevent the public servant who is in charge of the registration to decide whether the details are actually true or false (see for example H CJ 5070/95 *Naamat, Working and Volunteer Women's Movement v. Minister of Interior* [2002] IsrSC 56(2) 721). In this way, the Court forced the State to accept 'progressive' registry entries, without determining whether these registries were in fact valid.

overhaul its proposed legislation and amend it according to the Court's orders. The Court also often set up deadlines for the government, demanded information from government officials and ordered the government to provide alternative solutions. For example, in the Falash Mura cases, the Court ordered the government to set deadlines for reviewing the requests of Falash Mura members to be brought into Israel and for the completion of transfers of those whose requests have been approved.

However, as discussed above, the Court's judicial activism caused a backlash from politicians (e.g., Knesset members and government ministers) who threatened to curtail the Court's power to intervene in constitutional cases.⁸⁸³ Indeed, in recent years, the Court has restrained itself to a certain extent. As Friedmann describes:

From the Supreme Court's point of view, the situation is a sensitive one. It stands firm on retaining the dominance it has assumed for itself but is very much aware of how easy it would be for the Knesset to strip it of that power. It has to walk a fine line between the principles it proclaims and the fear that rulings that elected officials and the public fiercely oppose may impel the Knesset to pull the rug out from under the Supreme Court's excessive power.⁸⁸⁴

As discussed in previous chapters, the Court relies heavily on public trust for its legitimacy. Unlike politicians who are directly elected by the public, the Court is less reflective of popular sentiments. It must therefore be cautious when confronting other democratic institutions and choose its battles carefully.

v. Encouraging public debate

In order for constitutional deliberations to extend beyond the court room into the public sphere, court cases must receive ample coverage by the media. As discussed above, the Court's rulings and proceedings in the case studies received extensive media coverage, thus initiating and encouraging lively public debate over constitutional issues. In the WoW case for example, the continuous coverage of the Court's rulings, as well as of the protests for and against WoW services, resulted in more and more support to Wow from ordinary Israelis and politicians.⁸⁸⁵

⁸⁸³ See Friedmann, above n 669, 340.

⁸⁸⁴ Ibid 342.

⁸⁸⁵ See *Full History* on WoW website at <<http://www.womenofthewall.org.il/full-history/>>.

Perhaps the best evidence of the major effects constitutional litigation in the Israeli Supreme Court have had over public political awareness is the fact that many battles started with a single case which later became a series of cases. For example, in the WoW case, the conversion cases and the Falash Mura cases, the original petitioners were later joined by more individuals and NGOs who became aware of the issue as a result of the previous proceedings and the publicity they received. Unsatisfied with the original result, many petitioners took the case to the Court again. For example, the WoW case involved many back-and-forth exchanges between Progressive and Orthodox Jewish groups. Progress on the conversion issues was made due to the persistence of the individuals who kept petitioning the Court. Ethiopian Jews turned to the Court several times to prosecute their case. Ka'adan's case encouraged more Israeli Arabs to petition the Court in cases where they felt they had been unlawfully discriminated against.

The fact that the same issues were discussed and addressed by the Court more than once, each time involving different parties, is a clear indication that the media attention and publicity that often followed the Court rulings encouraged other people to get involved in issues that were deliberated at the Court.

2. Jewish diaspora involvement and influence

These cases demonstrated the kind of conflicts that arise between the part of the nation that lives in the diaspora and the part that lives in the kin-state. Because of the Israeli Supreme Court's deliberative features, diaspora Jews were able to use legal proceedings to change policies and laws of the State of Israel, even when their views did not align with those of most Israelis. For example, in the WoW case, diaspora Jews managed to raise awareness of issues of religious pluralism in Israel, despite the fact that most Israelis, at first, considered WoW battle as irrelevant to the daily lives of ordinary, secular Israelis.⁸⁸⁶

Often, the legal cases deliberated by the Court signified a serious rift between the Jewish diaspora and the Israeli government. Some of the issues covered in these cases are

⁸⁸⁶ See Ghert-Zand, above n 761.

ongoing. For example, the battle over non-orthodox conversions and the difficulties in implementing the 2016 compromise between WoW and the ultra-Orthodox parties in the Knesset continue to affect ties between the Jewish diaspora and the Israeli government.⁸⁸⁷ As Avigdor Lieberman, the Israeli defence minister, described the Israeli government decision to freeze the 2016 compromise: '[the] cancellation of the decision is a severe blow to the unity of the Jewish people, the Jewish communities and the fabric of the relationship between the state of Israel and the Jews in the Diaspora'.⁸⁸⁸

These cases reflect not only differences between Israeli Jews and Jews who live in the diaspora, but also the different views held by different segments of the Jewish diaspora. As we saw in some cases (e.g., the WoW case) Jewish organisations were active on both sides of the dispute with some supporting the petitioners and others supporting the respondents.

The case studies involved individuals from the diaspora Jews, diaspora organisations and diaspora funded Israeli NGOs that assisted diaspora Jews in their litigation. As discussed, the involvement of diaspora Jews is not limited only to their specific interests and rights in Israel, but it extends to other aspects of Israeli society. Diaspora funded NGOs also play a key role in assisting other groups of non-citizens, such as migrants and Palestinians. NGOs funded by diaspora Jews are also dominant in promoting the rights of the Arab minority in Israel. This is especially significant as other organisations supported by diaspora Jews, such as the Jewish Agency, regard such activities as threatening Israel's character as a Jewish state.

⁸⁸⁷ See Yair Ettinger, *Bowing to Ultra-Orthodox Parties, Israeli Cabinet Nixes Conversion Reform* (5 July 2015) Haaretz Daily Newspaper <<http://www.haaretz.com/news/israel/.premium-1.664527>>; Isabel Kershner, *'Israeli Minister Says Reform Jews Are Not Really Jewish'* (7 July 2015) The New York Times <http://www.nytimes.com/2015/07/08/world/middleeast/israeli-minister-says-reform-jews-are-not-really-jewish.html?ref=middleeast&_r=1>; Kobi Nachshoni, *Diaspora Rabbis Say They Won't Recognize Israeli Conversions* (13 September 2014) Ynetnews <<http://www.ynetnews.com/articles/0,7340,L-4569910,00.html>>; Barak Ravid, *Israeli Diplomats in US Brace for Protests by Liberal Jews over Western Wall* (2 October 2016) Haaretz Daily Newspaper <<http://www.haaretz.com/israel-news/.premium-1.745514>>; Lahav Harkov and Greer Fay Cashman *'Israel Can't Afford Rupture With Diaspora Over Western Wall'* (29 June, 2017) The Jerusalem Post <<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Israel-cant-afford-rupture-with-Diaspora-over-Western-Wall-498339>>.

⁸⁸⁸ Kershner, *Israel Suspends Plan for Egalitarian Prayer Area at Western Wall*, above n 746.

The legal activities of NIF grantees have attracted tough criticism from Israeli right wing politicians and activists, who claim that these organisations 'exploit Israeli democracy and manipulate the judicial system to further their political agendas disguised as free speech and humanitarian concerns'.⁸⁸⁹ The fact that many of these NGOs are foreign-funded has led some politicians to propose laws trying to limit their ability to receive foreign funding.⁸⁹⁰ The controversy surrounding the NIF and its funding policies was also evident in the Jewish diaspora.⁸⁹¹ In 2014, for example, some Jewish organisations attempted to ban the NIF from participating in the annual Zionist march in New York.⁸⁹² The controversies surrounding the activities of diaspora funded NGOs in Israel demonstrate the kind of conflicts that arise between diaspora communities and their kin-state and among large diaspora communities themselves.

⁸⁸⁹ See Moshe Dann, *A Matter of Sovereignty: NGOs vs Israel* (5 July 2012) The Jerusalem Post <<http://www.jpost.com/Opinion/Op-Ed-Contributors/A-matter-of-sovereignty-NGOs-vs-Israel>>.

⁸⁹⁰ *Committee Passes 2 Bills Limiting Funding to NGOs* (13 November 2011) The Jerusalem Post <<http://www.jpost.com/Diplomacy-and-Politics/Ctee-passes-2-bills-limiting-funding-to-NGOs>>; Joanna Paraszczuk, *NGOs: Bill Is a 'shameful Moment' for Israel* (13 November 2011) The Jerusalem Post <<http://www.jpost.com/National-News/NGOs-Bill-is-a-shameful-moment-for-Israel>>.

⁸⁹¹ Ronn Torossian, *New Israel Fund Supports Groups That Hurt the Jewish State* (18 November 2014) Observer <<http://observer.com/2014/11/new-israel-fund-supports-groups-that-hurt-the-jewish-state/>>.

⁸⁹² Sam Sokol, *Fight over NY's Celebrate Israel Parade Reignites Debate over New Israel Fund* (29 April 2014) The Jerusalem Post <<http://www.jpost.com/Jewish-World/Jewish-Features/Fight-over-NYs-Celebrate-Israel-Parade-reignites-debate-over-New-Israel-Fund-350719>>.

VII. Conclusion

In this thesis I provided an analysis of the challenges and legal implications created by the existence of large and influential diaspora communities in today's modern globalised world. I have connected diaspora theory with deliberative democratic theory, filling a gap in the deliberative democratic literature. I argued that in divided societies, and in societies with large diaspora populations, the court can play an important deliberative role, as part of a whole deliberative democratic system. I also presented in this thesis a unique form of diaspora-kin-state relationship, one that has not been adequately discussed in the literature. I showed that diaspora people can be legitimately involved in the political life of their kin-states by way of initiating, joining and supporting petitions submitted to the kin-state's constitutional court.

In chapter II, I explored the term 'diaspora' and how it has developed over the years. I then explained how diaspora communities are connected to their co-ethnics in the kin-state. I highlighted the features they share as well as those that divide them.

I discussed what drives diaspora communities to identify with and become involved in political issues in their kin-states. I showed the great importance of self-identity as well as group-identity in shaping the relationship between the diasporic individual and the diasporic community and the kin-state. I then outlined various ways by which diaspora people attempt to affect political issues in their kin-states and the methods used by kin-states to engage with their diaspora communities. I described how in an increasingly globalised world, the thin line separating citizens of the kin-state from their co-ethnics in the diaspora has become blurred. Not only has the size of diaspora communities expanded with increased movement of people, but the nature of their connection with their kin-states is becoming more complex. I discussed the relationship between the concepts of diaspora and explained under what circumstances diaspora people can be described as citizens of their kin-states.

In chapter III, I reviewed the relevant literature on deliberative democracy and explained different concepts and approaches prevalent among deliberative democratic theorists. I focused in particular on the differences between popular and elite models of

democratic deliberation and discussed the advantages and disadvantages of each model. Deliberative democratic theorists still face the challenge of coming up with initiatives that can engage large numbers of the population in deliberative processes; this task becomes even more difficult when the aim is to include not only people who live in the relevant territory but also people who are scattered in different parts of the world. Ethnic and religious tensions, coupled with the existence of large diasporic populations, make it even more difficult to bring people together and deliberate, to keep an open mind and to acknowledge the other side's valid points.

This thesis addressed the underexplored area of deliberative democracy in divided societies. I outlined the specific challenges deliberative democratic theory faces in divided societies. In such societies, unfavourable empirical conditions limit the prospects and quality of effective deliberation. This becomes even more complicated when diaspora populations are involved, as diaspora populations tend to get more involved in their kin-state if it is undergoing an ethnic or religious conflict. I explained why popular models of deliberation may be neither desirable nor practical in divided societies. In fact, popular deliberation in such societies can sometimes be counterproductive.

In this era of globalised electronic communications, it is easier than ever before for diaspora communities to influence political debates in their kin-states, and they have several avenues available to them. I explained why it is important (for moral as well as practical reasons) to consider diaspora communities a part of the kin-state polity, particularly when the kin-state is undergoing a major constitutional change that may have major consequences for its diaspora community. In exploring the diaspora-kin-state relationship, I reviewed the complications and implications this phenomenon has for modern democratic theories, and I examined these problems in the specific context of deliberative democracy. When conflicts arise, diaspora people are unable to vote and directly affect government policies in the kin-state. However, I explained that it is possible to influence kin-state government policies through constitutional litigation, even where the views of the diaspora do not align with those of the citizens of the kin-state.

In chapter IV, I reviewed the important role played by elites in divided societies and young democracies and explained how in such societies, deliberation by elite bodies serves a key role in instilling democratic practices and fostering popular deliberation. I contended that popular models of deliberative democracy are difficult to implement in such societies. In such cases, elite models of democratic deliberation are sometimes the more effective way to conduct deliberations that include minorities and take into account the interests of all those who are affected by the ultimate decisions.

In chapter V, I specifically addressed the qualities of constitutional courts as elite deliberative democratic bodies. Courts exercise key deliberative principles, including transparency, public reasoning and accessibility. I explained why courts often are not only deliberative but also fit well within a deliberative democratic framework. First, courts that are more accessible promote democracy by allowing more people and more issues to be discussed publicly. Second, constitutional cases deliberated in constitutional courts often instigate and inspire deliberations in the media and among the greater public. Most importantly, courts enable groups of non-citizens to participate in the democratic process and allow their voices to be heard.

The trend in democratic theory is towards expanding the range of people whose views should be taken into account when the state decides on new laws and policies. This is in line with the principle that all those who will be affected by a decision should have a say in the process of shaping that decision. Adopting such a principle would require states to sometimes take the interests of non-citizens into account. Moreover, it may require states to allow some groups of non-citizens, such as long-term migrants and residents, to actively participate in shaping the laws of the state in which they live and work.⁸⁹³ Currently, however, in most places non-citizens are not allowed to vote in local elections and their ability to otherwise influence the laws in the place in which they reside is limited.⁸⁹⁴ A deliberative court is able to address the interests of such groups, either by accepting petitions by non-citizens or by including in its deliberations submissions made by third parties through the process *amicus curiae*. However, different courts vary in the

⁸⁹³ See Eisenberg, above n 2.

⁸⁹⁴ Song, 'Democracy and Noncitizen Voting Rights', above n 2, 614.

range and quality of their deliberative features. At the end of chapter V I provided a list of criteria that can be used to evaluate the deliberative level of different courts.

In chapter VI, I demonstrated the contentions of this thesis by focusing on the Israeli Supreme Court as an example of a constitutional court that engages diaspora people and their interests in its deliberations. I examined the Israeli Supreme Court's unique deliberative features. For example, the Court's broad standing and justiciability policies make it remarkably accessible to individuals and NGOs. Individuals who are not Israeli citizens or even Israeli residents have access to the Supreme Court so long as the harm they suffered was inflicted by an Israeli authority. The Court welcomes *amicus curiae* submissions from NGOs and academic think-tanks and it gives voice to minority views by allowing dissenting opinions. I explained how these features of the Israeli Supreme Court enabled diaspora Jews (and other groups of non-citizens) to participate in the Israeli democratic process, challenge constitutional norms in Israel and affect government policies and laws. Evidently, the accessibility of the Israeli Supreme Court comes at a cost. The judicial system has become overloaded and over litigation interfered with legitimate government policies and has reduces efficiency. However, in cases of divided societies, the benefits of having an active court that gives voice to underrepresented groups and enjoys high levels of trust by the public may be a price worth paying.

Through the case studies, I demonstrated that diaspora communities can be involved in constitutional cases taking place in their kin-state. Some cases involved Jewish individuals from the diaspora and Jewish diaspora organisations. Other cases involved NGOs that were funded mainly by Jewish diaspora organisations. The cases also demonstrated how other groups of non-citizens can participate in shaping constitutional norms in the countries they reside. I showed how various groups of non-citizens, such as Palestinians, illegal migrants and asylum seekers, used the Israeli Supreme Court to initiate deliberations over constitutional issues. This feature of constitutional courts can be most valuable for today's democracies, where states are often required to also accommodate the interests of non-citizens. The democratic system is enhanced by allowing non-citizen access to the judicial system when they feel their rights have been violated.

The case studies also show how deliberation that takes place in a constitutional court can foster deliberation among the greater public. I provided examples of how the cases ruled on by the Israeli Supreme Court triggered further deliberations within Israeli society. Many of the cases were recurring, pointing to the fact that even when the petitioners did not win (that is, in the majority of cases) the mere act of petitioning the Court allowed public activists and NGOs to gain further publicity and support that enabled them to continue their social battles.⁸⁹⁵

I explained how the case studies fit within the deliberative democratic framework I outlined in this thesis. The legal battles that have taken place between NGOs and the Israeli government should be viewed as a part of a deliberative process that takes place in the public sphere and often involves people who are affected by the decisions but have no other ways to participate and shape these laws that affect them. Jews in the diaspora, Palestinian citizens, illegal migrants, asylum seekers and foreign workers are all groups that are affected by actions of the State of Israel but are not able to participate thorough voting in Israeli elections.

Although this thesis only examined one specific court in detail – the Israeli Supreme Court – it would be interesting to look at other courts fulfilling similar functions in other divided societies. As mentioned above, countries with large diaspora populations sometimes emulate Israeli practices regarding diaspora issues. One may wonder therefore why this practice of intervention through legal activism has developed among Jewish diaspora communities but not among other diaspora communities and their kin-states. One obvious reason may be that such process is possible only in jurisdictions whose constitutional courts exhibit similar properties to that of the Israeli Supreme Court. Moreover, many divided societies with large diasporic populations are recovering from years of conflict and are still in the process of developing viable democratic institutions that are accessible to their own citizens, let alone to their diaspora populations. Another reason may lie in the fact that Israel is a young democracy – less than 70 years old. As Jewish diaspora communities existed and coalesced for centuries before the kin-state was reestablished, it may be the case that Jewish communities in

⁸⁹⁵ See Dotan and Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements', above n 660, 3.

the diaspora still see an opportunity, or even an obligation, to contribute to forming the democratic traditions of the newly reconstructed home land. However, all the above does not necessarily mean that courts in other societies with large diasporic communities cannot consider using a similar approach to that of the Israeli Supreme Court in order to foster democratic deliberation.

The combination of legal analysis and deliberative democratic theory provides a theoretical framework for both political scientists and legal scholars. The case studies provided a valuable examination of the work of one of the most active constitutional courts in the world and can assist other scholars conducting research in constitutional law and jurisprudence. The detailed examples provided by the case studies show how diaspora communities can legitimately become involved in major political deliberations in their kin-state. Democratic principles of inclusion require states to take into account not only the interests of their citizens, but also of other people who may be affected by the state's decisions.⁸⁹⁶ This, however, does not mean that non-citizens who live overseas (e.g., diaspora people) should be put on the same level as citizens that live in the state's territory.⁸⁹⁷ In this thesis, I identified a specific pathway – namely, the courts – through which diaspora communities are able to influence the social and political landscape of their kin-states. Those legal battles that take place between diaspora and state's representatives are in fact a major part of the comprehensive deliberation process that takes place in the public sphere and allows people who are affected by decisions, to participate in shaping them.

Scholars still need to come up with practical ways to differentiate between individuals who are 'positioned differently within a citizenship constellation'.⁸⁹⁸ As discussed in chapter II (E), many scholars agree that diaspora people should be entitled to vote on questions of 'national identity', but it is hard to define what exactly falls under this category. It is also unclear what body can resolve disputes between diaspora and kin-

⁸⁹⁶ Song, 'Democracy and Noncitizen Voting Rights', above n 2, 609.

⁸⁹⁷ Eisenberg, above n 2.

⁸⁹⁸ Bauböck, 'Cold Constellations and Hot Identities: Political Theory Questions about Transnationalism and Diaspora', above n 4, 302.

states, and so such questions are still waiting to be researched and addressed by legal scholars and international relation theorists.⁸⁹⁹

Further research could also explore how groups of non-citizens, like diaspora populations, can be involved in deliberations taking place in other democratic institutions, such as parliaments and special ad-hoc committees (e.g., constitutional committees, special inquiry commissions).

This thesis has provided a theoretical framework and practical tools to engage and integrate groups of non-citizens that are currently underrepresented or excluded from political participation. The experiences of the Israeli Supreme Court suggest that, in some cases and under certain conditions, diaspora people can be legitimately included in constitutional deliberations and shape the contours of their kin-state.

⁸⁹⁹ See Addis, 'Imagining the Homeland from Afar: Community and Peoplehood in the Age of the Diaspora', above n 5, 1008.

Appendix A - List of constitutional cases in the Israeli Supreme Court in which the Court overruled a law or part of it

	Case	Dissent opinion/s	Concurring opinion/s
1.	HCA 1715/97 Investment Managers Chamber v. Minister of Finance IsrSC 51(4) 367	no	yes
2.	HCA 6055/95 Zemach v. Minister of Defence IsrSC 53(5) 241	yes	no
3.	HCA 1030/99 Oron v. Chairmain of the Knesset IsrSC 56(3) 640	no	no
4.	HCA 1661/05 Gaza Beach Regional Council v. Israeli Knesset (9.6.2005)	yes	no
5.	HCA 8276/05 Adalla v. Minister of Defence (12.12.2006)	no	yes
6.	HCA 2605/05 Human Rights Association v. Minister of Finance (19.11.2009)	yes	no
7.	VCA 8823/07 Doe v. the State of Israel (11.2.2010)	no	yes
8.	HCA 6298/07 Resler v. the Knesset (21.2.2012)	yes	no
9.	HCA 10662/04 Hassan v. National Insurance Association (28.2.2012)	no	yes
10.	HCA 8300/02 Nasser v. the Israeli Government 22.5.2012)	no	yes

11.	HCA 7146/12 Adam v. the Knesset (16.9.2013)	yes	no
12.	HCA 8425/13 Gavrislasi v. the Knesset (22.9.2014)	yes	no
13.	HCA 5239/11 Avneri v. the Knesset (15.4.2015)	yes	no
14.	HCA 8665/14 Deseta v. the Knesset (11.8.2015)	yes	yes
15.	HCJ 1877/14 <i>The Movement for Quality Government in Israel v the Knesset</i> (12.9.2017)	yes	yes

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