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Communities and Law

Politics and Cultures of Legal Identities

Gad Barzilai

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I dedicate this book to three generations in our small community:
Vera and Andrei, my parents, who lost their families in the Holocaust in Central Europe;
Karine, my wife, for her reciprocity, true partnership, and love;
our sons, Daniel and Ari, who enjoy the multicultural experience of both East and West.

Contents

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Introduction: Conceptual Framework and Structure

This book is about law and culture as major pillars in state-society relations. More accurately, it is about legal cultures in nonruling communities. To comprehend and examine communal legal cultures as key phenomena in politics, this book develops a concept that I call critical communitarianism. This revised version of communitarian theory conceives of nonruling communities in the context of the politics of identities, the plurality of legal orders, and state domination (often a violent form of domination legitimized through legal ideology). Critical communitarianism views nonruling communities as cultural foci of mobilization for, or resistance to, state law in the political context of state-society relations.

Accordingly, communities require special emphasis in our contemplation of law, politics, and society. As we shall see, whereas liberalism, primarily individual liberalism, has professed fascination with individual autonomy, it has largely ignored the centrality of community in our sociopolitical life. This book aims to rectify that situation through an analysis of communal legal cultures. Empirically, it expounds in depth on three communities in Israel: Arab-Palestinians, feminist women, and ultra-Orthodox Jews. Theoretically, it addresses broad questions and the conceptual inquiry as to culture and law, state and society, identities, legal practices, violence, and actions in politics. This introductory chapter presents the overall structure and conceptual framework of this study.

Since the 1960s, research on political cultures has acquired a prominent place in political science. Yet, despite the intellectual engagement in the ways in which people interact with public institutions at the infrastate, in-state, interstate, and transnational levels, political scientists are erroneously inclined to presume that the law and the

courts have neither been part of nor affected these cultural processes (Epstein 1999; Shapiro 1993). A group of studies has only recently been recognized for its striving to better comprehend political regimes by delving into the cultural fundamentals of law and attitudes toward law (Caldeira and Gibson 1992, 1995; Epstein and Kobylka 1992; Ewick and Silbey 1998; Feeley and Rubin 1998; Freidman 1985; Greenhouse, Yngvesson, and Engel 1994; Kagan 1991, 1999; Santos 1995; Sarat et al. 1998; Sarat and Kearns 1998; Scheingold 1974, 1984; Twining 2000).

While inquiry into norms, values, attitudes, and practices in and toward law has expanded, the conceptualization of law as a form and source of political culture has yet to evolve. Legal culture has only rarely been explicated as a multidimensional fabric in a political context. It has often been defined in a simplistic way, as a set of behavioral modes (e.g., obedience and disobedience) and a set of attitudes toward state institutions. Although the contribution of such studies to our knowledge of the workings of law and society cannot be denied, this book argues for a more profound theoretical perspective. It dwells on legal cultures as practices of those identities that have become embodied in legal consciousness and that have been generated through state-society relations as well as struggles for power.

This book assumes diversity in legal consciousness, identities, and practices within communities based on some shared concept of the public good in addition to other collective attributes. Whether legal pluralism has prevailed in practice and to what extent are separate issues to be theoretically elaborated and empirically examined in the subsequent chapters. This book has drawn a line between legal pluralism and the plurality of legal orders that has been restricted by state domination. The plurality of legal orders is reflected in hermeneutics and the marginalized communal practices of nonruling collectivities (Merry 1998; Nader 1990; Santos 1995). I follow Santos's somewhat similar distinction (1995, 114) but expand it theoretically and examine it empirically in communal and communitarian contexts.

I submit that communities are crucial pillars in the conjunction of law and politics. As will be explored theoretically and empirically, communities have been constituted by and have been sources of legal consciousness, identities, and practices related to law along a multiplicity of social avenues. Communities' legal cultures, as this study

will argue and explore, have not been matters of romantic visions about social harmony (*Gemeinschaft*), but rather they have been pillars in sociopolitical interactions and conflicts. In contrast to myriad previous studies, I do not submit that communities are rather marginal in state-society relations and monolithic in their internal settings. On the contrary, I perceive communities as multidimensional entities that significantly constitute state-society relations despite their certain dependence on state law.

The exploration of legal cultures has mainly been focused on countries in the Western world. Notwithstanding, a wave of research into legal cultures in non-Western countries erupted in the 1990s and may mature into a crucial domain (Epp 1998; Gibson and Gouws 1997; Kagan 1999). Middle Eastern countries have been marginal in this scholarly proclivity. Influential social thinkers such as Max Weber, Roberto Unger, and Martin Shapiro have paid some attention to the Middle East as a region that should be explored due to its cultural and institutional particularities. Generally, however, since Western constitutionalism has only partially affected the region, the Middle East has been excluded from studies about law, society, and politics. Even Israel, which is erroneously perceived as clearly fitting Western expectations of law and order, has customarily been missing from efforts to explore legal cultural orientations.[1]

This book aims to grapple with several challenges that have often been ignored in the literature. First, it suggests examining the legal cultures of communities, primarily nonruling communities, despite the arguments that have reduced the importance of communal cultures to what may be seen as the globalization of culture. Second, it suggests we look at communities from a critical communitarian viewpoint that includes an emphasis on state domination and the politics of identities. Third, this book addresses crucial questions about legal consciousness, identities, and legal practices in the context of state domination and transnational forces, and it uses communal voices to comprehend social being and state-society relations. Fourth, it dwells on the legal and sociopolitical strategies adopted by states and nonruling communities toward one another. Inter alia, it views litigation

1. Exceptions obviously exist. Complete references are provided in the following chapters.

as a frequently used but extremely problematic avenue of communal action within the convoluted context of struggles over power and the allocation of public goods. Fifth, violence is explicated here in its broad legal and cultural conjunction. It appears in various forms, as conflict and cooperation between states and nonruling communities, as a mechanism for expressing conflict between community members and "outsiders," and as a mode of communal communication, control, and subjugation. Sixth, this book carefully examines the meanings and contents of legal cultures among liberal, nonliberal, and antiliberal communities. It probes into these communities through their own voices, using a variety of unpublished primary sources from a comparative perspective. Seventh, it contemplates the meaning of communities in human life, public policy, grassroots politics, and law.

A conceptual analysis of communitarianism and communal legal cultures in democracies is elaborated in chapter 1. This chapter represents an epistemological entry into each of the subsequent chapters, where theoretical arguments concerning nonruling communities under state domination are also developed. Democracies are less understood through explication of procedures, such as elections and formal state laws, than they are through analysis of culture and cultural practices. The phenomenon of political culture, particularly democratic political culture, is illuminated, since legal cultures have been major components in political cultures. Legal cultures are, then, conceptualized as the basis for further examination.

The meaning of legal culture has been resolutely debated for theoretical reasons; these are expounded in chapter 1. Different schools of sociopolitical and legal thought have offered distinct outlooks on state-society relations and legal cultures. Accordingly, I analyze the theoretical perspectives of legal pluralists, liberals, elitists, Marxists, neo-Marxists, post-Marxists, communitarians, feminists, and postmodernists.

Thus, liberals have underscored the dynamic interactions between the diverse attitudes held by autonomous individuals sharing the same democratic procedures. This is how liberals conceptualize the sources of autonomous culture. Elitists conceive of the same issue contrarily. They have focused on states and ruling elites and have viewed legal and political cultures as generated by elite and state organs. According

to elitism, cultural processes are highly contingent on the elites' desires and interests.

The liberal and elitist theories explicated in chapter 1 suggest very limited conceptions of legal culture. These conceptualizations have reduced culture to a mere reflection of either state interests or autonomous social processes. Through my analysis of intellectual traditions, I deconstruct the state-culture and organization-culture dichotomies and construct a concept of legal culture that combines structuration/domination with cultural elements. Legal cultures, I submit, are partial products of state law, state ideology, and legal ideology (these terms are explained in chaps. 1 and 2). However, legal cultures have also been constituted and practiced as nonhegemonic and counterhegemonic phenomena that may present a challenge, even a violent one, to the state. Following its elaboration in chapter 1, this conceptualization of legal culture is examined in chapters 3 (Arab-Palestinians), 4 (feminist women), and 5 (ultra-Orthodox religious Jews).

Legal culture is a more intricate phenomenon than is legal ideology. I argue in chapter 1 that because legal culture is a matter of practice some of its parts originate in state domination and legal ideology while others are born of communal sources such as social being, legal consciousness, and collective identities. As we shall see in the following chapters, the concept of legal ideology is narrower than and separate from the concept of legal culture. The latter phenomenon is generated in a diversity of practices outside and inside state domination through a web of relations woven by the sociopolitical forces expounded in this book.

As this book shows, cultural legal practices are very diverse; they cannot be predicted and explained exclusively through legal and ideological prisms. Thus, Israeli Arab-Palestinians have mobilized Zionist law, liberal feminists have been incorporated into the patriarchal establishment, and religious fundamentalists have sometimes adopted legal pragmatism. These examples represent the often unpredicted and paradoxical broader meanings of legal cultures.

This book examines the importance of communities as sources and carriers of legal cultures. It explores the reasons why democracies should not cultivate individual rights solely, as liberals have presumed.

It argues that instead democracies should stress the virtues of nonruling communities and communal rights, as communitarians have claimed.

Democratic political culture should indicate the degree to which the democratic process has been internalized by elites, institutions, communities, groups, and individuals. What a democracy needs is a process that is sensitive to the different expectations and needs of individuals and communities. That process should safeguard communal and individual rights. But procedure alone is insufficient; democracy requires a political culture that incorporates and then inculcates such a process and regenerates that process through its public institutions.

The weaving of such a complex sociopolitical fabric cannot be contingent on individuals in the strict liberal sense. Most individuals are not autonomous. Their knowledge is too limited; their power is too confined; and their attachments, expectations, and memories are embedded in communities (*community* is defined in chap. 1). Communities construct and generate the identities adopted by individuals (Etzioni 1995a, 1995b, 2001; MacIntyre 1984, 1988; Minow and Rakoff 1998; Santos 1995; Selznick 1987, 1992; Taylor 1994). Hence, communal legal cultures are major pillars of democratic political cultures (Sarat et al. 1998).

My concept of critical communitarianism views legal culture as a multidimensional phenomenon. Chapter 2 explains why communal legal culture is not divorced from state law and state ideology (including legal ideology). I prefer to call state law and state ideology, taken together, state legal culture because I dwell on the formalities of law, its narration, its identities, its languages, its formal and informal practices, and the major sociopolitical forces and institutions that have carried that culture. These elements constitute as well as reflect an identifiable legal culture—only partially associated with the political elite—which is endorsed, managed, and enforced by the state through its organs. However, conceptually the phenomenon of legal culture cannot and should not be reduced entirely to the state level.

Nonruling communities are affected by the diverse variables comprising state legal culture, primarily proximity to the state's metanarratives. I conceive of communal legal culture as neither a complete autonomous entity (Friedman 1997) nor merely the product of state and legal ideology (Cotterrell 1997). Yet fundamental comprehension of

state legal culture is essential, as no analysis of communal legal culture is possible without explication of the mechanism of state domination.

Chapter 2 inquires into the informalities of state law in Israel in the context of infrastate, in-state, and transstate legal and sociopolitical forces. By analyzing stratification, hegemony, and subjugation of identities in state law, I explore the state metanarratives that have been created and articulated and those identities that have been marginalized and discriminated against. Chapter 2 claims that the ideological legal narrative of "patriotism" serves Judaism and Zionism as a major rationalization in state legality and its categorizations. It proceeds to study the state's mechanisms of control and the practical contribution of state organs—such as its courts—to the generation of state legal culture. Accordingly, the language of rights is often intertwined with the symbols and practices of religion, ethnicity, nationality, and national security as principal elements in state law and its ideology. Chapter 2 explores how rights have been part of state legal culture and delves into their meaning for nonruling communities. The centrality of judicial making—in addition to legislation—is critically examined. My research explores how decentralization of the courts, as organs that constitute and generate legal cultures, has profoundly contributed to the unveiling of multifarious communal legal cultures.

The ensuing chapters are devoted to a careful and systematic examination of the communal legal cultures of nonruling communities. Accordingly, social being, legal consciousness, identities, and practices are explored vis-à-vis state domination so as to deal with the theoretical dilemmas formulated in chapter 1.

An effort is made to understand sociopolitical and legal voices from the communal and communitarian perspectives based on an analysis of unpublished primary sources. Each community selected represents various aspects and distinct interactions comprising state-community relations: nationality, gender, religion, and ethnicity. A comparison between and among the communities and between them and other sociopolitical forces is addressed while also paying attention to intercommunal affiliations and unpredicted sociopolitical coalitions. I begin with a critical communitarian explication of a national minority, Arab-Palestinians, as the most remote, excluded community from the state's metanarratives. Feminist women have been less excluded and more embraced by state ideology. Hence, they are

analyzed subsequently. This not only enables the reader to compare these two nonruling communities on the basis of proximity to metanarratives but allows us to examine diversity (Arabs and Jews, men and women) and understand the intercommunal dilemmas of Arab-Palestinian women. I conclude with Jewish religious fundamentalists, the ultra-Orthodox, as a nonruling but powerful community that, although it is more integrated in the Jewish narrative of the state, has divorced itself from the Zionist narrative.

Chapter 3 probes legal culture among Israeli Arab-Palestinians. Following a brief exploration of the minority's sociopolitical and legal tribulations, the chapter analyzes the untold story of their formal categorization and inclusion as religious communities—rather than a national minority—in state law and their exclusion in practice based on the latter definition. The chapter thus reveals how this minority has been excluded as an entity of multifaceted identities, veiled, homogenized, and later individualized by the state through the formalities of individual rights, self-asserted egalitarianism, liberal rhetoric, and ostentatious publicized adjudication.

The identities of the Arab-Palestinian minority and their utilization in modes ranging from personal alienation and apathy to political mobilization and litigation are also explored. The diversity of hermeneutics and practices, including violence, in the elite and public domains is explicated through a field survey conducted in Arabic, personal interviews, and other primary and unpublished sources. The possible contribution of litigation, primarily by organizations, to a nonruling community outside state metanarratives, versus other modes of communal political action, is analyzed and critically evaluated as one possible source of legal and social change, however limited and problematic.

Feminist women are another community often located within state metanarratives. Chapter 4 begins with a theoretical construction of feminist communitarianism. While the existence of national communities and national communitarianism appears plausible, the combination of feminism and communitarianism seems problematic despite some shared feminist and communitarian criticism of liberalism. Chapter 4 continues with an exploration of discrimination against women in various spheres of state law while pointing to the state legal culture of gender discrimination. In the context of feminine experience, feminist

organizations express and frame a complex legal consciousness as well as a multitude of identities and practices. I call for adopting the virtues of feminist communities and feminist communitarianism as avenues for attaining equality and democratic justice.

The next section in chapter 4 inquires into the legal practices of feminists (Jewish and Palestinian), although it attends primarily to the heterogeneous radical and liberal practices of identities toward and within state law. Research into this community is based on personal interviews and unpublished primary sources, which have been useful in uncovering legal practices. The epistemological deficiencies, virtues, failures, and limited successes of liberal feminism are of prime concern in comparing it to the radical feminism that emphasizes feminine communality. The approaches to violence in this context are revealed to be different. All feminists view the subjugation of women as violence. Liberals emphasize physical violence and utilize the struggle against it to mobilize state law and budgetary allocations. Radicals underscore aspects of nonphysical violence against women as well and call for grassroots activities to overcome that problem.

Feminist practices in either policy groups or grassroots organizations are studied using unpublished and published primary sources. The chapter analyzes Ashkenazi (East European and Western Jews), Mizrachi (Oriental, i.e., Mideastern and North African Jews), religious and secular Jews, and Arab-Palestinians. Heterosexual and lesbian experiences and unexpected coalitions between Jews and Arab-Palestinians are included as elements of feminist communal legal culture. Chapter 4 ends with remarks that compare the contradictory approaches to state law, legal ideology, and state ideology favored from various feminist perspectives. Hence, notions such as equality, affirmative action, and violence are placed in their communal feminist context.

The inclusion of religious fundamentalist communities in multicultural democracies has often been negated in the literature. While critics categorize communitarianism as a traditionalist approach, communitarians have neither probed into nonliberal and religiously fundamentalist communities nor called for their inclusion in democracies. Following research into the communal legal culture of the ultra-Orthodox, this book takes a different—that is, critical communitarian—approach, one that embraces religious fundamentalist communities in multicultural settings and only rarely justifies state intervention in a commu-

nity's autonomy. This book thus considers religious fundamentalism to be integral to democratic multiculturalism and communitarianism.

Chapter 5 delves into social being, legal consciousness, identities, and practices in a religious fundamentalist community under state domination as well as American-led transnational and national liberalism. It focuses on ultra-Orthodox Jews (known as Haredim in Israel) by exploring their voices, practices, and perspectives. This chapter explicates primarily political and cultural legal aspects that are unanticipated if state legal culture is the sole phenomenon studied.

Chapter 5 begins by portraying religion, narratives, political regimes, and religious communities in both horizontal and vertical dimensions, while looking at various religious collectivities, particularly religious fundamentalists. This comparative perspective helps us to better appreciate the ways in which religious fundamentalist communities perceive state law and interact with its organs in diverse spatial configurations. Religious fundamentalist perspectives of Halachic communal and state law are explored using primary unpublished and published sources. Thus, chapter 5 analyzes alternative legal practices as part of a communal sociopolitical construction.

Hermeneutics is described as identity practices directed toward the non-Orthodox state with ambivalent meanings for the community. Additionally, the communal practices of mobilization and demobilization of state law are underscored. Thus, while the legal and sociopolitical hermeneutics of the state and the community are diametrically opposed in some aspects, the religious fundamentalist community is shown to operate within state spheres. Similar to the situation in other democracies, ultra-Orthodoxy in Israel shares a common political cultural space with the state.

Apparently, religious fundamentalism and liberalism have been categorized as two contradictory phenomena because liberalism has multiplied the variety of religious practices that may argue for legitimate coexistence and equality. Correspondingly, two levels of analysis are used in this chapter to explore the possible effects of liberalism, however confined it is within the state legal culture, on religious fundamentalism, especially in Israel. One is the horizontal dimension. Here I explore the struggles between non-Orthodox religious movements, originating in the United States, and ultra-Orthodoxy over various controversial and pivotal issues, including conversion,

religious councils, and military conscription. These conflicts articulate tensions between religious fundamentalism and American-led liberalism. The other is a vertical dimension, along which I study state interference in the religious fundamentalist community, exemplified by the use of liberal arguments for individual rights in state law. This type of coercive liberalism has been challenged by communal practices as they are realized in a range of legal and political actions ranging from mobilization (and countermobilization) to violence along both dimensions.

If religious fundamentalists are taken seriously as communities in democratic multicultural settings, we should search for legal cultural boundaries. Accordingly, chapter 5 raises some theoretical questions concerning the boundaries of nonliberal communities in liberal settings. It probes the limits that should be imposed on liberal state interference in the communal affairs of religious fundamentalists. I argue for the democratic need to preserve the communal culture of religious fundamentalism and, with a few exceptions, to preserve its normative order and process. Accordingly, chapter 5 further develops Robert Cover's notion of state law as jurispathic.

Religious fundamentalism is not independent of other social identities. In Israel, Mizrachi Jewish ultra-Orthodoxy is represented mainly by the political party and movement of Shas. Chapter 5 explores the tensions and conflicts between state legal culture and oriental sociopolitical legal practices grounded in those emotions, memories, and traditional communal attachments that have been marginalized and subdued by the state. State law has generated an antithetical ethnic liberal identity. Through an examination of the legal struggle that Shas waged over electoral behavior and procedures, the chapter elaborates several conceptual contentions about rationality, modernity, and democracy that apply to cases in which liberalism and communitarianism collide over the place of multiculturalism within the electoral process.

Special U.S.-Israel relations, and American cultural effects on Israel in particular, have played a significant role in shaping several aspects of state law, state legal ideology, and communal legal cultures. Liberalism in state law and its attendant ideology represent, in practice, Americanization of the legal culture. Mobilization and resistance to this transnational trend are discussed in chapters 1 through 5. Critical communitarianism should take into account not only infrastate and

in-state processes but also transnational dynamics, their effects, and their possible (re)construction at the communal level.

Chapter 6 addresses this book's main conclusions as to the conceptualization of legal culture, nonruling communities, state domination, identities, practices, and communitarianism in the midst of globalization. I emphasize the communitarian criticism of globalization, and explain why a neoliberal concept that pretends to promote global culture cannot respond to human needs and expectations.

Accordingly, chapter 6 dwells on communities and the roles of state law, state ideology, and legal ideology in shaping communal legal consciousness, identities, and practices. It then generalizes the political strategies used by states and nonruling communities in their legal cultural practices and summarizes the effects that transnational and national American-led liberalism has had on state and communal legal cultures in Israel and elsewhere. Litigation and violence are formulated as multifaceted phenomena within the context of communal practices. The book concludes with a statement of what can be learned about the state, law, and society from a critical communitarian study of nonruling communities as bounded spaces of culture, power, and law.

Chapter 1

Legal Cultures, Communities, and Democratic Political Cultures

A Preliminary Note: Why Do Cultures Matter for Democracy?

Democracy requires the fulfillment of a number of prerequisites, two of which are pivotal: first, open and peaceful elections with the participation of at least two rival candidates, with guaranteed realization of electoral results; and, second, a political culture that sanctifies and realizes community and individual rights. What we call a *rooted democracy* should display a political culture that shapes institutional and public commitments to democratic processes and human rights (Ely 1996; Habermas 1994). Diametrically opposed schools of thought, from that of pluralists to those of social critics, communitarians, and ethnic critical legal scholars, have underscored the need to recognize and protect the rights of nonruling groups, especially minorities (Appiah 1994; Dahl 1982; Habermas 1994; Sandel 1982, 1996; Taylor 1994; Van Dyke 1977, 1982, 1985), in order to maintain the democratic character of a society.

Many historical examples—from Weimar to Yugoslavia and the Balkans and from Latin America, Eastern Europe, and Asia to the Middle East—demonstrate that open and free elections are insufficient to maintain a democratic regime in the absence of cultural commitments to such rights and procedures. Culture, that is, collective values and practices, is crucial to democracy because no formal procedure and no process can, by itself, guarantee the maintenance of legality and human rights. But what are the sources of culture, especially a culture supportive of democracy? What meaning do these sources have in law, society, and politics under conditions of domination? How are cultures produced in different legal and sociopolitical contexts? Are communities necessary for the production of culture?

These questions will guide us in our probe into the concept of political culture and the relevance of legal culture and community to its democratic character.

Political Culture, Political Domination, and Legality

All states and all types of political regimes exhibit political cultures. Almond and Verba define *political culture* as the system of symbols, values, behavioral norms, and modes of expression related to political life and the state (1963, 1989). Their behaviorist approach perceives culture as a product of autonomous individualistic behavior and sees political attitudes as originating in autonomous social forces. Yet, despite its popularity, Almond and Verba's definition is wanting because it ignores the role of state institutions in the construction and generation of culture. In the following pages, I explain the source of the error by examining the reasons why political culture cannot be autonomous.

As the neo-institutional literature demonstrates, organizations and institutions play an important role in the formation, generation, and articulation of political culture. Because they order the interactions maintained between communities, groups, individuals, and the state, they mold political culture (Edelman 1994; Etzioni 1995a, 1995b; Gillman 1996–97). Accordingly, state organs, like other organizations and institutions, are crucial elements of political cultures due to their constitutive role in framing our social being, political consciousness, identities, and political practices. Later we shall explore how the type of culture relevant to our discussion—legal culture—is articulated and constituted through and within those bodies.

The argument that state agencies, organizations, and institutions are part of political culture does not imply that political cultures are cohesive phenomena. A democratic political culture is far from being a homogeneous set of values and norms. Under the same political regime, different communities may embody contradictory and complementary political cultures with varying degrees of autonomy. This is one point upon which liberals (Dworkin 1977; Kymlicka 1995) and their critics (Nader 1990; Scheingold 1974) concur. However, many liberals are still captives of the illusion that autonomous individuals may freely choose to make rational decisions independently of their communities. Few liberal thinkers, however, convincingly demon-

strate how individual decisions are shaped by cultural, and particularly epistemological, constraints imposed by group affiliations (e.g., Hardin 1999).

Nonliberal thinkers dwell on hegemonic cultures, systems that not only frame but also dictate, to significant degrees, epistemologies and practices. This also applies to the political sphere. Marxists and neo-Marxists such as Gramsci and Hall stress that the dominant social class, the bourgeoisie, because it controls state political power, *constructs* state ideology and, more broadly, hegemonic culture (Cohen 1989; Gramsci 1971; Hall 1992). Hall follows Foucault in arguing that even when hegemonic cultures do not serve one distinct social class they still promote the distinct political interests of ruling groups (Hall 1992). However, structuration in its coercive form may not be the only determinant of hegemonic cultures. Using narration analysis and the postcolonial approach, postmodernists are able to reveal the role of language in the construction of hegemonic cultures and the consequent marginalization and oppression of nonruling cultures (Brigham 1998; Derrida 1987, 1992; Kristeva 1984; Merry 1998).

Hegemonic cultures avow "harmony"; their leaders assert that their cultural universe exhibits peace and solidarity and that no challenge to their hegemony should be tolerated (Mills 1956, 243–48; Nader 1990). It is evident, however, that, in spite of ruling cultures, other types of cultures generated in the same political regime may challenge that hegemony. This observation points to the importance of multiculturalism as the constituent basis of democracy (Etzioni 1995a, 1995b; Rockefeller 1994; Sarat and Kearns 1999; Walzer 1994). Cultures of nonruling communities are not necessarily better or worse than hegemonic cultures. However, nonhegemonic cultures have exerted lesser sway, in the short term, on the formation of the national ethos. As we shall see in the following chapters, the legal cultures of Israel's nonruling communities (Arab-Palestinians, feminist women, and ultra-Orthodox Jews) are characterized by several values, norms, and practices that they share with the general political culture. Yet their interactions with the hegemonic political culture are inherently challenging.

My argument concerning the importance of state domination in democratic political cultures contradicts the notion of "civic political culture." Studies conducted since the 1960s conceive of civic political

culture as an idealized expression of Western democracy. In their formulation, civic culture is characterized by the freedom from state intervention that most of its institutions and organizations enjoy. Hence, civic culture is perceived as a system of autonomous practices. This implies that the legal institutions (e.g., the judiciary) and practices (e.g., litigation) found in civic society should also enjoy professional autonomy.

Nonetheless, no political culture is free of all state effects. This line of argument requires elaboration, which I do next. I consider three major and very general paradigms as I debate the issue of what generates political cultures and concepts of legality in those cultures. This theoretical interlude is required so as to frame and better understand legal cultures.

According to elitists, irrespective of the formal constitutional separation between official authorities, the state through its organs (e.g., government, public administration, courts, armed forces, police forces, public media, and legislatures) reproduces state ideology while it generates political culture and its respective conceptions of legality. According to this approach, culture, including concepts of legality, is not an autonomous domain. Rather, it is a symbolic production of the oligarchic ruling elite.

These same theorists also contend that democratic political culture is the creation of a small group within the hegemonic community that retains political and cultural control over the masses (Gordon 1990; Michels [1911] 1962; Miller 1985; Mills 1956; Mosca 1939; Pareto 1935). Others emphasize the importance of economic organizations and a capitalist economy as state-oriented sources of culture and legality (Schmitter 1974; Schumpeter 1976; Weber 1947). Similarly, legality is conceptualized as a cultural construct produced and reproduced by the ruling elite for purposes of control. This control is achieved through inculcation of therapeutic social symbols of justice and state impartiality (Reich 1973). Empirical studies that support these claims demonstrate how state law, state ideology, and legal ideology significantly construct political cultures in liberal and nonliberal settings (Greenhouse, Yngvesson, and Engel 1994; Nader 1990; Sarat and Kearns 1992a, 1998, 1999; Scheingold 1974). Later I will expand the concept of state domination and culture within a critical communitarian theory of legal cultures.

Liberal pluralism perceives culture differently. It alleges that democratic political culture stems from a variety of autonomous social processes, that is, processes that are not directly dependent on the political establishment, public policy, or leadership. Moreover, processes of cultural formation can include individuals, groups, institutions, and different social roles, none of which is permanently hegemonic (Marsh and Stoker 1995). Apparently, distinct and rather equally protected cultural concepts and histories have framed democratic political culture. Yet, as this book will show, liberal pluralism tends to underestimate the importance of states in the construction of values, norms, and practices; it likewise ignores the effects of political and social hegemony on cultural reproduction.

Individuals acting through associations rather than the state, communities, or social class often provide the fundamental building blocks of democratic political culture in the liberal pluralist epistemology (Dahl 1982; Truman 1951). An individual's sense of belonging to various associations during the stages of his or her life is colored, it appears, by communities, class, and institutions. Competition between associations and coalitions of associations has therefore sparked numerous dynamic changes in the attributes of democratic political cultures.

Hence, legality in post-Kantian and post-Rawlsian liberal epistemology is a deontological procedural outcome originating in the plurality of dispositions regarding good and evil that is aggregated and articulated through majoritarian procedures (Bierbrauer 1994; Ehrmann 1976; Friedman 1969, 1985). Significantly, this source of procedural legality, as liberal pluralists argue, is free from state coercion, ruling elite culture, bourgeois interests, and hegemonic communities because, they contend, legality is very much affected by the diverse social forces expressed in democratic procedure.

The liberal presumption that states are as powerful as other organizations and institutions during cultural formation is very problematic. In most democracies, the state is in fact stronger than any other organization or institution. The state usually controls massive bureaucracies; the courts; the making and application of laws; regulation; systems of investigation, information, surveillance, prosecution, and punishment; the armed forces; and other agencies of collective violence. In addition, the state also controls a significant portion of the educational system, labor market, financial market, and media. Obviously,

globalization, even in its narrow sense of more powerful and interactive international and transnational economic organizations, may reduce the organizational and cultural power of the state (Gill and Law 1989; Gill and Mittelman 1997; Santos 1995; Twining 2000). Yet as long as states survive they will remain powerful in domestic politics and far stronger than any nongovernmental organization (NGO) in its respective sphere.

Rawls and his proponents advance another liberal pluralist assumption concerning the impartiality of the state. Their argument is, frankly, unconvincing. It is difficult to find a democratic state that does not contain subsets of identities, core values, a formal history to recount, a practical history to veil, and selected metanarratives through which it legitimates itself. It is inconceivable that a state can actively participate in the legal sphere in the absence of some concrete political preferences, state ideology, or legal ideology. Prominent adherents of liberal pluralism have already articulated significant doubts as to democracies' interest in and ability and desire to participate in impartial policy making (Dworkin 1985; Smith 1997); soft communitarians such as Walzer (1983, 1994) maintain similar positions.

Thus, liberal pluralism fails to recognize the power of social reproduction and hegemony as sources of culture, including legal culture and the concept of legality. In contrast, Marxism and its theoretical progeny, in their belief that human society is stratified according to social classes and economic interests, perceive political culture and legality as artificial phenomena at the macrolevel of superstructure (Marx 1983, [1843] 1975, [1852] 1976). Accordingly, political culture is one, if not the major, expression of the values, behavioral norms, and practices of the bourgeoisie. The bourgeoisie rules the state; the state is designed, in turn, to articulate the political hegemony of the bourgeoisie. These two overlapping powers together frame the political culture that legalizes bourgeois hegemony and reproduces the capitalist economic structure and its social relations.

As a mechanism of control, legality is more efficient during times of economic globalization, periods in which the neoliberal elite uses international and transnational economic forces to reconsolidate and justify its control over local populations for purposes of tax collection (Gill 1995), among other economic benefits. This process is abetted, as Marx powerfully argued and this book examines, by liberal legality

due to the capitalist state's ability to fragment civil society into individuals who are unable to challenge the state and its ostensible legality (Cain and Hunt 1979, 136, 206).

Fragmentation is accomplished through application of the principle "one person one vote" and other individual rights. This subsequent atomization of society and particularization of the proletariat's collective needs are accomplished by generating a mirage of social mobilization extending from the lower to the middle and upper social classes. The ethos of rights and mobilization hinders social class struggle (Poulantzas 1978a; 1978b). Stated differently, the Marxist and neo-Marxist argument asserts that democratic political culture is a means of acquiring a specious interclass solidarity and thereby forestalling class conflict in the capitalist state.

At this point, I should summarize the Marxist and neo-Marxist theoretical contribution to this book. The fundamental Marxist claim guiding my analysis is that political culture is neither autonomous nor the product of collective processes in which diverse social groups and social classes construct the substance of collective goods. In Marx's terms, the bourgeoisie, the dominant social class, produces the epiphenomenon of political culture or ideology. Legality is a central pillar in the state's political culture because state law, when it is produced, is the most reliable intersubjective mode of communication (quoted in Cain and Hunt 1979, 135–37). The individual's class consciousness is thus replaced with dependence on this illusive legality. The conjunction of legality and ideology, namely, legal ideology, enables the state and the ruling class to reproduce the capitalistic legal order. Later I examine legal ideology as a component of state domination over nonruling communities.

Marxism and its interpretations criticize legality as a socially, politically, and culturally contingent phenomenon. In doing so, they explicate the construction of political cultures by states and discard the concept of the structural autonomy of the state. This book likewise assumes that states are not autonomous. I have explained elsewhere why states, including Israel, are not structurally free of sociopolitical constraints (Barzilai 1996, 1997a, 1997b; for the political economic aspect, see also Barnett 1990, 1992). However, I view the Marxist class approach as rather confined. Apparently, and unfortunately, ruling elites and hegemonic communities occupy undeniably preferred

socioeconomic positions. Yet their economic power is not the exclusive source of their political power. State domination, which originates in a diversity of sources, should be perceived as a constitutive force in the construction of political culture and legality.

The argument presented in this section, which is meant to inform our understanding of democratic political culture with a broader critical, theoretical perspective, leads to the hypothesis that states are hegemonic generators of democratic political cultures and legality (this hypothesis is elaborated in chap. 2). It is hardly conceivable that states, however weak, are disengaged from the production of political culture, from marking their own beliefs as hegemonic while marginalizing those of nonruling communities. The fact is that nonruling communities may retain some cultural autonomy in selected aspects; they may also be sources of diverse practices, including resistance. With this in mind, we now turn to an examination of the meaning of legal culture through a political analysis of culture in law and of law as one cultural domain.

What Is a Legal Culture?

The notion of legal culture has often been considered as an epistemological antinomy, as though law and culture were separate entities. Max Weber conceptualizes legal order and culture as distinct phenomena. Weber points to the difference between "legal order" and "conventional order." While the latter is based on cultural conformity, the former is based on enforcement and sanctions against deviations (Weber 1947, 126–30). Yet not every facet of legal culture is derived from sanctions and enforcement; consider legal consciousness, hermeneutics, and mobilization.

Various practices within law and directed toward law—from litigation and legislation to defiance and resistance, from consent and conformity to dissent and disobedience—constitute legal culture yet are themselves generated through, in, and toward organizations (Edelman, Uggen, and Erlanger 1999; Ewick and Silbey 1998; Sarat and Kearns 1993, 1998). Furthermore, legal culture is not limited to the arena of the courts (Rosenberg 1991); it encompasses processes in which law is but one part of an interactive network of social forces and politics (McCann 1994). Legal culture nevertheless has no meaning

unless it is viewed within a political context. As we shall see in the following chapters, the inquiry into the effect of legal practices (e.g., mobilization and demobilization) is dependent on political criteria that evaluate these practices and their relevance to change (Roberts 1999). The phenomenon of legal culture deserves critical inquiry because law, society, and politics are incomprehensible when they are considered in isolation from culture in law, culture toward law, and law toward culture, all within the context of power relations and state domination.

Liberal pluralists view legal culture through the lens of democratic and individualistic political culture. They define *legal culture* as a set of attitudes, values, norms, and modes of behavior toward law and in law (Friedman 1985, 1990). Due to the ability to quantitatively measure public opinion about institutions in the midst of drawn-out adjudication of publicized cases, attention has been focused on attitudes toward the courts, particularly supreme courts (Caldiera and Gibson 1992; Epstein et al. 1994; Gibson and Caldiera 1995). Legal cultures have consequently been investigated largely in the guise of public attitudes toward the courts, primarily in the United States but increasing in Eastern Europe, Russia, South Africa, Western Europe, and Israel (Barzilai, Yuchtman-Yaar, and Segal 1994b; Dotan 1999; Epp 1998; Gibson and Gouws 1997, 1998; Jacob et al. 1996; Tanenhaus and Murphy 1981). These studies have indeed become a rather prominent avenue of empirical research in political science.

The argument that legal culture is an essential component of political culture (Epp 1998; Friedman 1969, 1985, 1990; Tyler 1990) appears to be justified. However, our critique of the liberal pluralist conceptualization of democratic political culture is relevant to this school's definition of *legal culture* as well. The essence of my argument is that the state narrates law and initiates the evolution of political life around and in law. It follows that norms pertaining to legitimacy and legality are formed on the basis of state ideology, legal ideology, and the state's political interests, as are the practices that constitute modes of behavior within and toward law (Gordon 1990).

Two examples demonstrate these critical comments. First, Israel's government and attorney general shape the content of cooperation and conflict in numerous spheres. Government prosecutors operating inside and outside state courts display the respective practices—

many of which are informal. Extratextual institutional arrangements of this sort informally shape legal practices in other democracies as well. Contrary to expectations, public opinion, viewed in its liberal pluralist sense, plays an insignificant role in the formation of this facet of legal culture despite the formal obligations of state prosecutors to act in favor of the "public interest" (Barzilai and Nachmias 1998). Such behavior demonstrates how the "rule of law" is constructed on the basis of institutional arrangements, which are later incorporated into the mechanisms of state power and elite behavior.

Second, research on legal symbols conducted in Israel in the 1990s found that the public legitimates court behavior on the basis of myths related to incumbent high court justices. This finding indicates that the state significantly affects public attitudes toward law because the myths themselves were generated through state law, state ideology, and legal ideology. Accordingly, the justices (all of them Jews) are supported as loyal agents of the "general will" and contributors to the "state and democracy." It is therefore easily understood why the public has rarely legitimated any judicial review having the potential to alter state narratives (Barzilai 1999a). Comparative studies about other political regimes argue for a similar cultural centrality of judicial myths, an effect generated through state domination (Casey 1974; Fitzpatrick 1992).

My argument, however, is not meant to inflate the momentum of state domination in the production of legal culture. Foucault is correct in criticizing theories of rights for overplaying sovereign power as the sole source of justice and order. State law should be perceived within a broader, decentered framework of fragmented power and legal cultures. I relate to state law as a limited form of law that interacts with communal cultural legal practices that are in constant flux. Accordingly, this book examines the role of state law as one form of state domination operating within communal legal cultures in addition to the legal strategies applied by the state and nonruling communities toward one another.

Therefore, in the following chapters *state law* refers to the legal formalities, informalities, structures, and practices that are constructed by the state's power foci. State ideology is the cultural conjunction of state narratives, particularly those that constitute metanarratives,

whereas legal ideology is constructed as that part of state ideology in which state law is conceived and generated as the rule of law. It should be clear that state law is not merely an epiphenomenon. It contributes significantly to the structure and substance of legal and state ideology. State domination, which is realized as well as formed through state law, is justified through state as well as legal ideology. (In chap. 2, I apply this theoretical framework to Israeli state law within the context of state-community relations as these are perceived from a legal cultural perspective.)

Damaska has distinguished between the "reactive state," which respects the existence of civil society and only sets the procedures required for the exercise of civil liberties (which I call state law), and the "activist state," which promotes a certain public "good" and intervenes prominently in the lives of its citizens (1986, 73–88). This is a somewhat redundant distinction. In both types of political regime, the state influences law and legal culture through its public policies. The tactics applied are, however, different. While the reactive state withdraws from direct confrontation with civil social forces by applying liberal or libertarian policies, the active state is much less inclined to remain so distant from the daily lives of its citizens.

Thus, it is erroneous to assume that in reactive states the ruling elite and its apparatuses do not influence legal cultures. As we shall see, no communal legal culture is immune from state domination. For example, Palestinian citizens of Israel, while dissenting from many facets of state ideology, tend to legitimate some aspects of Israel's legal system. Moreover, the distinction between reactive and active states is too polar and inclusive. First, states may simultaneously adopt active and reactive policies toward different spheres of law and diverse nonruling communities. Second, in concrete historical periods, if a state is in transition from one sociopolitical model to another, regime classification is illusive and temporary.

Thus, as France moved from the Fourth to the Fifth Republic (in 1958), its state was characterized by the transition from a more reactive to a more active political regime. The period 1958–61 can hardly be portrayed as either uniformly active or reactive. Rather, the regime was adopting different stances taken toward different spheres of law (Stone 1992). In contrast, during the 1980s and 1990s Israel veered from a more

active to a more reactive policy but only in very specific legal arenas and in relation to distinctive communities; moreover, these shifts took place in a highly incremental fashion. In both instances, state domination was not disengaged from daily life and legal culture.

Many scholars agree that legal culture is a broader and more convoluted phenomenon than is state domination despite its ideological aspects. Ideology is the abstract narrative of state power, while culture is about practices (M. L. Friedman 1990; Gordon 1990; Roberts 1999). Culture has been constituted inside and outside state law through identity practices that generate interpersonal and intercommunal relations regarding, inter alia, justice, injustice, equality, discrimination, conflict, cooperation, and conflict resolution. These relations in turn are mirrored in identities and the ways in which these identities are realized in legal practices (Appiah 1994; Brigham 1998; Habermas 1994; Merry 1998).

Later we will see that communities are important sources and carriers of identities in legal and sociopolitical contexts. Carole Greenhouse finds that communities in which different conceptions of time are ingrained in their cultural practices hold different views of desirable laws (1989). Each of these communities, with its own view of law, engenders a distinct legal culture. Numerous studies worldwide demonstrate how communities have constituted legal practices and *lex nonscripta* (Harris 1996; Nader 1969, 1990; Renteln and Dundes 1994; Sheleff 2000) on different foundations. Nonruling communities are no different in this respect, even under state domination.

In order to bridge the gaps separating the legal culture of the state from those of nonruling communities, NGOs have often been employed by communities in the name of legal mobilization. State law is thus mobilized by the NGOs for communal political purposes because such a process can contribute to the reallocation of goods despite the price of admitting state legitimacy. This tactic is productive because the public is inclined to have faith in symbols of order and rights, which are exteriorized through communal mobilization of law (Barzilai 2001; Edelman, Uggen, and Urlander 1999; Scheingold 1974). Thus, communities, either directly or through NGOs, are sources and carriers of legal mobilization, a factor this book explores in various empirical contexts. Local leaders who aspire, via this mobilization, to adapt state law to their own interests can even use the notion of

"community" in its mythic connotations (Greenhouse, Yngvesson, and Engel 1994). Legal mobilization as such is inherently capable of activating identities in law and toward law, a capacity examined in the later chapters of this book.

Despite its centrality, mobilization is not the only legal practice that this book examines, nor does it imply a court-centered approach. Here I add another element to the concept of legal culture: decentralization of law. Application of the concept of legal culture requires displacing courts as the single, central pillar of law (Tomasic and Feeley 1982). Instead, we should consider a context much broader than courts and their concrete rulings (see, e.g., Galanter 1969, 1983; and McCann 1994, 227–32). This context is also created by sociopolitical coalitions, the consequent fabrics of legal and political practices, the selection of cases for litigation, legal hermeneutics, the construction of rights-based arguments, attendant state and communal narratives, judicial behavior, and policy formation.

For instance, in his study of pay equity and legal mobilization in the United States, Michael W. McCann has pointed out the power of salient court rulings to induce mobilization. Such rulings focus public attention—often through media coverage—on the severity of an issue. This attention can induce further litigation as well as nonlitigious actions (1994, 48–91).

Seen in this light, litigation, as one mode of political behavior and legal cultural practice, targets legal victories in courts. But, more significantly, it also represents a publicity tactic aimed at raising legal consciousness and promoting mobilization. Accordingly, McCann conceptualizes legal culture as a process that minimizes the centrality of the courts as a *distinct* legal actor. This process involves publicizing the case and its conduct while focusing on nonlitigious legal actions, sociopolitical coalitions, and mobilization as the pillars of legal culture. In sum, this conceptualization of legal culture "upgrades" litigation and converts it into a multidimensional process in the broader context of rights claims and group politics. One outcome of this analytic thrust is that state law, as it is dealt with in litigation, is transformed into a grassroots force for change and vice versa (for a similar approach, see Epp 1998).

As a liberal pluralist who believes in critical liberalism as one source of collective struggle, McCann underscores constitutive practices as

fundamental aspects of legal cultures. He argues for the importance of state law in collective action, although he underestimates the effects of the dominant culture and state constraints on legal consciousness and action. Following Galanter (1974), McCann conceives of legal culture as a set of practices that are instigated, inter alia, by salient court rulings for the purpose of initiating reallocation of goods (1994, 177–79). If we recall that legal culture is only partially reflected in formal legal texts, state institutions, and dominant social groups, we can understand why crucial aspects of culture in and toward law are generated through collective action initiated by pressure groups (277). Following this analysis, the principal *social* carriers of legal cultures are not judges but the lawyers and political activists who use a handful of court cases to organize and activate collective action for the sake of legal mobilization.

As I have implied, McCann concluded in his authoritative study of pay equity that legal mobilization was successful in reforming state law. Hence, he argued for the possible triumph of incremental processes within the context of legal sociopolitical struggles for liberal rights (see also Epp 1998, where the author impressively argues that for legal mobilization to be effective civil society and an organizational structure are needed). The relevance of these conclusions, however, is contingent on the political culture. Are we to reach the same conclusions regarding political cultures that sanctify the state and its narratives more vigorously than does the United States? Are McCann's conclusions relevant to countries where the scope of civil society is narrower than in the United States—Japan and Israel, for example? In response, chapters 3, 4, and 5 address these aspects of legal mobilization, including litigation, in the more general context of legal cultures explored from communal and critical communitarian perspectives and under conditions of state domination.

McCann's insightful cultural approach acknowledges the gap between state law and group legal practices in their political contexts. He does not, however, contemplate practices and identities in state law in depth. He conceives of state domination as a given, a second-order problem, not a dynamic, often paradoxical, constitutive cultural force that requires investigation. This book attempts to fill this gap from a critical communitarian perspective.

Let me conclude this section. State law and its practices and place in state-society relations should be taken into account when legal culture is debated. This means that studies of legal culture need to explore two dimensions: first, state domination in political and legal cultures; and, second, communities and their legal consciousness, social being, identities, and practices. I argue that we need to know much more about these dimensions. This book attempts to contribute to that store of knowledge as it investigates and conceptualizes communal legal cultures as these are expressed in the experience of Arab-Palestinians, feminist women, and ultra-Orthodox Jews in Israel.

But does legal culture require abstraction, theorization, and research on communities—particularly nonruling communities—as components in its conceptualization as we enter the third millennium? In other words, who needs "communities" as a major subject of scholarship since "postmodern globalization" has entered our lives? Heated arguments on the subject are to be found in the literature (compare Benhabib 1992; Etzioni 1991, 2001; Fiss 1996; Greenhouse, Yngvesson, and Engel 1994; Lomosky 1987; and Selznick 1987). In response, this book presents a critical communitarian perspective on the subject while claiming that communities do indeed occupy a major space in law, society, and politics. The following section is devoted to elaborating this position.

Communities: Why Are They Important?

In democracies, majoritarian processes, even those that pretend to be deontological, should not be installed as the exclusive cornerstones of constitutionalism. The countermajoritarian problem is central to this position: to what degree can a minority, namely, a nonruling community, be protected and its rights entrenched in law against majoritarian tyranny (Cover 1992b)? In theory, judicial activism can generate minority rights. Yet, supreme courts, and the judiciary as a whole, often evade adjudication and judicial intervention for the protection of minorities unless that protection is empowered by some significant elite in combination with some measure of public support (Mishler and Sheehan 1993; Rosenberg 1991). Even when liberalism celebrates its triumph in cases in which the courts have defended

existing and generated new minority rights, the liberal rhetoric underscores individual rights, not the communal good, as the basis of equality (Glendon 1991; Spann 1993).

What, however, do we mean by community? Communities are collectivities that share common ontological characteristics; a common perception of the collective good; joint histories; collective memories; distinct practices and organizations; bounded spaces of politics, power, and culture; common identities and consciousness; and epistemological boundaries that separate it from other collectivities (Etzioni 1991, 1995a; Selznick 1987, 1992). In the last section of this chapter, I expand on this definition when explaining the choice of the communities selected for this study.

In many democracies, such as Australia, Austria, Canada, Cyprus, Czech Republic, France, Germany, Great Britain, India, Israel, Mexico, New Zealand, Peru, Slovakia, Spain, Turkey, and the United States, one finds a variety of nonruling communities that express distinct, even contradictory interpretations and practices when viewed against state narratives and state law (see Lijphart 1977). In these and other countries, communities provide the basis of distinct collective virtues, political participation, and resistance. I argue that nonruling communities generate justice because they represent identities that have no access to collective means of bargaining over power and goods. In the following chapters, I examine how each community generates its own form of collective action and its bargaining mode in and toward state law. Prima facie, national minorities (e.g., Palestinians), religious fundamentalists (e.g., ultra-Orthodox Jews), and gender minorities (e.g., feminist women) display distinct modes of collective action and bargaining that flow from their distinctive positions vis-à-vis the state.

As Robert Cover conceives of the process, each nonruling community develops alternative interpretive meanings of hegemonic state narratives and state law (1992a). While state narratives legitimize the historical illegality of the state's inception, communal interpretations of these narratives confer other ideological, political, and practical meanings on these narratives. This legalistic, pluralistic contention is based on the conceptualization of communities as meaning-providing discursive entities. The approach connects illegality/legality, language in the form of narratives, state law, communal law, and hermeneutics

to form an intricate network of meanings that support or resist state domination.

This book extends Cover's notion, as his argument is particularly relevant for the unfolding and examining of the concept of communal legal culture in the Israeli context. While reviewing the literature, I suggested that state domination and identity practices (e.g., mobilization through litigation or violence) should be considered as components of legal culture. This suggestion follows Cover and demands that the legal hermeneutics of nonruling communities be included among the crucial facets of legal practices to be stressed. At the state level, legal hermeneutics articulate and empower state narratives as well as legal ideology. At the communal level, legal hermeneutics instigate a variety of practices, some of which are unanticipated by state law. I go beyond Cover by explicating practices such as litigation and grassroots action in various communal contexts. For instance, the legal hermeneutics applied by Palestinian feminists in Israel have generated unanticipated coalitions and struggles (this is analyzed in chaps. 3 and 4).

For Cover, as for myself, law is neither a homogeneous nor an exclusively statist phenomenon. State law is one kind of law, but law in its generic form allows for a multiplicity of constitutive meanings and practices whose sources cannot be attributed to the state (Cover 1992a, 109; see also Santos 1995; Sarat et al. 1998; Twining 2000). These meanings and practices transcend the formal legal hermeneutics of the state's hegemonic legal culture; they are generated through interactions between the state and nonruling communities. The state's formal legal text may dominate, as it does in the case of the U.S. Constitution, *Basic Law* in Germany, or *Basic Law: Human Dignity and Freedom* in Israel. However, the meanings of such formal constitutional cornerstones are always contestable and contingent on communal identities and legal practices as these are realized in daily life.

Let me explain why Cover's work is important for the comprehension of communities'—especially nonruling communities'—law, politics, and culture. The distinction between law as power and law as meaning is central to Cover's work and to theorizing about legal cultures in a communal context. Cover conceptualizes state courts and the legal and sociopolitical stories they tell as the first dimension of analysis (i.e., law as power). Nonruling communities generate another dimension and different stories (i.e., law as meaning); these

emerge from their distinctive legal consciousness, identities, and practices as well as the constitutional worlds they articulate (Cover 1992a, 112–13). Later I will use this theoretical insight to illuminate the rulings of Israel's Supreme Court and the communal hermeneutics applied to those rulings by Arab-Palestinians, feminist women, and ultra-Orthodox Jews residing in Israel.

Cover's legal pluralist prism contributes to his denial of the ability of one historical narrative, in tandem with state violence, to hamper the creation of alternative and challenging meanings. Hence, from the perspective of law as meaning—in contrast to law as power—communal hermeneutics has generated multiple histories. When I discuss Zionism as a hegemonic metanarrative, Cover's argument becomes essential to gaining an understanding of Israel's communal legal cultures as possible counterhegemonic forces.

I do not wish to claim that Cover is a nihilist. He is not. On the contrary, he is a legal pluralist in that he claims that no one political or legal ideology or one hermeneutics should be considered superior to any other. This insight leads him to conceive of legal culture in the dual context of state violence on the one hand and communal pluralistic hermeneutics on the other. It raises a conundrum, one that is unsolvable within his theoretical prism. On the one hand, he conceives of state law as evil and condemns the agents of state violence who "kill" alternative interpretations. On the other hand, he does not propose any political alternative to the state, nor to liberal democracy, which he so vigorously criticizes (Minow, Ryan, and Sarat 1992).

As Austin Sarat correctly points out, Cover emphasizes the need for interpretative communities, although he is not a communitarian (Sarat 1992, 265). In contrast, this book constructs and examines a critical communitarian approach that places nonruling communities at the core of law, society, and politics; it reverses the order of Cover's dimensions by arguing for their primacy as producers of meaning and as participants in democratic regimes.

Communitarians do not criticize individualism as a value, although they do deny individualism as the sole foundation of democratic constitutionalism (Carter 1998; Selznick 1992; Taylor 1994; Van Dyke 1977, 1982, 1985). They further advocate, as I do, construction of a constitutional basis that can protect and empower nonruling communities with respect to their ontological virtues and rights. Contrary to lib-

eralism, and to Habermas's theory of communicative public spheres (Benhabib 1992), communitarians argue that no procedure can distinguish between communal ontological good and justice (Etzioni 1995a; Selznick 1992). As Selznick claims, even a procedure that sanctifies cultural relativism embodies a certain conception of "good" and cannot be completely objectified (91–116).

In the following pages, I criticize the ways in which liberals, including Cover, have ignored and marginalized nonruling communities. I then explicate the importance of nonruling communities as seen through the communitarian lens.

Liberalism identifies two mainstays of legal culture. First, it asserts the priority of individual rights over the communal good; second, it emphasizes "fair" procedures that are impartial under any definition of *communal good.* In the process, the state is considered to be disengaged from any effort to define specific collective goods while it generates a framework for the cultivation of individual rights in a pluralistic setting (Rawls 1971). The bearers of rights, then, are autonomous individuals who enjoy freedom of choice (Riker 1988). Democratic legal culture is consequently evaluated according to its ability to embody these two cultural fundamentals of individual rights and impartial procedures.

Paradoxically, however, liberalism sanctifies a strong state, a state that can respond to claims for rights and can protect those rights (Sandel 1992, 27). Moreover, as Sandel has correctly stated, liberalism shifts the focal point of action from legislatures and political parties to forums that are less attentive to communal pressures: judiciaries and bureaucracies that supposedly respond to litigation and demands grounded in the rhetoric of individual rights. This argument, which is essentially communitarian, is also important for the comprehension of legal cultures in Israel. There parliamentarianism has declined in the midst of a more vociferous liberal rhetoric and the soaring rise of the politics of adjudication since the 1980s (see figs. 1 and 2 in chap. 2).

Liberalism asserts that legal cultures should be inclusive and allow every individual to cultivate his or her values based on an autonomous set of preferences (for a systematic analytical approach, see Gans 2000; Raz 1994; and Tamir 1993). Associations should serve individuals in their choices (Rockefeller 1994; Putnam 2000). Nonetheless, liberalism neglects communities, the most fundamental "association"

in the individual's environment, as a vital component of our personalities (Glendon 1991; MacIntyre 1984, 1988; Selznick 1987, 1992; Sandel 1982, 1996; Taylor 1989). Hence, it likewise downplays the constraints placed on individuals within the communal context in which they are socialized. This erroneously assumes that communal practices are transcendent and marginal to constitutional models of democracy.

However, liberalism does not necessarily ignore communities (see the prominent works of Gans 2000; Raz 1994; and Smith 1997); while it recognizes their existence, it generally conceives of communities as ontologically subordinate to individuals and individual liberty. Hence, liberalism does not apprehend communities as self-generating entities embodied in collective identities, consciousness, practices, conceptions of the public good, or communal needs and rights (Dworkin 1992).

Joseph Raz, one of the most prominent contemporary liberals, considers multiculturalism to be an axiom of modern liberal democracy. His argument concerning nonruling communities as possible generators of multiculturalism is a traditional liberal argument. Communities should be respected, Raz contends, as long as they respect the individual freedom of their members. If communities are not liberal in themselves, Raz demands enforcement of individual freedom in them (1994). Four erroneous assumptions lead him to suggest the oxymoron of imposed freedom.

First, Raz assumes that most communities are liberal. Obviously, this is an error that articulates a Western epistemological bias that views liberalism as the sole criterion determining the quality of democratic life and its legal culture. In many democracies, nonruling communities are not liberal. Inter alia, one can mention Australia, Brazil, Canada, India, Israel, New Zealand, Peru, Turkey, and the United States, each of which is home to a range of nonruling communities. Second, Raz believes that individual freedom and its absence can be objectively defined. I agree with Raz's contention that if a person wants to leave a community he or she should be entitled to do so, notably when the community condones violence against him or her (see chap. 5). But these instances are rare. Often members of communities, including nonliberal communities, do not wish to leave their sources of identity and empowerment irrespective of their legal or political cultures (Renteln and Dundes 1994; Sheleff 2000).

How does Raz determine in which instances people do or do not have the freedom to choose their lifestyles in a nonliberal setting? He does not; he avoids this issue. As I show in the following chapters, nonliberal communities do offer space for individual practices, action, and choices. Raz, like many other liberals, has argued for a construction of deontological justice. He does conceptualize individual freedom as a legitimate public good, but the good he defines is relative to all other communal goods. As subsequent chapters will show, *individual freedom* by itself is a relative term ingrained in the liberal tradition yet culturally and contextually contingent on the specific community.

Third, Raz presumes that individual freedom is an absolute value. But is it? Let us suppose that we can arrive at an "objective" definition of *individual freedom;* does this make it an absolute value? Do we know of any organization or political regime that has justified complete individual freedom, under all circumstances, and is it always desirable to maintain individual freedom, as an absolute value, at the expense of other values? If not, why presume that individual freedom is always superior to a communal right to preserve its nonliberal collective culture?

This leads us to the fourth error. If we perceive a certain antinomy between the value of individual freedom (in its absolute liberal terms) and the preservation of communal culture, how can we endorse the liberal argument for multiculturalism? To do so, we must presume—like Raz—that liberalism is superior to any other theory of democratic justice. However, if we claim the superiority of the liberal theory of justice we are forced to exclude the principle of cultural relativity, which is the basis of multiculturalism. Hence, Raz's arguments do not respond to the needs of nonliberal and nonruling communities for protection in multicultural settings. Without such protection, multiculturalism cannot be embraced as a principle in law and politics as practiced in democracies.

Historically, liberal legal culture has been primarily individualistic (L. M. Friedman 1990), although liberals have emphasized the importance of groups to multicultural political articulation and participation in decision making. As "associations," communities have not been considered as warranting collective rights and systematic collective protection in public policy and law (Lomosky 1987; Roberts 1999). In avoiding the logical consequences of this position, liberals have been

able to continue to embrace the primacy of individual rights (Dahl 1971, 1982; Kymlicka 1995; Smith 1997).

Liberalism's inability, lack of interest, and unwillingness to accommodate communal pressures in the midst of growing infrastate, instate, and global transnational multicultural pressures (Santos 1995; Twining 2000) is a crucial issue in the following chapters. The critical communitarian approach, which combines analysis of the politics of identities, law, and state domination, allows me to confront liberalism's failure to recognize, protect, and empower those nonruling communities that the state has perceived as challenging its ideology and law. But, much more importantly, critical communitarianism enables me to explore how liberalism is directed toward subduing these communities, eroding their communal boundaries, and disempowering their counterhegemonic role in democracies.

Communitarians consider nonliberal and liberal communities as constitutive collectivities in democratic legal cultures because communities are central to the formation of human identity and prime agents for the fulfillment of human needs, interests, and desires. It follows that nonruling communities should be viewed as carriers of individual as well as group rights and duties, not as venues for excluding individual rights, individual duties, and individual dignity (Etzioni 1991, 1995a, 1995b; MacIntyre 1984, 1988; Putnam 2000; Sandel 1982, 1992, 1996; Selznick 1987, 1992; Taylor 1994; Van Dyke 1977, 1982, 1985; Walzer 1983). Further, as this book will show through the cases cited, nonruling communities should be protected because they are forces for the emancipation of individuals who have been marginalized due to their sociopolitical characteristics and embedded identities.

The issues of nonruling communities and collective rights lead, of course, to the issue of justice. Alasdair MacIntyre describes how various traditions and concepts of justice were generated through human history. He correctly points out that no modern political setting is capable of aggregating all those traditions into one comprehensive concept of justice (1984, 1988). States are not impartial; they have selected identities, which are ideologically advanced as "worthy objects" of justice. Therefore, constitutional and political generation of multiculturalism is impossible without substantive recognition of nonruling communities and without permitting expression of their con-

cepts of justice in law and public policy. This requires appropriate political regimes.

Arend Lijphart has devoted much comparative research to polarized and segmented societies characterized by severe sociopolitical cleavages. Lijphart's theoretical analysis of their political regimes notwithstanding, he has sought a prescription for stabilizing such societies through the procedural mechanisms of grand coalitions and the constitutional sharing of power and authority. Formal mechanisms of "consociational democracies," he contends, may create space for groups and communities that have distinct ontological virtues and precepts of distinct justice (1977). As a liberal pluralist, Lijphart seeks to discover the democratic procedures appropriate for attaining and maintaining political stability. His search is motivated by the assumption that under appropriate procedural formulas legalization of "justice" in divided societies can be refined through national arrangements of power sharing between various elites.

He is less interested in my topic, namely, nonruling communities, culture, and law under state domination. I assume—contrary to Lijphart—that any concept of justice is drastically contingent on communal social being, consciousness, identities, and practices under state domination. Hence, formalization of political regimes is only a second-order problem. It should follow the first-order problem of comprehending nonruling communities as bounded spaces of claims for justice and power, of rights and obligations.

Communitarians underscore the communal "good" of a community as the cultural infrastructure of human justice. All communitarians allege that no coherent theory of justice is possible without assigning prominence to the plurality and relativity of definitions of this concept (Sandel 1982, 1996; Selznick 1992; Taylor 1989). Communal good reflects attachments to tradition realized as a fundamental cultural characteristic; both significantly affect private and public life (Gutmann 1992; Miller 1992; Taylor 1989). Hence, communitarianism is as critical of the deontological self as it is of attempts to rationalize any one tradition of justice as both absolute truth and the objective criterion for legal order (MacIntyre 1984, 1988; Taylor 1989). This book adopts the communitarian stance and argues that theoretically nonruling communities are necessary for multicultural democracies.

As we shall see in our investigation of the Israeli case, Charles Taylor is correct in asking: "Again, what would happen if our legal cultures were not constantly sustained by a contact with our traditions of the rule of law and a confrontation with our contemporary moral institutions?" (De Shalit and Avineri 1992, 44). Concepts of justice apply here as well. Communal legal cultures, as we shall see, maintain various traditions of the "rule of law" and have different ways of interacting with state law, state ideology, and legal ideology. Hence, this book argues that a sustainable democratic culture should embrace, not exclude, nonruling communities and legal pluralism; in other words, it should accept multiculturalism.

It has frequently been asserted that communitarians prefer the communal good to personal liberties, an argument often raised by liberals, communitarians, and postmodernists. This book will show that the collision between the collective good and individual rights does indeed occur in communities. Yet, because subordinated communities empower their members and enable them to gain and utilize personal rights, in this sense nonruling communities are sources of collective participation and personal emancipation. In other words, while communities may confine individual autonomy in its liberal sense, they enhance the ability of their members to preserve their ontological identities and enjoy their rights to be whatever they wish.

Liberalism, like many other traditions, is not static. Will Kymlicka, one of the most vibrant liberal students of contemporary politics, has attempted to envision a different type of liberal legal culture, one that acknowledges certain types of group rights (1995). Kymlicka's liberal premise that individual rights precede the communal good notwithstanding, he has grasped that societies are inclined to be multicultural and that groups in multicultural contexts strive to articulate their distinctive characteristics, needs, and interests. Hence, legal cultures expounding pure individualism, if they hamper group demands for protection and empowerment, contribute to the delegitimization of democracies.

In response to this predicament, Kymlicka makes a distinction between "external protections" and "internal restrictions" (1995, 35–44). External protections shield minorities from majoritarian democratic procedures that may drastically limit the ability of nonruling community members to enjoy their unique characteristics in a liberal context.

External protections belong to liberal theory because they occupy the juncture between liberal concepts of fairness and communal ontological virtues. Thus, external protections do not represent drastic alterations of liberal constitutional democracy; instead, they allow minorities to participate in constitutional democracy as required by "procedural fairness." In contrast, internal restrictions aim—according to Kymlicka—to discipline nonruling community members while preventing the state from interfering with internal communal life. According to liberal theory, internal restrictions should be considered undesirable in principle because they may empower the communal elite to transgress the individual rights of community members. Conceptually appealing as these distinctions may be, in proposing them Kymlicka expresses the erroneous liberal proclivity to identify communal practices with the restriction of individualism while ignoring communality as a source of individual identity and empowerment.

Consider the right to education. My right to educate in my communal language and according to my communal values (external protection) is also my right to impose restrictions (internal restrictions) that preserve the collective ontological virtues of my community and defend them from state interference in their content. If we assume, as I do, that communities are confined spaces of embedded identities and practices, is it possible to distinguish between internal restrictions and external protections in such cases, and can we seriously respect the notion of "community" if our normative model of constitutional democracy is liberal? Stated simply, how can we endorse the right to external protection, on the one hand, and condemn it as an internal restriction on the other?

Kymlicka is correct, however, in his contention that communitarians fall short in their attempts to explain how an individual is protected if he or she is not the primary carrier of rights (for a similar contention, see Kukathas 1992). Moreover, communitarians tend to evade the issue of nonliberal communities in liberal states or in states, such as Israel, that exhibit some liberal characteristics. What, then, distinguishes a desirable boundary between the state and its nonliberal communities? Later I will address these issues theoretically and empirically, especially with respect to the communal life of ultra-Orthodox Jews and Arab-Palestinians in Israel.

While many liberals emphasize citizenship as the common bond

that unites individuals and resolves the problem of self-fulfillment in pluralistic societies, Kymlicka takes an additional step. He recognizes the value of legal cultures that accentuate group-differentiated rights as a source of civil identity. "Differentiated citizenship" is a concept that attempts to empower legal cultures that perceive of groups as a way to incorporate individuals into a liberal political culture (1995, 173–92).

Accordingly, Kymlicka points out that if a culture is inclusive then minorities are entitled to demand some group rights (external protections) in order to participate in the political process. Under these conditions, the peril to a stable democracy is minimal and group-differentiated rights represent a solution in situations of severe political conflict in multicultural settings in which a conception of common citizenship has failed (1995, 176–81). The issue of the ability to preserve a stable democracy based on group rights is relevant to the research on Israel's legal culture, especially but not exclusively because it so intimately touches on the interactions maintained between Jews and Arab-Palestinians.

Given this analysis, it is understandable that communitarians and liberals have generated different models of legal cultures. In the following chapters, the empirical and theoretical analysis will evaluate the main characteristics of the communal legal cultures inherent in these models and assess the success and failure of each model to render rights and empower human beings belonging to nonruling communities. In other words, this book explores whether the adoption of individualistic liberalism is sufficient when nonruling communities attempt to address their needs and empower their members.

As you, the reader, may have noticed, the differences between these models are not entirely diametric. Communitarianism does not dismiss the normative demand and sociopolitical need for individual rights as a sanctified principle of constitutional democracy. Liberals acknowledge the possible usefulness of some collective (group) rights and their reconciliation, however problematic, with liberal tenets. Rogers M. Smith, in his monumental study of American citizenship, elaborates the reasons why liberal democratic visions of citizenship should include communities as enlargements of civic cultural and political space (1997).

Moreover, among the critics of liberalism who have recognized the vitality of multicultural contexts and the centrality of communities,

few have been supportive of any constitutional alternative to liberal democracy (Shapiro 1999). Jurgen Habermas (1994) has made a major effort to synthesize critiques of liberalism with an attempt to construct a procedural and institutional alternative to declining social democratic states. This new political structure would be based on autonomous interactions between individuals and among communities. The somewhat blurred intellectual boundaries notwithstanding, the communitarian criticism of liberalism, as it is explicated and advocated in this book, addresses the liberal neglect of the need to protect and empower nonruling communities, particularly nonliberal communities.

My argument here is that the comprehension of democratic political cultures, and legal cultures in particular, should not rely solely on an investigation of the politics of individual rights. We should look very carefully and systematically at nonruling communities that have developed distinctive identities and practice their unique perceptions of the collective good. We need to study these communities' characteristics, identities, legal consciousness, and practices toward law and in law through their own voices. I agree with MacIntyre's communitarian (1988) and Benhabib's postmodern neo-Habermasian (1992) claims that comprehension of the "other" collectivity is possible only by probing its voices. Communal legal culture, as we now understand it, is not only about social being and legal consciousness but about the ways in which collective identities of nonruling communities are expressed in law and toward law.

One point warrants repeating here. I have constructed critical communitarianism as my theoretical approach because it delves into communal legal cultures while stressing two rather neglected aspects in the communitarian model: state domination and the politics of identities. State domination in communal legal cultures was elaborated earlier and will be further explored in the following chapters. The next section is devoted to a theoretical contemplation of identity in a communal context.

Communities, Differences, and Identities

Identities are subject to the conflicts waged between states and nonruling communities and among communities (Crenshaw 1995;

Crenshaw et al. 1995). The democratic state in multicultural societies often ignores and/or suppresses the distinctive identities of nonruling communities; in turn, it asserts "social integration" and claims that civic culture ensures multicultural "harmony" (Danielsen and Engle 1995; Nader 1990). Courts frequently embrace such views and nurture the norms dictated by the hegemonic culture (Jacob et al. 1996). Nonruling communities, however, continue to construct distinctive collective identities—which are unrecognized and restrained by the state—and assert their collective expectations regarding recognition, protection, and empowerment in culture, law, and politics (Danielsen and Engle 1995).

Robert Cover has clarified how judges obey state law and adhere to the legal ideology promoted by the state and why they prefer state legality to the alternative hermeneutics originating in other views of justice and normative order. He argues that judges are state organs whose preference for the exhibition of their supposed powerlessness allows them to disregard or subdue options offered by alternative communal settings (Cover 1975; Minow, Ryan, and Sarat 1992). Current circumstances demand that we ask whether globalization and intercommunal unrest change such a judicial proclivity or challenge hegemonic hermeneutics. In his *Justice Accused* (1975), Cover responds negatively to a similar question concerning natural law. He describes how judges ignored natural redemptive law when they were willingly cooperating with slavery in the period preceding the American Civil War. Unfortunately, Cover passed away before contemporary neoliberal globalization became prominent; we can only wonder what his response to this situation might have been.

The following chapters examine whether Cover's main arguments about the unwillingness of state judges to alter realities by embracing counterhegemonic communal hermeneutics are still valid. The contingencies of globalization are significant for the exploration of state-community interactions in and through a decentered approach to state law. Analytically speaking, globalization itself should be decentered as well.

Santos has hypothesized that communities may be affected through globalization, a process that involves reconstruction of their local cultures. He has also hypothesized that alternatively local communities can globalize their cultures (Santos 1995). The first process entails the

localization of globalization, the second the globalization of locality. Following Santos, I hypothesize a similar process concerning the politics of identities in communal legal cultures. Accordingly, communities can localize the contemporary international language of human rights, reshape communal practices, and thereby raise claims designed to anchor their local identities in state law. Alternatively, communities can engender practices that transcend a specific communal identity and thus benefit others through the transnational language of human rights to the extent that those rights exist. To ascertain the empirical applicability of this model, throughout this book I examine how each community practices its identities as demanded by different political purposes and how globalization affects counterhegemonic and communal legal cultures.

Further, within this framework a nonruling community, as a construct, does not represent a unified social unit with one identity. Numerous identities and other differences are included in the intersectoral practices that are articulated and constituted within any particular communal legal culture. Intersectoral identities, on the other hand, can result in diverse and even contradictory legal practices. This does not exclude the possibility that specific groups within a nonruling community may still be deprived of their ability to maintain their preferred identities. Kimberley Crenshaw (1995) demonstrates how African American females suffer from the lack of legal mobilization because of intersectoral deprivation. Because they are embedded in the African American community, they are not thought to fully represent a distinctive collectivity. The result is paradoxical: as African Americans, they are disempowered within the feminine community; and as women they are disempowered within the African American community.

Crenshaw concentrates on the dilemma faced by African American battered women. Should they privilege their female identity and inform the police, the representatives of the ruling white social class, or should they privilege their ethnic identity and prevent the arrest of their violent African American partners? As Crenshaw has rightly noted, this is not an abstract dilemma but an acute and personal plight, one that determines who will survive and who will not.

The case that Crenshaw discusses helps us to comprehend the actuality together with the potentiality of identities in each community as sources of various and often irreconcilable legal practices (Danielsen

and Engle 1995, 332–54). Stated differently, I hypothesize that each community is a multifaceted entity that displays a diversity of identities, each of which articulates differences and generates varied and even opposing legal practices.

A multiplicity of identities and contradictory legal practices are also assumed under theories of postcolonialism. The postcolonial literature correctly contends that communal identities are not shaped in empty spaces (Garth and Sterling 1998; Harrington and Merry 1988; Merry 1998; Nader 1990; Santos 1995; Shamir 2000). State law is a colonizing power because, like invading powers, it constructs identities through marginalization and for the purpose of subordination. In postcolonial states such as Israel, state law and its ideology display ambivalent elements (Shamir 2000). For example, in Israel they have generated a new identity for the hegemonic, Jewish-Zionist ruling community, which is now considered to be the exclusive national force of liberation. In parallel, state law and its ideology have induced the marginalization and subservience of those counterhegemonic identities associated with nonruling communities, particularly those of Arab-Palestinians (chap. 3) and ultra-Orthodox Jews (chap. 5), which are remote from the state's metanarratives of national liberation.

The application of critical communitarianism allows us to examine this contention about postcolonial communal liberation-subordination in a broader context while emphasizing variables that the postcolonial literature has played down: multiculturalism, communal legal cultures, and the interactive practices of states and nonruling communities in and toward law. But it also allows us to proceed one step further: as an extension of communitarianism, critical communitarianism underscores the interplay between state domination and the politics of identities in a communal context. The latter deserves elaboration.

Law relies on, just as it actuates, the coercive power of the state (Gordon 1990; Scheingold 1974). But this does not apply to all types of law, only to state law. For Michel Foucault, the innovative and intriguing post-Marxist, Western cultures of rights attempt to legitimize sovereign power and legalize obedience to the monarch/ruler (1977; Gordon 1980). Bourgeois legal culture is accordingly not a "veil of ignorance" (to use a Rawlsian term) but a veil meant to promote state domination. Legality, in post-Marxist phraseology, is a state-produced illusion that

disguises the micromechanisms of power in which discipline enforces subordination.

While Foucault emphasizes the localization of power, he conceptualizes law as a centralized state organ, a view that leads him to overshadow law's contextual and communal meanings. On the contrary, as I argue here, other types of laws exist; they have been constituted by and are contingent on communal identity practices. As we shall see in the following chapters, these identity practices reflect at the same time that they constitute the communal organization of power and resistance. If this analysis is correct, the eruption of communal resistance need not be solely a reaction to state law; it may also represent a response to the intracommunal organization of power and injustice.

Thus, feminist Palestinians have protested against the Israeli state not merely in response to its law and ideology as Jewish and Zionist; the crux of their dissent is rooted in the coalition of the Jewish state and the Muslim male elite represented by the *kadies* (ecclesiastical judges). Oriental ultra-Orthodox Jews have dissented from state authority as part of their conflict with ultra-Orthodox Ashkenazi Jews. In another example, the lesbian feminists' condemnation of the state originated in their conflict with the hegemonic heterosexual ideology prevalent among other feminists.

Critical communitarianism maintains that as a substantial component of communal power and identities law is pervasive and immanent (Ewick and Silbey 1998; Sarat and Kearns 1993, 1998, 1999). Through identity practices, law generates, forms, and expresses human interests, expectations, desires, fears, and behavior. It also produces a sense of political belonging and, alternatively, of political alienation. Thus, many facets of human life are meaningless without communities. Communities largely construct identities, and our personalities are partially embedded in them (Etzioni 1995a, 1995b; Hardin 1999; Hoebel 1969; MacIntyre 1984, 1988; Minow and Rakoff 1998; Selznick 1987, 1992; Taylor 1994). Indeed, law extends beyond the courts and other adjudicative institutions (Brigham 1987, 1996, 1998; Ewick and Silbey 1998; Scheingold 1974). If we accept this analysis, we can argue that law, culture, and identity, both in communities and through them, are constituents of everyday life and that everyday life is to a large extent a

narrative about process, about how communities and law penetrate politics.

Even state law, which is generally viewed as a more formal and stable *lex scripta* than other legalities (Galanter 1969; Renteln and Dundes 1994), is not a fixed entity having firm and coherent interests together with a single identity. Instead, we find associated with ruling groups a profusion of interests that generate complex and contradictory identity practices (Feeley and Rubin 1998). Identity practices, then, are multidimensional phenomena in state law as well.

In the next section, I turn to the important efforts made by legal pluralists to grasp the meaning of identities in the arena of legality. Following this analysis, an additional hypothesis, formulated from a critical communitarian outlook, is addressed.

Law as Practices in Everyday Life

Scholars of "law in everyday life," an approach that focuses on everyday practices, emphasize the quintessential role of legal practice in the formation and generation of cultural control and resistance. Hegemonic legal practices, they contend, articulate as well as constitute social stratification and inequality. In this light, Sally Engle Merry examines processes of criminalization of the local activities of Native Americans in the public schools and Hawaiians in the courts and public agencies. The practice of criminalization, she concludes, is integral to colonization in that legality constructs selected hegemonic cultural aspects as "good" and "proper." Unique cultural aspects of nonruling communities are subsequently framed as evil and their associated practices as illegal (Merry 1998; see also Calavita 1998; and Merry 1991).

Such a multicultural approach delves into the localities of informal law that are constructed through as well as generating commonplace actions, daily practices, and hermeneutics. Feminist criticism of man-made law, critical linguistic studies of law, sociological analyses of local knowledge, and the postcolonial literature inform the insights gained by this perspective (Abu-Lughod 1995; Bourdieu 1977; Derrida 1981, 1992, 1994; Geertz 1983; Yngvesson 1993). For example, Martha Minow, Todd Rakoff, Menachem Mautner, and Ronen Shamir have demystified the "reasonable person" formula. They have deconstructed the "objectivity" of that formula and explored its impact as

constitutive of the hegemony imposed by ruling communities in a multicultural world displaying diverse legal practices regularly suppressed by state law in the course of everyday life (Mautner 1994; Minow and Rakoff 1998; Shamir 1994).

In applying this analytic approach, the genealogy of law is reconceptualized and shifted to the context of legal pluralism and decentered law. The underlying supposition is that law is culturally framed by the everyday practices performed by ordinary human beings (Engel and Munger 1996). Under the rubric of grassroots practices, Austin Sarat and Thomas R. Kearns explored this process in their pioneering 1993 volume, which compiled studies illustrating how law is constituted in and through everyday practices. Local practices form communities, and community members then apply grassroots law (Sarat and Kearns 1993, 60). It should be noted, however, that due to the salience of antistructuralism state law is conceived as given and deserving of only limited attention (for a good study, see Engle 1993).

As a result, scholars of legal pluralism and decentered law have increasingly shifted to the study of informal and even invisible localities of cultural practices. Within the context of this new literature, for instance, Patricia Ewick and Susan Silbey focus their attention on the personal stories of ordinary citizens in their daily interactions with the law (1998). At this point the "law in everyday life" approach considers personal affiliations with nonruling communities only marginally (Engel and Munger 1996).

Like the law in everyday life approach (Merry 1988), liberal structuralism claims that the courts should not be conceived as major agents for social change—unless their rulings are embodied in legislation enforced by an enthusiastic bureaucracy and generated in a majoritarian public mood (Rosenberg 1991; see also Barzilai and Sened 1997; Epstein and Knight 1998; Epstein and Kobylka 1992; Knight and Epstein 1996; and Mishler and Sheehan 1993). Court rulings are inclined, therefore, to reinforce the social and political status quo insofar as they are framed within prevailing political and social boundaries, whether hegemonic or multicultural (Rosenberg 1991; for a broader criticism from a neo-Marxist cultural perspective, see Horwitz 1977, 1992). Critics have also argued that state courts shy away from the reform of hegemonic cultures and tend not to challenge them

even to protect minorities (Crenshaw et al. 1995; Glendon 1991). Nevertheless, rare occurrences of social change have followed in the wake of successful legal mobilization (Epp 1998; McCann 1994).

The law in everyday life approach extends this argument about the confined social role of the courts even further. John Brigham shifts from the decentralization of the courts in legal cultures to their deconstruction as cultural entities. He also delves into those everyday practices through which cultural images and symbols construct the normative supremacy of federal courts in the public mind (1987; 1998). While Brigham accepts the notion of the courts as hegemonic institutions, he employs critical linguistic analysis to explore localities of identities, practices, and symbols as the compelling forces motivating judicial supremacy.

We can conclude by stating that law in everyday life as an analytic vehicle, simultaneously reduces and elevates law from the institutional and neo-institutional levels to the level of communal practices and sometimes to the nuclear level of personal practices embodied in grassroots law. Several principles of this approach are adopted here. First, the approach views law as culture in its political context. Second, it probes practices of identity. Third, it explores the plurality of legal orders in a decentered legal fabric but does not celebrate legal pluralism as a political reality. Inclusion of these principles, however, need not alter the book's critical communitarian stance, which focuses on nonruling communities and their legal cultures under state domination. That being said, the question still arises as to what meaning communal and individual legal practices can carry if, and to the extent to which, a global culture is created. This is discussed next.

Relativism, Localities, and Globalization: Critical Communitarian Reflections on Cultural Homogenization

As we approached the third millennium, it seemed that Immanuel Kant's vision of cosmopolitan experience, universal legality, and global justice had been accomplished. The world—especially in Western segments—had experienced a soaring sense of immanent global peace since the end of the Cold War. For some students of the international system, war had become obsolete (Fukuyama 1989, 1992). This was not, however, the first time in human history that a Pax Romana had

been widely articulated in academic and nonacademic circles. Regretfully, it also was not the first time that human beings observed the demise of their dreams, or should we say fantasies?

Even before the devastating and unimaginable terror attack on the United States on September 11, 2001, terrible events had shown how violent our world remains. Consider the Gulf War (1990–91) and the hostilities in the former Yugoslavia. Other examples are the massacres in Rwanda; violent conflicts in Algeria, Angola, Burma, China, India, Indonesia, Lebanon, Mexico, Nigeria, Northern Ireland, Pakistan, Peru, Russia, South Korea, Turkey, and Uganda; and the continuing struggle in the occupied territories of Palestine. All these instances point to the irrelevance of an inclusive concept of global peace in the post–Cold War era.

Amid global violence, illusions about cosmopolitanism have been propelled largely by and through the international and transnational interactive economy, which has made an American-led neoliberal capitalist epistemology ever more prevalent. The world has experienced an increase in capital flows, innovative computerized technologies, global trade (including the rise of e-commerce), massive international migration, expanding labor markets, and economic integration within the European Community (Grossman and Helpman 1997).

Correspondingly, the world has experienced increasing regional (primarily European) and international legalism articulated in international covenants of human rights, evolving international criminal law, multilateral economic agreements, and extensive adjudication, unprecedented in scope, by national and international courts. This legalism has been partially addressed to resolving problems that arose in the age of the global capitalist economy. Adjudication has accordingly embraced issues of property, vocation, intellectual property, computer and Internet law, immigration, labor relations, corporate law, and individual rights. Generally, and without completely downplaying regional effects, the American-led liberal approach to human rights and constitutionalism has dominated this trend (Scheppele 1999).

What we call globalization is in practice a set of legal-economic interactions that are constituted as well as articulated in increasing international and national regulation, which is sometimes experienced as local economic deregulation (Kagan 1991, 1999). But has this phenomenon created a global legal culture? At this point, several

distinctions should be made. Humanity does not share a cosmopolitan culture. Scrutiny of data bases containing several hundred empirical studies of communal localities throughout the world reveals the opposite. There is more than ample evidence that no cosmopolitan culture has arisen in the post–Cold War period. The diversity of counterhegemonic cultures in local communities remains prominent. Before I detail some of those studies, another associated claim should be mentioned.

If culture is taken seriously, the need for a global culture evaporates. Culture—as defined previously—is a web of multicolored threads articulating multifarious aspects of social being, consciousness, identities, and practices. Is it desirable to assume that distinctive collectivities embedded in disparate traditions should be stripped of their ontological virtues and robed in a uniform culture? Is it not reasonable to assume that each culture will continue to carry its expectations and transcend its own concept of justice as a prerequisite of universal justice? Do we already have or can we arrive at a transcendental and universal criterion under which to judge disparate cultures and ascertain which ones are deserving of our favor? Even if we accept Kant's dictum of cosmopolitan freedom, the various intellectual traditions of liberalism and communitarianism incorporate different concepts of freedom, as we have seen. Later we shall observe the same phenomenon of cultural contingency and relativism in our analysis of communal voices in and toward law.

Historically speaking, the end of the Cold War fostered multiculturalism, often expressed as nationalism; this trend challenged what was perceived as global culture. Moreover, nonruling communities in numerous countries became localities of cultural resistance and challenged hegemonic assertions about cultural homogenization. The empirical studies cover such diverse countries as Brazil, Canada, Denmark, France, India, Israel, Mexico, the Netherlands, and the United States (Croucher 1996; Legare 1995; Lemish et al. 1998; Mato 1997; Mele 1996; Raz 1999; Shamir and Shamir 2000).

The reactions to universal cultural relativism are expressed in three problematic concepts. Samuel Huntington, with his "clashes of civilizations" theory, has articulated one of them (1993). He acknowledges the existence of a multicultural world but believes in the need to ensure the triumph of the "Judeo-Christian" tradition, which accord-

ing to him will forestall the Islamic menace to modern civilization. This binary, antirelativistic concept expresses a cultural prohegemonic preference, that of American-led individual liberalism, and an intellectual endeavor to formulate that preference as superior.

Liberal multiculturalism is the second of these concepts. Although it is sensitive to the variance in cultural hermeneutics, it has been intolerant toward nonliberal communities and has endeavored to impose Western concepts of freedom on them. Joseph Raz and to a lesser degree Will Kymlicka have promulgated it. The third concept is that of universal cultural "harmony," typified by Ronald Inglehart's arguments about the gradual prevalence of postmaterialistic culture. Inglehart and his colleague Paul Abramson have conducted comparative studies of political cultures in dozens of countries (Abramson and Inglehart 1995) and concluded that, the diversity of localities of cultures notwithstanding, postindustrial values emphasizing quality of life have become more diffuse from a cross-national perspective. Even if we accept their findings on their merits, and even if we are ready to indulge in the erroneous Western infatuation with its cultural dominance, Inglehart and Abramson do not exhibit a set of cross-national values that constitute a global culture of shared transnational traditions, memories, identities, and practices.

In contrast, when viewed from the perspective of a global economy, it is often argued that the international economy, characterized by sophisticated information systems, virtual spaces, and e-commerce, may well reduce the power of the state to control its subjects in such crucial spheres as communications, voluntary associations, financial investments, and political participation. Even if such a scenario is realized, how will the process affect consciousness, identities, and practices in the legal and sociopolitical settings?

As Michael Sandel points out, the future decline of the state and the possible dissemination of its political hegemony will amplify the importance of communities (1996). The difficulties human beings face in attempting to identify with international and transnational economic organizations will induce localization and greater involvement by the nonruling community. Due to the inability of universality as an organizing principle to address distinctive and numerous cultures in diverse localities, and due to the human need to be (at least) partially embedded in collectivities, nonruling communities will become ever more

important sources of consciousness, identities, and practices. It appears that the cosmopolitan universal space is incapable of addressing the plethora of perceptions of good and evil, of justice and injustice, and the associated practices that originate in communal localities (Derrida 1994; Scott 1997).

Capitalism in its intensive, interactive, economic and technological dimensions has already reduced the relevance of international borders (Grossman and Helpman 1993, 1997; Helpman and Coe 1993, 1995; Helpman and Razin 1991; Hollingsworth et al. 1994); probably, it will continue to nourish that proclivity. Nevertheless, capitalism can neither replace all of our epistemological boundaries nor provide a communal space that contains all our identities and practices. We can assume, therefore, that nonruling communities are crucial sources of alternative cultures and challenges to hegemonic forces.

This does not imply the absence of change. New communities will emerge, and new spaces, perhaps as virtual entities, will be created in which nonruling communities can thrive. While these developments may spur greater international and transnational communication, they also may augment the ethnocentrism already exhibited in ethnic conflicts and violence around the globe (Linz 1997). Critical communitarianism, as portrayed in this book, offers the intellectual tools necessary to deal with communities as premodern, modern, and postmodern collectivities in the midst of the globalization of local values and accompanied by the localization of global values. It may therefore help us to conceptually grasp and behaviorally respond to the violence that may result from the interaction between globalized local (e.g., religious extremism) and localized global (e.g., transnational neoliberalism) practices.

Violence: The Critical Communitarian Challenge

As our analysis of Robert Cover's work has shown, violence is not necessarily physical. Violence is any practice whose aim is to systematically subdue alternative hermeneutics; similarly, it is any practice intended to systematically eliminate the other's practices and meanings. Violence is intrinsic to the jurispathic characteristics of contemporary state law. From the perspective developed here, state law is jurispathic because it is paternalistic, coercive, and destructive toward the alterna-

tive hermeneutics proffered by rival communities (Cover 1975; Minow 1992). Yet, as Cover has shown, violence is not a fixed phenomenon; it is multifaceted and capable of being at once challenged and mobilized. This book therefore extends the work of Robert Cover in its conceptualization of violence in the context of nonruling communities and in its examination of violent practices as they are expressed in the concrete political contexts of state-community relations.

It follows that communities can be characterized as violent if violence is part of the repertoire of internal mechanisms used to enforce discipline among their members. The statement that all communities are essentially violent is erroneous, however. Liberals, liberal feminists, and postmodernists perceive communities as close authoritative spaces because they presumably impose the complete embodiment of the individual self in their cultures. In contrast, I claim that while communities are distinctive collective spaces they are neither harmonious nor coercive in principle; therefore, individual autonomy in nonruling communities is possible.

More precisely, while several nonruling communities are violent, similar to organizations designed to enforce cultural discipline, many other nonruling communities focus on combating violence. My analysis in the succeeding chapters will likewise show that *violence,* like other cultural terms, is relative, possessing contradictory meanings in specific legal cultural contexts. For instance, comparative studies show that some communities (e.g., feminists) have participated in organizing collective efforts to combat violence (Weiss and Friedman 1995). This finding permits me to argue that feminist communitarianism should and can be helpful in the struggle against male subjugation of women in the communal as well as the legal cultural space.

To be more precise, the exploration of violence in nonruling communities should be conducted within the larger framework of multiculturalism through the examination of state domination, the politics of identity and social being, and transnational liberalism in and toward law. Several kinds of violence may be observed in state-community relations.

First, state violence against nonruling communities should be studied through critical analysis of the legalistic categorization of collectivities inside as well as outside state narratives. Chapter 2 will explore these narratives and categories, followed by a discussion of the

ramifications of state violence for each of the nonruling communities surveyed. Critics of communities as "violent spaces" and critics of communitarianism as "traditionalist coercive essentialism" have ignored or understated the possibility that nonruling communities may defend, represent, and empower individuals who refuse to be stripped of their nonhegemonic identities. This book will demonstrate why state interference in internal communal legal practices is often violent. I will argue, by means of this analysis, that such state interference is justified only in rare instances such as violence against members who are unable to exit the community.

Second, community members may use their collective organizations to counteract the violence originating externally. Because one main feature of communality may be its formation through apparatuses of mutual assistance, the possibility of communal struggles against nonstate and state violence should be examined by delving into internal communal processes in and toward law.

Third, violence may be utilized against the state as a part of communal resistance to state domination. Because the state activates violence through legality, nonruling communities may legitimate and generate violence as a mechanism of resistance. This possibility will be examined primarily in chapter 3, which deals with the Arab-Palestinian minority. Fourth, some community members may activate violence against others in the same community. This book examines the possibility of violence as a component in the production of intracommunal hegemony within nonhegemonic communities and as a communal counterhegemonic practice against hegemonic communal authorities. These possibilities are examined when we delve into the legal cultures of Arab-Palestinian women struggling against male religious dogmatism; conflict among fundamentalist Jews over normative order and power; and friction among feminist women over hermeneutics, feminist consciousness, and heterosexual versus lesbian representation.

Violence as a communal and intersectoral phenomenon should be investigated in the dynamic political juncture between culture in law and law in culture. Clearly, violence can be employed for purposes of liberation or coercion. The chaotic and sometimes unpredictable meanings of violence can be comprehended only in terms of its role within the communal legal culture investigated. Such an analytic stance requires a comparative approach. Here I adopt such an approach.

My Conception of Communal Legal Culture, Research Questions, and the Selection of Communities

Pursuant to the analysis of the literature, we may conclude that cultural approaches have stressed selected facets of community, mainly hermeneutics, consciousness, identities, practices of everyday life, and mobilization. Anthropological studies, on the other hand, have investigated localities of knowledge and practices from ethnological and evolutionary perspectives while emphasizing cultural relativity and resistance to colonialism as initiators of communal constructions. Both of these schools have divorced law from its institutional and triadic adjudicative setting and have looked instead at its informal, diffuse, collective, and grassroots aspects.

Both approaches have overlooked state law, legal ideology, and state ideology as substantive and constitutive elements of the legal cultures constructed by nonruling communities. Critical communitarianism has contributed to these avenues of study by probing into communal legal cultures from an elitist perspective, that is, by focusing greater attention on state domination while accentuating the vitality of communal legal practices.

From another perspective, Marxist, post-Marxist, neo-Marxist, and critical legal studies emphasize states as cultural generative forces controlled by the hegemonic social classes/elites that mold legal culture. However, these approaches marginalize nonruling communities, which are considered to be unrealistic models for human relations under configurations of capitalist nationalism according to Marx's original prognosis (Anderson 1991). Alternatively, structuration theories have argued that nonruling communities are subject to complete state domination (Cohen 1989). My contribution in this book critically rejuvenates the notion of community as a source of empowerment, participation, and counterhegemonic action without, at the same time, neglecting structuration and social class theories of state domination.

Legal culture has two components: first, practices of identities in and toward law such as apathy, violent and nonviolent resistance, grassroots mobilization, litigation, and legislation; and, second, a legal consciousness composed of values, attitudes, and norms of behavior. Practices of identities are derived from and in turn shape legal consciousness. In addition to their place in legal cultures, these

components are explored in the context of social being, namely, the social, economic, and political conditions of individuals and collectivities under state domination and transnational sociopolitical and economic forces. Communal legal culture is affected by social being and subsequently affects social being. It includes a distinctive communal legal consciousness and communal identity practices as well as state law, legal ideology, and state ideology.

Furthermore, I assume that nonruling communities are neither harmonious nor apolitical (Shapiro 1999; Smith 1997). Instead, nonruling communities are dynamic political entities. Accordingly, the application of critical communitarianism, an approach that incorporates this assumption, enables us to examine the concept of communal legal culture and its meaning for state-society relations by means of the following set of questions.

First, is there such a phenomenon as a communal legal culture and what meaning does it have among nonruling communities in a multicultural context? Second, what is the role of state domination (state ideology, state law, and legal ideology) in the constitution and generation of communal legal culture and what are its implications for theories of cultures, state domination, and communitarianism? Third, what strategies do the state and nonruling communities employ in their legal practices toward each other and how does exploration of these strategies advance our understanding of state-society relations? Fourth, what effect does liberalism as a transnational, national, and intrastate force have on the state's legal culture and communal legal cultures of nonruling communities? Fifth, what can we learn about the state, politics, society, and law by looking at communities from the perspective of critical communitarianism? Sixth, what is the place and meaning of violence as a cultural phenomenon in hegemonic and counterhegemonic communal legal practices and what is its significance in the theory of critical communitarianism? Seventh, what does this study teach us about the sociopolitical and legal relevance of communal localities as bounded spaces of power, politics, culture, and law in the midst of spreading neoliberal globalization? Eighth, how can communal legal culture, as a modern and postmodern concept, affect future research agendas?

To study our assumptions and answer our questions, three col-

lectivities were selected. Israel's feminists, Arab-Palestinians, and ultra-Orthodox Jews can be considered to be communities because each displays a typical collective order of preferences that articulates a distinctive perception of the collective good and the concept of justice. But these are not sufficient in themselves. What other elements construct these groups as communities?

Each nonruling community has its own singular cultural traits, consciousness, identities, historical memories, distinctive hermeneutics, organizations, political leadership, social elite, structure of power, and mechanisms of discipline. In addition, each community has its own unique political language and distinctive collective practices, dress, and habits that provide a basis for approaching and challenging its surroundings, including state law (on the methodology of community definition, see Selznick 1992). What's more, members of each community have a distinctive physical appearance, which is one feature of their bounded communal space. Identifiable residential localities also mark Arab-Palestinians and ultra-Orthodox Jews.

Each community has also managed its own educational systems (ultra-Orthodox Jews) or demanded educational autonomy (Arab-Palestinians). All three have established political parties as a means of gaining parliamentary representation for their respective communal interests. Their political parties have gained marginal success in the instance of feminists, stable yet moderate success in the case of Arab-Palestinians, and significant electoral success in the instance of ultra-Orthodox (especially, Mizrachi, or Middle Eastern) Jews.

Finally, each community has a number of boundaries that mark its communal space vis-à-vis "others" outside the community. In complementary fashion, the others also perceive those communities as separate collectivities. These communities have contrived a collective *lex scripta* (Arab-Palestinians and ultra-Orthodox Jews) and distinctive legal hermeneutics. Internally, they display a multiplicity of identities, which sometimes conflict with one another; hence, they cannot be embraced by one coherent definition. Similarly, members of these communities have intersectoral and intercommunal affiliations and identities that are explored and analyzed.

Thus, we find that feminists are affected by collective characteristics other than gender. Nationality, ethnicity, religion, and sexual

preference influence their legal consciousness and practices. Therefore, they cannot simply be subsumed under the rubric of a gender community. Religion, nationality, feelings of collective deprivation, and agrarian attachments significantly touch Arab-Palestinians. Thus, they cannot be characterized simply as an endogenous minority in a Jewish state. Although ultra-Orthodox Jews are relatively more homogeneous, their communal identities are affected by ethnicity as well as by different conceptions of nationality and religious redemption. Within each community, social class, and more generally social being, influence collective identities, legal consciousness, and practices (these communal characteristics are examined in chaps. 3–5).

Importantly, both liberalism and communitarianism are inclined to articulate a rather narrow concept of democratic boundaries. Liberals assume the primacy of their own concepts, including a veiled ontological good, and tolerate unidimensional multiculturalism provided that liberal communities only enjoy that tolerance. Although communitarians, as previously discussed, disagree with that position, they also tend to evade the challenge of nonliberal communities in liberal states. Both approaches—but especially liberalism—ignore the possibility that Western cultural arrogance may have contributed to the mystification of the nonliberal communal menace to democracy. This book examines and challenges these exclusionary stances.

Nevertheless, it is communitarianism rather than liberalism that provides the point of departure for the study. More than any other theory of politics and justice, communitarianism is sensitive to cultural relativism, the shifting boundaries of modernity and rationality, and the importance of nonruling communities as carriers of rights and cultures and promoters of multicultural democracy, participation, resistance, and justice. Yet I share the postmodern view that both approaches are much too narrow to allow a thorough understanding of culture, law, and community (Jones, Natter, and Schatzki 1993).

Therefore this chapter and the entire book go far beyond the liberal-communitarian debate. Critical communitarianism contributes to the conceptualization of state domination and the politics of identities in nonruling communities under conditions of globalization. Given this theoretical bent, the study is acutely attentive to the plurality and relativity of legal cultures, a position from which I can effectively dispute major liberal assumptions and arguments.

The following chapter is devoted to an exploration of the state's legal culture and its mechanisms of domination (state law, legal ideology, and state ideology) conducted through an analysis of metanarratives, state structures, legal ideology, formalities, informalities, identities, and practices in the context of multiculturalism. Chapters 3–5 focus on nonruling communities observed through their own voices. The book concludes with a theoretical extension of the analysis of communality in politics, law, and society.

Chapter 2

State Legal Culture: Domination, Identities, and the Politics of Rights

Israel's state law articulates the dominant values and organizational interests of Judaism and Zionism, which are the two main principles of state ideology. State law is not merely a reflection of the state's narration processes. Rather, it plays a major constitutive role in shaping values, norms, and political practices. Law forms and articulates elite and public consciousness as to what type of citizen is the most essential for the existence and maintenance of the political regime. Other crucial facets of state law, later illuminated, are also significant in the process of framing hegemonic legal culture. While state law in democracies is never autonomous from sociopolitical practices, legal categorizations and processes in state spheres affect society and politics (Gordon 1990; Horwitz 1990; Scheingold 1974).

Since according to critical communitarianism state domination and its legal culture have significant ramifications on nonruling communities, this chapter explores a number of central aspects of Israeli state law. First, I investigate the ways in which state law has framed the concept of the "preferred citizen" in collective consciousness. Accordingly, I dwell on the ways in which the legal setting has shaped "patriotism" as part of state legal culture. Modern law has justified distinctions between and among communities through the construction of patriotism in legality. Then, I delineate the sociopolitical characteristics of state law and its legal ideology as predominately a "rule of law" in the Jewish, democratic, and Zionist state. Following a narrative analysis, I refer to neoinstitutional analysis. Institutions are carriers of narratives. I examine the Supreme Court, especially when it is sitting as the High Court of Justice (HCJ), and its contribution to the framing of the state's legal culture. As in other political regimes, state law has been affected by transnational liberalism. It is argued that

liberalism has contributed to the decline of parliamentarianism and in turn contributed to the elevation of the Supreme Court to a hegemonic position. The possible ramifications of this process on nonruling communities are addressed. Finally, I dwell on national security as the state's form of reproduced violence and its impact on nonruling communities and rights within the dynamic processes of some liberal experiences.

Who Is a "Patriot"? Law and Culture as the State's Political Dictum

State law embodies exclusive formal criteria for conferring Israeli citizenship. Those criteria were constructed according to the fundamentals of Orthodox Judaism. Two statutes are central in granting citizenship: the Law of Return (1950) and the Citizenship Law (1952). They were enacted when the state was consolidating its domination, and they both, with a few other laws, constituted its cultural identity during its inception as Jewish and Zionist. These two laws formally established that even a Jew who was born outside Israel and does not have a family in Israel can automatically obtain Israeli citizenship. Conversely, Arab-Palestinians cannot return to their lands inside the Green Line (the territories under Israeli rule since 1948) due to exclusionary statutory categorizations, which grant citizenship only to Arab-Palestinians who were living in Israel upon the termination of the 1948 war.

Hence, Israel was predominantly framed as a Jewish state, and Israeli nationalism was ultimately constructed as Jewish nationalism. These laws and related court rulings reflected elite desires to guarantee that Jewish and Zionist institutional and cultural hegemony would determine the state's evolution (Barzilai 1997a). The Arab-Palestinian minority inside the Green Line enjoyed only secondary citizenship. State law articulated and constructed a precept that only an "ideal" Israeli—namely, the Jew preferred by the state—is entitled to automatic citizenship.

State ideology narrated state law, whereas the state's legal ideology justified state law as the rule of law. Accordingly, state courts further framed separate legal spheres for Jews and Arab-Palestinians in Israel. The Absentees' Property Law (1950) and the Security Service Law

(1986) were prominent in this context. The first legalized the state's control over lands captured during and subsequent to the 1948 war, after their Arab-Palestinian residents had fled or were expelled. Their lands were assigned to the state's official, "the appointed authority for absentees' property." Since legal ideology framed Israel as a democracy, state law licensed the state to assume control over Arab-Palestinian lands without formally contradicting the declared principles of Israeli democracy. Hypothetically, Arab-Palestinians had at their disposal procedures for returning land to their control or ownership. In practice, however, most appeals to the "appointed authority for absentees' property" and the Supreme Court requesting restitution of land were dismissed (Kedar 1998; Shamir 1996). Through this veil of legality and democratic procedures, state law significantly contributed to molding a hegemonic culture that bestowed legitimacy on the state's control over lands on which Arab-Palestinians had resided prior to Israel's inception (Kimmerling and Migdal 1993).

The second act, the Security Service Law (1986) and its accompanying regulations, outlined the scope and conditions of compulsory military service, which is a central social institution due to its effects on the social positions of individuals and communities (Barzilai 1996; Ben-Eliezer 1998; Hofnung 1991; Horwitz and Lissak 1990; Levy 1997; Peri 1983). Hence, and from that perspective, state law framed the sociopolitical stratification of Israeli society. Until 1998, the common legal interpretation claimed that this law granted the defense minister the authority to determine which groups and individuals could be exempted from compulsory military service. Accordingly, the state (via governmental decisions and through legalistic categories) shaped society and politics by exempting certain individuals and communities from military service. Inter alia, this law formalized the collective exemption of ultra-Orthodox Jews (Haredim) and Israeli Arabs (Arab-Palestinians), with the exception of Druzes and Bedouins—Arabs who were not considered Palestinians and therefore were regarded as loyal (or at least less dangerous) to the state (Hofnung 1991).

In both instances, these collective exemptions applied to non-Zionist communities. Yet in the case of the Haredim the political elite hoped to forestall delegitimization and severe opposition aired by the ultra-Orthodox Jewish community against the Jewish state that was perceived as too secular and very problematic. Therefore, the exemption

for Haredim essentially became a collective right. Conversely, Arab-Palestinians were exempted in order to delegitimize them as a non-Jewish community. The exemption was framed as a collective duty (although I do not claim that most Arab-Palestinians desire to serve in the armed forces of the Jewish state).

Whereas the formal constitutional arrangements concerning these two nonruling communities may be seen as similar, the sociopolitical intentions of state law were completely different and were determined according to the degree of patriotism attributed to each community. At this point, state domination became part of the society's communal practices. But before we look at the nonruling communities from their own perspectives let us sharpen our focus on state law.

Haredim have legal immunity as a community. This exempts them from a collective duty yet allows them to participate in the allocation of public goods. On the other hand, exemption was forced on Arab-Palestinians. Through it, state law supplied officials with the legal justification for stigmatizing a minority as disloyal (Barzilai 1992) and excluding it from power (Keren and Barzilai 1998).

The Security Service Law also addressed women's military service and therefore contributed to their secondary sociopolitical status. Its regulations constituted separate, noncombative, often unprofessional, and shorter service for females who do not identify themselves as religious. Military orders within the armed forces initially prohibited and after the 1980s restricted the combative and professional functions of women. Hence, the legal setting denotes females as inferior because of their supposed lesser contribution to national efforts. Some reforms in laws, regulations, and internal military orders concerning the status of women in the military have taken place since the 1980s. I elaborate these issues in chapter 4 and dwell on the practices of feminists with regard to state law, practices that have altered some aspects of the legal status of women in the armed forces.

In Israel state law is much more than a regulative organ. While Santos conceives of state law as primarily regulative (1995), I find it to be a more constitutive force with problematic repercussions for nonruling communities. It is a constitutive means of marking boundaries between nonruling communities and the state. It also functions as a sociopolitical marker by allocating symbols of patriotism. Let us con-

tinue to see how state law, state ideology, and legal ideology endeavor to dominate nonruling communities.

State law has formalized the criteria of "preferred" political participation. The legitimacy of political behavior is contingent on its appropriateness to the principles of the state as "Jewish and democratic." According to state law, political parties can be disqualified from participation in national elections. Clause 7A of Basic Law: The Knesset, which was added in 1985, embodies three criteria, each of them a legal cause that justifies the disqualification of political parties. These criteria are "negation of the existence of the state of Israel as the state of the Jewish people" (clause 7A [1]), "negation of the democratic character of the state" (clause 7A [2]), and "incitement to racism" (clause 7A [3]).

Clause 7A authorizes the Central Committee for Knesset Elections—a multiparty political body headed by a justice—to decide whether to disqualify a political party from participating in specific Knesset elections. The committee's decisions can be appealed to the Supreme Court. In practice, clause 7A articulates the desire of the political elite to better control the electoral market so as to battle the menace of Jewish racism, on the one hand, and Israeli Arab-Palestinian nationalism and Muslim religious fundamentalism on the other (Gavison 1995; Peled 1992).

Inter alia, the Court has further empowered the political establishment to disqualify Arab-Palestinian political parties if they support binationalism or assert the need for other radical reforms in the basic political structure of Israel as "the state of the Jewish people." The Supreme Court in the *Ben Shalom* case, which involved the Arab-Palestinian-Jewish "Advanced List for Peace and Equality," adopted this constitutional interpretation. In a ruling on appeal against this party's participation in the national elections of 1988, the Court dismissed the appeal due to lack of satisfactory evidence as to the severity of the menace that the party posed for national security. Nonetheless, the Court asserted the following.

> Regarding clause 7A, we have already determined . . . that there is no contradiction between it and clause 7A (2) and in the words of Justice Allon . . . the quality of Israel as the state of the Jewish people was expressed in the declaration of independence through

> its definition of the state as a Jewish state and not only of the Jews, via the opening of the gates of Israel to Jewish immigration and the ingathering of the exiles. Without dealing with unnecessary ideological definitions, but since the issue before us requires such a decision, I am willing to accept a minimum definition . . . that one of the fundamental principles of the state is the existence of most of the Jews living in it, and preference is given to Jews over others to return to their country and to maintain an interactive relationship between the state and the Jews of the Diaspora, all in the spirit of the declaration of independence. I accept the outlook that the list, whose central goal is to achieve the cancellation of the said elements of this definition . . . all at the required evidentiary levels, falls under the category of clause 7a (1).[1]

The precept of Israel as the "state of the Jewish people" was formally framed as a metalegal fundamental, a metanarrative. It authorized disqualification, under certain conditions, of a non-Jewish political party from participating in elections for the Knesset due to its criticism of the political regime.[2] As Robert Cover has correctly pointed out (Cover 1992a, 1992c), exclusionary interpretations of state identities kill alternative and dissenting interpretative practices of nonruling communities. Additionally, clause 7A empowered the political establishment to set the boundaries of electoral competition. Hence, it has endangered the democratic foundations of pluralism and the existence of effective and meaningful opposition to the state (Avnon 1996; Barzilai 1997a; Gavizon 1995; Shamir 1996; Sheleff 1996). The construction of Israel as a Jewish state resulted in the oppression of the Arab-Palestinian minority within the legal ideology of a "Jewish and democratic state" (Barzilai 1992; Ghanem, Rouhana, and Yiftachel 1998; Peled 1992; Rouhana 1998; Smooha 1989; Yiftachel 1999). Indeed, Basic Law: The Knesset, which reflected, constituted, and aggravated that construction, significantly restricted the minority from participating in the design of national power structures and from receiving public goods.

1. E.A. 2/88 *Ben Shalom v. Central Committee for the 12th Knesset Elections,* P.D. 42 (4) 749, P.D. 43 (4) 221, 248.

2. Ibid., P.D. 43 (4) 248.

Jewish hegemony notwithstanding, the Supreme Court decided in *Ben Shalom* that its judicial policy should somewhat restrict the applicability of clause 7A (1) while preserving its original meaning. Accordingly, it ruled that disqualification of a political party should be judicially upheld only if its partisan goals and deeds, implicitly or explicitly, constituted a "clear and proximate danger" to the state "of the Jewish people."[3] In so doing, the Court narrowed the scope of this particular clause in Basic Law: The Knesset, and reduced the danger that the basic procedures of free elections would be subject to governmental infringement.

In *Ben Shalom,* the Court ruled that the limited dissent of the Israeli Arab and Arab-Palestinian political party was not an adequate reason to disqualify it from taking part in national elections. Yet the ruling both reflected and generated the Jewish character of the state and Judaism as its metalegalistic tenet. Although the judicial elite was aware of the need to secure democratic procedures, it ruled that an Arab-Palestinian list that breaks the rules of Israel's political game can be disqualified by invoking clause 7A (1) of Basic Law: The Knesset.

The state's control over political participation has an additional aspect. In 1992, the Knesset enacted the Law of Political Parties. As in the Federal Republic of Germany, legal oversight of political parties may protect democracy if state law aims to impede antidemocratic extremism. The Israeli case is different because the legislation aims to preserve the Jewish character of the state. Clause 5A (1) of the Law of Political Parties adopted the interpretation that Israel is "Jewish and democratic" and has asserted that no political party that denounces the existence of the state as Jewish and democratic will be registered. A refusal to register a political party prevents its formal establishment, activities, and financing.

The precept expressed by the legislature in enacting the Law of Political Parties was similar to that which guided the alteration of Basic Law: The Knesset. In both instances, the state law was enacted to allow the regulation and construction of the partisan political domain. Consequently, any party that desires to participate in Israel's political life has

3. In 1953, in the case of *Kol Ha'am,* the Supreme Court framed the criterion of "clear and proximate danger" for limiting military censorship of press reports and criticism in security affairs. See HCJ 75, 87/53 *Kol Ha'am v. Minister of the Interior,* P.D. 7, 871.

to overcome two barriers: first, to be registered as a political party, and, second, not to be excluded from participation in national elections (Doron 1989). In both legal contexts, the state, through its ideological, legalistic narration, formally possesses the crucial constitutional power to set the boundaries of the political game. In both contexts, a political list can be disqualified if its goals or actions imply criticism of the metalegal creed of Israel as a Jewish state.

Clauses in laws that limit the registration of political lists are very problematic from a democratic standpoint, as they contradict the values of political pluralism and confine the scope of opposition to the political regime and establishment. Many other democracies, such as Germany, Greece, Italy, Portugal, and Sweden (Avnon 1993), regulate the registration of political parties by law. Nevertheless, such democracies do not prevent political parties that question the religiosity of the state from registering and participating in national elections. The issue of religion and nonruling communities is a crucial facet of state law in democracies. It also affects the relations between the state and nonruling communities in Israel.

State Law, Religion, and Democracy

Democracy requires a significant degree of institutional separation of religion from the state. In Israel, the imposition of Orthodox Judaism on public life places severe restrictions on the representation of other Jewish sects and other religions in the state's institutions. The dominance of Orthodox Judaism in state law infringes on rights of Jews and Arab-Palestinians. The Jewish Orthodox establishment controls such facets of Jewish life as marriage, divorce, the state's religious institutions, religious services, conversion, national ceremonies, and national festivals. Despite the formal legal definition of equal citizenship, Israeli society was designed to discriminate against non–Orthodox Jews and especially non-Jews whose national identity is not recognized by the state, mainly Palestinian Muslims. The state and its religion exclusively recognize symbols of Orthodox Judaism (Liebman and Don-Yehiya 1983), and maintenance of that state religion is one of the central principles in state law and its ideology.

Let us consider the following dilemma. If the state's Jewish values, on the one hand, and democratic values, on the other, are in conflict,

which will prevail? For example, what will be the political fate of a party that seeks to formally separate Jewish religion from the state? Is it justified to exclude it from participation in national elections?

Its exclusion is utterly undemocratic, since democracy should guarantee the equal expression of beliefs and attitudes. Such a separation is a tenet of liberal democracy. On the other hand, a dissenting political party jeopardizes the formal Jewish "essence" of the state. In practice, Jewish political parties that have publicly endorsed a formal separation of religion from the state have not been excluded. Yet, according to clause 7A, their electoral eradication might be perceived in court as required to preserve the state as Jewish. What if an Israeli Arab-Palestinian political party seeks to achieve the same? Considering the political culture in Israel, its fate would be different from that of a Jewish political party. The Jewish elite and public would most likely perceive it as endangering the existence of the state (Barzilai, Yuchtman-Yaar, and Segal 1994b; Barzilai 1999a), and it could be disqualified from participation in national elections (or not be allowed to register as a political party).

The narration of the state as Jewish and democratic imposes limits on political and legal discourse. The basic laws anchoring that fundamental terminology, Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Vocation (1992),[4] and their accompanying court rulings most expressively articulate the hegemonic political culture. That culture sanctions the lack of separation of the Jewish Orthodox religion from the state (Liebman and Don-Yehiya 1983). These basic laws symbolize the religious-secular status quo in a Jewish and democratic state as being part of Israel's raison d'être and embody it as a constitutional precept that allows judicial abolishment of contradictory Knesset legislation.

Among the judicial elite, primarily justices of the Supreme Court, a controversy has arisen over the constitutional interactions between Judaism and democracy. Often Zionist religious justices such as Menachem Allon and Zvi Tal have conceived of Orthodox Judaism as having greater weight than the international discourse of human, civil, and individual rights in determining the essence of the state and resolving constitutional disputes. They view Orthodox Judaism as

4. The latter was reenacted in 1994.

Israel's main fundamental and consider it as a guideline in rulings on the scope of democratic principles. Chief Justice Aharon Barak has promoted a different judicial doctrine since the 1990s. He is inclined to foster the privatization of Jewish Orthodoxy and reduce its status as a state religion while preserving the basic characteristics of Israel as a Jewish and democratic state (Avnon 1996; Gavison 1995; Marmor 1997; Rozen-Zvi 1992, 1995).

Secularizing state law is a prominent element in Aharon Barak's broader vision of judicially created political culture. Accordingly, the Supreme Court has fostered a secular Jewish discourse that calls for plurality in Judaism and is more attentive to civil rights. Justices Allon and Tal see this trend as endangering the status quo, which they, as representatives of the Orthodox segment, desire to preserve. Practically, they aspire to preserve the institutionalized hegemony of Jewish Orthodoxy in Israel's public life. This is the established viewpoint of Jewish religious justices, and they have championed Zionist Orthodox interpretations of Judaism as the only avenue of legal hermeneutics.

These contradictory viewpoints have resulted in a struggle over the "proper" meaning of state law as a source of domination. Secular justices, and to a lesser degree observant justices, see themselves as "modernists" who seek to reduce the effects of Jewish Orthodoxy on public life. Accordingly, they tend to disagree with their Orthodox religious colleagues. Chief Justice Barak is an influential leader of that dominant group of justices, which has controlled the Supreme Court since the beginning of the 1990s. They believe that Western concepts of liberal individualism are of greater importance than religious values (Barak 1993).

These two judicial groups have failed to recognize the possibility of an alternative, non-Orthodox, and yet religious interpretation of Judaism, and therefore they have missed the opportunity to integrate non-Orthodox Judaism (e.g., the reformist and conservative groups) into constitutionalism (Edelman 1994; Sheleff 1996). Justices Barak and Allon, both of them dominant representatives of their respective groups, hold that a Jewish state is imperative. They both—the former as a secular proponent and the latter as religious—are Orthodox Zionists. Moreover, neither perceives non-Orthodox Judaism as a significant source of alternative legal hermeneutics. Allon, as an Orthodox

religious Zionist, desires to use rabbinical law as the foundation of legal hermeneutics. Barak, as a secular Zionist, desires to neglect Judaism (which he mainly identifies as Orthodox) and has adopted Western conceptions (mainly American) of individual civil rights as desirable postulates in the constitutional structure of the Jewish state (cf. Barak 1993; and Allon 1995).

On the one hand, this very problematic duality of democracy and Orthodox Judaism has characterized the general predicament of Israeli state law since its inception. It has been gaining prominence since the 1970s, especially during the 1990s when the strife between secularism and Orthodox religiousness became even more severe (Mautner 1993). On the other hand, as chapter 5 will detail, there has been increasing activity among the Jewish reformist and conservative movements, which have asserted the need to formally conceive of Judaism in alternative ways as vital sources of additional legal interpretations. Inter alia, these movements call for equality between females and males in Jewish religious services and demand a proportional share of representation in political bodies that deal with religious services. They have challenged the Chief Rabbinical Bureau by demanding to manage ceremonies of marriages, funerals, and religious conversions in accordance with interpretations based on alternative meanings of Judaism (Edelman 1994; Etnar-Levkowitch 1997; Shifman 1995).

Would a formal written constitution have prevented Orthodox Jewish predominance in the state? I do not think so.[5] The reasons are grounded in the history of Zionism. First, over the years the ruling political parties forestalled formalization of a written democratic constitution. The political elite actually opposed a binding constitutional document with entrenched civil rights and a definition of authorities, which could have limited the excessive use of executive power. The political elite, furthermore, did not desire to draft a constitution that could endanger their ruling coalition, which was composed of religious political parties (Sprinzak 1986). Second, the Orthodox and ultra-Orthodox political parties countered any possibility of a constitutional judicial review that could have undermined their efforts to

5. At this stage of my analysis, I have not differentiated between Orthodoxy and ultra-Orthodoxy.

enact pro-Halachic laws and preserve their power (Barzilai 1997a, 1998; Sprinzak 1986).[6]

Yet what these explanations neglect is the lack of a prominent democratic ethos in Zionism and the ramifications of such an absence on Israel's constitutional foundations. In many democracies, political elites prefer unlimited authority (Tilly and Ardant 1975; Tilly 1992, 1995, 1999). In addition, various minorities prefer their own definitions of the collective good over ratification of a written constitution, which would emphasize the interests of the majority. Why, then, were formal written constitutions approved in most democratic states but not in Israel?

A crucial cultural impediment in the Israeli instance was Zionism itself. It was not constituted as a social movement of democratic opposition to an alternative political ethos. The Israeli political elite, which was dominated until the 1970s by the Mapai and Labor Parties, did not strive to generate a civic democratic ethos and separation of the state and religion (Horowitz and Lissak 1990; Shapiro 1976, 1977; Sternhell 1995). The Zionist revolution was focused on creating a Jewish state and homeland. It was not focused on establishing an alternative democratic system (Lustick 1980; Vital 1975, 1982, 1987).

Consequently, Israel's cultural background was unlike that of France in the late eighteenth century; the United States in the course of establishing its federation, also in the late eighteenth century; Italy and West Germany after World War II; or postapartheid South Africa in the 1990s. In these cases, and a few others, the symbols of the democratic ethos were central to the political experience of separating from old regimes and opposing their heritage. The new civic democratic symbols were embodied in formal written constitutions.

The central ethos guiding Israel's inception emphasized Jewish existence and the Jews' control over their own state. The Declaration of Independence (May 1948), which has been incorporated by Israeli courts as a basis of legal interpretations, does not mention the term *democracy.* While it requires the maintenance of liberty and equality, the main focus is on the Jewish identity of the state. Among the different types of equality, equality among different nationalities is

6. See, for example, Knesset Debates, January 2, 1950, in *Knesset Protocols,* vol. 4, 714–46, 767–84; vol. 5, 1306–32.

not mentioned because Jewish nationality was the only national identity that the state was willing to recognize. During its formative years in the 1950s, Israel's goal was the attainment of Jewish dominance as expressed in the Law of Return, the Citizenship Law, and the Law of Absentees' Property.

Historically, the democratic element in Israel's legal culture has been secondary. Until the 1990s, the legislature (Knesset) avoided formalizing human, citizen, and individual rights in the form of legislation. Israel's basic laws, from the first (passed in 1958) until the basic laws in 1992, constituted the procedures surrounding the management of political life and declared state ownership of land. Yet entrenchment of human, civil, and individual rights was absent from that legislation (Noiberger 1997, 1998). Indeed, it has been the Supreme Court, especially when acting as the High Court of Justice, that has incrementally molded individual rights (Barak-Erez 1999; Bracha 1988; Cohen 1993; Kremnitzer 1987, 1994; Kretzmer 1987, 1997; Lahav 1993b, 1993c, 1997; Maoz 1999; Mautner 1993; Rozen-Zvi 1993; Rubinstein 1991; Segal 1988, 2000; Shapiro and Bracha 1972; Zamir 1989). This issue is elaborated in the next section.

Judicial State Law and the Political Regime

It is not my intention to review the individual rights established by the HCJ through either a simple legal interpretation or judicial activism. Here I will present only a sample of the court rulings without which democratic legal culture would have no meaning. The HCJ established freedom of movement by determining that this liberty could not be restricted except in extreme and rare cases, special circumstances such as "clear and proximate danger" to national security. The ruling in *Kauffman* was a breakthrough in anchoring this basic right in Israeli legal culture.[7] In 1953, the HCJ's ruling in another salient instance, *Kol Ha'am*,[8] determined that freedom of expression is a basic liberty and that limitations on this liberty could not be imposed except under specific and extreme circumstances. As in *Kauffman*, the

7. C.A. 73/51 *Kauffman v. Attorney General,* 5, 1648.

8. HCJ 75, 87/53 *Kol Ha'am v. Minister of the Interior,* P.D. 7, 871.

Court ruled that only clear and proximate danger to national security justified censorship of a publication.[9]

Later, in 1985, the Court ruled in *Kahana* that the government could not prevent political opinions from being aired on TV solely on the grounds that they were extreme. It ruled that an extreme view does not justify censorship by itself.[10] In 1989, in *Schnitzer,* the HCJ ruled that anyone who attempts to censor a publication that criticizes the security authorities must bear the burden of proof and justify the censorship. In so doing, the Court has somewhat diminished the power of the security establishment to prohibit information from reaching the public.[11]

At this stage, let me underscore that the Supreme Court was an agent of legitimization of the Jewish state through its declaration in *expressive verbi* that the state's Jewish identity should be its primary concern.[12] Yet it has also favored civil and individual rights. In so doing, it has formed a legal text and a terminological environment within which human beings and institutions must be located. Later I will show that state utilization of this terminological environment for the benefit of several nonruling communities has been restricted. The judiciary has not generated a universal language of human rights. Rather, it has elaborated a more confined legal discourse of civil and individual rights that has been restricted by Jewish and Zionist metanarratives, security arguments, and institutional pressures, primarily those of the ruling coalitions.

In 1969, the HCJ constitutionally anchored the concept of equality. In *Bergman,* and in a series of subsequent Court rulings that also dealt with the financing of political parties, it underscored that equality in the use of political procedures is central to all interpretations of Israeli law.[13] In these rulings, the Court framed equality in its liberal sense. It was constructed to guarantee fair political procedures, which should

9. Ibid.

10. HCJ 399/85 *Kahana v. Management Committee of Israel Broadcasting Authority,* P.D. 41 (3) 255.

11. HCJ 680/88 *Schnitzer v. Chief Military Censor,* P.D. 42 (4) 617.

12. E.A. 1/65 *Yardor v. Chair of the Central Elections Committee,* P.D. 19 (3) 365; HCJ 5364/94 *Velner v. Rabin,* P.D. 49 (1) 758.

13. HCJ 98/69 *Bergman v. Minister of the Treasury,* P.D. 23 (1) 693; HCJ 148/73 *Kaniel v. Minister of Justice,* P.D. 27 (1) 794; HCJ 246/81 *Agudat Derech Haretz v. Broadcasting Authority,* P.D. 35 (4) 1; HCJ 141/82 *Rubinstein v. the Knesset,* P.D. 37 (3) 141.

be impartial and grant each citizen a fair opportunity to accomplish his or her interests. Thus, in the mid-1980s the Court applied its legal interpretations of gender equality in rulings that enabled women to serve in municipal religious (Orthodox) bodies.[14]

The effect of liberalism on the Court's rulings was evident. As previous studies have shown, the Israeli society of the 1970s, 1980s, and 1990s became more Americanized in its proclivity to articulate the rhetoric of individual rights and in its tendency to assert equality in accessibility to and usage of political procedures (Mautner 1993; Shamir 1994; Hirschl 1997; Barzilai, Yuchtman-Yaar, and Segal 1994b). In that context, the Supreme Court generated cultural transplantation of liberalism in Israel. Since the 1970s, its decisions have referred more and more to American rulings and more of its justices have acquired American or American-oriented legal educations (Edelman 1994). Overall, as previous studies have shown, especially since the 1970s, American jurisprudence has become a significant basis of legal hermeneutics in Israel (Gross and Shachar 1998).[15]

As was shown in an extensive public opinion poll conducted in 1991, the Jewish public, primarily the secular middle class, tends to embrace such Americanized adjudication as long as it is narrated through the Jewish notion of the state and its security (Barzilai, Yuchtman-Yaar, and Segal 1994b). Furthermore, we shall see in chapters 3 and 5 how liberalism has effected Arab-Palestinians and ultra-Orthodox Jews. As Santos has argued, while "globalization" has not rendered the end of the nation-state, it has incited transplantation of transnational values in legal and political settings (Santos 1995; Twining 2000).

Gender equality has also become a more conspicuous value in state law as part of the augmented proclivity among the secular Jewish middle and upper classes to articulate the rhetoric of individual rights. In chapter 4, I elaborate this issue. In the case of the Israel Women's Network in 1994, and in a somewhat similar case in 1998, the HCJ decided that all government companies must adhere to

14. HCJ 153/87 *Shakdiel v. Minister of Religious Affairs,* P.D. 42 (2) 221; HCJ 953/87 *Poraz v. Mayor of Tel-Aviv–Jaffa,* P.D. 42 (2) 309.

15. The increasing number of American-trained scholars in Israeli law faculties and friendly associations between Israeli judges and justices with their American counterparts and academics are additional indicators of this trend.

gender equality in appointing members to their directorates.[16] This was an enforcement of legislation that in practice dictated affirmative action for women in government companies. In the 1995 *Danilovich* case, the HCJ formalized homosexuals' right to receive equal benefits in the workplace. Again the Court was reacting to the Knesset's legislation, which had strongly suggested such an interpretation.[17] Indeed, state law has become more receptive, in some of its facets, to the value of equality.

In a number of rulings, the Supreme Court determined that infringement of the value of equality was a legal cause to judicially abolish a law.[18] Nevertheless, until 1995 the Court's doctrine had been that its jurisdiction excluded the authority to revoke legislation due to questionable content. In a few cases, the Court disqualified laws that were enacted in violation of parliamentary procedures. Under these conditions, if equality had been infringed upon and the law had not been properly enacted, the Court declared that law, or a specific clause, null and void.[19] In that respect, the Court's review was administrative rather than constitutional, unlike constitutional courts in democracies such as Austria, Canada, Germany, Italy, and the United States.

The Court has operated within the Jewish and Zionist metanarratives even though most of its justices have been Jewish seculars. They have generated an inclination to diminish, if only slightly, the domination of Orthodox Jewish institutions in public life. In *Shakdiel* and *Poraz*, two important legal cases from 1987, the HCJ ruled that Halachic law should not be applied as a source of interpretation in appointing members to municipal religious councils and municipal religious bodies that elect municipal rabbis. It ruled that when specific legislation exists state law should be applied in light of secular principles of equality, even against the Halacha and its authorities. Accordingly, it ruled that women could be appointed to these councils and bodies,

16. HCJ 453/94 *Israel Women's Network v. Government of Israel,* P.D. 48 (3) 501: HCJ 2671/98 *Israel Women's Network v. Minister of Labor,* P.D. 52 (3) 630.

17. HCJ 721/94 *El Al v. Danilovich,* P.D. 48 (5) 749.

18. HCJ 98/69 *Bergman v. Minister of the Treasury,* P.D. 23 (1) 693; HCJ 148/73 *Kaniel v. Minister of Justice,* P.D. 27 (1) 794; HCJ 246/81 *Agudat Derech Haretz v. Broadcasting Authority,* P.D. 35 (4) 1; HCJ 141/82 *Rubinstein v. the Knesset,* P.D. 37 (3) 141.

19. Ibid.

despite the opposition of the Orthodoxy.[20] In *Metaral*, the HCJ decided that the state's prohibition on importing non-Kosher meat into Israel contradicted Basic Law: Freedom of Vocation.[21] The Court ruled that prohibiting the privatization of importing meat could have been justified if it had been decided on economic grounds. Yet, because religious grounds were the basis for the nationalization of importing meat, the Court considered it as infringing on freedom of (and freedom from) religion and freedom of vocation.[22]

At this point, we see the content of state domination. State law has been narrated through the state ideology of Judaism and Zionism. State law has generated state ideology, maintained it, and constituted it through its formalities, informalities, and practices. These interactions within spheres of state domination were legitimized through legal ideology since Jewish and Zionist legality was constructed as the "rule of law," which reconciles values of the "Jewish and democratic state." Under the effects of transnational, American-led liberalism, state domination in general and its legal ideology in particular have been characterized by growing tensions and conflicts between Jewish Orthodoxy (especially ultra-Orthodoxy) and the liberalism of the Jewish secular bourgeoisie and the Supreme Court.

Despite salient court rulings—within the scope of the state's meta-narratives—adjudication has been within institutional limits (Hirschl 1997). The Supreme Court has been institutionally confined in its interactions with other state organs. The *Velner* case is illuminating. In 1995, the HCJ ruled on a draft of a coalition agreement between the Labor and Shas Parties. Under the Labor-Shas arrangement, the parties agreed that if the Supreme Court ruled against Orthodox religious legislation or the religious-secular status quo the Labor-led coalition would initiate legislation to limit the repercussions of the Court's ruling. Severe judicial criticism of that political arrangement

20. HCJ 153/87 *Shakdiel v. Minister of Religious Affairs;* HCJ 953/87 *Poraz v. Mayor of Tel-Aviv–Jaffa.* In *Shakdiel,* the Zionist religious justice Menachem Allon, in a separate opinion, arrived at the same conclusion as Aharon Barak, but he preferred the use of Halacha as a source of major interpretation of state law.

21. HCJ 3872/93 *Metaral v. Prime Minister and Minister of Religion* P.D. 47 (5) 485.

22. In reaction, the Knesset changed the law, and the Court in a further appeal was forced to consider the prohibition as constitutional. See HCJ 4676/94 *Metaral v. The Knesset,* P.D. 50 (5) 15.

notwithstanding, the HCJ dismissed the claim that it was unlawful and avoided disqualifying it. All five justices viewed the arrangement to confine the Court's rulings as morally reprehensible. Moreover, they (with the exception of Justice Mishael Hashin) were of the opinion that legal norms should be imposed on political agreements and that the Labor-Shas arrangement should be found ethically and legally undesirable.[23] Yet a majority of three justices concluded that a judicial intervention declaring the agreement to be illegal and therefore null and void would ignite a constitutional crisis, which they desired to avoid. They were apprehensive that antijudiciary legislation and administrative sanctions against the Court would cause severe damage to the Court's public status (Barzilai 1998; for illuminative analysis of the issue of political agreements, see Cohen 1993).

Institutional constraints notwithstanding, the Supreme Court has tended to increase its judicial supervision over the executive and the legislature in a way that has made it a hegemonic institution in the sphere of state domination. Thus, in the *Deri* and *Pinchasi* affairs it ordered the prime minister to dismiss Minister Arieh Deri and Deputy Minister Rafael Pinchasi from their respective positions after they were charged with crimes.[24] In so doing, the HCJ offered a broad legal interpretation of Basic Law: The Government. The law granted the prime minister discretion to dismiss ministers and deputy ministers. Yet it was silent as to the possible duty of a prime minister to dismiss these officials if they were only suspected of committing crimes. The Supreme Court broadly interpreted the basic law as establishing the statutory duty of the prime minister to dismiss any minister or deputy minister who was undergoing criminal procedures or was suspected of committing a crime.[25] Thus, in this case the justices enforced the prime minister's judiciary-made obligation to dismiss the offending minister and his deputy from their formal offices. The Court has also enlarged its judicial review over the parliament. In *Pinchasi,* it repealed the Knesset's decision to remove Pinchasi's immunity because in the course of parliamentary processes the Knesset had made a number of

23. HCJ 5364/94 *Velner v. Rabin,* P.D. 49 (1) 758.

24. HCJ 3094/93 *Movement for Quality of Governance in Israel v. Government of Israel,* P.D. 47 (5) 404 (the Deri case); HCJ 1843/93 *Pinchasi v. The Knesset,* P.D. 44 (1) 661; HCJ 4267/93 *Amitai v. Yitzhak Rabin,* P.D. 47 (5) 441.

25. Ibid.

blunders. Accordingly, the Court ordered that the motion to remove Pinchasi's parliamentary immunity must be repealed.[26]

The state's legal culture therefore has been characterized by the increasing engagement of the Supreme Court in framing the rules of the political game and in enforcing norms. In the 1950s, the Court was primarily the state's legitimizing institution. However, after the 1970s it began challenging other state entities by increasing its adjudication in the midst of political polarization, fragmentation, and harsh public controversies that could not be resolved by any other state organ, including the fragmented parliament. The Court's tendency to adjudicate political issues became especially prominent in the 1980s and 1990s and continues today (Barak-Erez 1999; Maoz 1999).

After the 1980s, the Supreme Court asserted its willingness to determine individual rights and frame the general rules of the political setting in a more vigorous and intensive way. Thus, it adjudicated political agreements between political parties and legitimized the norm of publicizing political agreements.[27] The HCJ ruled that appointments to senior bureaucratic positions could be disqualified, even following governmental confirmations, if they contradicted norms of public integrity. More specifically, the Court canceled the nomination as general director in the Ministry of Housing of a senior veteran of the secret services who had been suspected of fabricating evidence during the Shabak (internal security service) affair (1984–86) and pardoned.[28] The Court ruled that despite the pardon he was not entitled to serve in a top bureaucratic position since public officers should be innocent of public suspicion of their personal integrity.

During the 1990s, the Supreme Court gained an unprecedented political prominence in Israel's annals due to its willingness to adjudicate most political affairs. Yet in most of the cases the Court did not intervene to limit the discretion of officials and did not change the status quo (Barak-Erez 1999; Hofnung 1991; Maoz 1999). The Supreme Court has tended to ignore the rights of communities and has defined individuals as the major carriers of rights (Gross 1998). In the legalistic

26. Ibid.

27. HCJ 1601/90 *Shalit v. Peres,* P.D. 44 (3) 353. See also HCJ 1653/90 *Zerzevsky v. Prime Minister,* P.D. 45 (1) 749; HCJ 1523/90 *Levy v. Prime Minister,* P.D. 44 (2) 213.

28. HCJ 6163/92 *Eisenberg v. Housing Minister,* P.D. 47 (2) 229.

eyes of the Court, Israel does not have nonruling communities, distinct communal identities, and various communal needs and claims for collective rights. The Court has promoted individualization of the society and formal recognition of specific individual rights. In the next section, I explore the institutional prominence of the Supreme Court in Israel's public life and the meaning for the state's legal culture of the fact that the Court has neglected nonruling communities.

Supreme Courts as Political Institutions and Legal Cultures

Supreme courts are political institutions that operate in the context of legal cultures. They are political institutions for four reasons. First, they are the state's apparatuses of control (Althusser 1971; Foucault 1980; Jacob, Blankenburg, Kritzer, Provine, and Sanders 1996). Second, they resolve disputes based on political values (Segal and Spaeth 1999). These values, with all their diversity, mainly reflect hegemonic narratives (Brigham 1987, 1998). Third, supreme courts decide the allocation of public goods (Epstein and Knight 1998; Feeley and Rubin 1998; Krislov 1965; Smith 1988). Fourth, they interact with other state and nonstate institutions to form and pursue a public policy and gain more power (Barzilai and Sened 1997; Epstein and Knight 1998).

Supreme courts cannot operate outside their cultural context, primarily the cultural legal context. Courts have to sustain their legitimacy as public institutions (Barzilai 1999a; Caldeira and Gibson 1995; Rosenberg 1991). Furthermore, judges and justices champion the political values (Segal 1997) they internalized during years of socialization, including their legal educations (Jacob et al. 1996). Hence, and considering the state's regulated processes of judicial nominations and elections, judges and justices tend to comply with hegemonic cultures (Abraham 1992; Horwitz 1990, 1992; Jacob, Blankenburg, Kritzer, Provine, and Sanders 1996). On the one hand, supreme courts reflect prevailing values, and on the other hand, under certain institutional and cultural conditions, they may foster alterations in the status quo, often within hegemonic narratives.

The ability of supreme courts to use institutional and cultural conditions in order to promote their judicial strategies affects their prominence in political settings (Barzilai and Sened 1997). I explain subsequently the institutional and cultural conditions that have led to

prominence of the HCJ in Israel's legal culture, claiming that paradoxically its prominence has also imposed limits on its judicial power. Later this point will be crucial for comprehending the expectations, practices, and frustrations among nonruling communities regarding the state's judicial power.

A detailed survey analysis based primarily on two public opinion polls that I conducted in 1991 among a representative sample of Israeli Jews and in 1998 among a representative sample of Israeli Arab-Palestinians may suggest a few observations on how Israelis perceive their judiciary and the Supreme Court in particular. The Israeli public, especially the Jewish public, has supported the Supreme Court's rulings on a number of issues. But the Supreme Court has enjoyed more than a specific legitimacy, that is, the legitimacy of many of its rulings. The legitimacy that the Court enjoys as an institution is broad in some sectors, including that of the religious Zionists (Barzilai, Yuchtman-Yaar, and Segal 1994b; Barzilai 1999a).

Let us look at some details. According to the 1991 survey of the Jewish-Israeli public, the average specific legitimacy of court rulings was about 59 percent and the average institutional legitimacy (i.e., diffuse legitimacy) around 66 percent (Barzilai, Yuchtman-Yaar, and Segal 1994b, 1994c). In 1995, I detected similar broad institutional legitimacy among the Jewish-Israeli public, around 77 percent. Other surveys reported similar findings in the late 1990s. Yochanan Peres and Ephraim Yuchtman-Yaar reported a significant proclivity among Israeli Jews to support the judiciary and the Supreme Court in particular (Peres and Yuchtman-Yaar 1998). This high level of judicial legitimacy among Jews was maintained in 2000 as well (Rattner, Yagil, and Pedhazur 2000).

Studies in the late 1980s found that Israeli Arab-Palestinians were inclined to have faith in the Israeli judiciary, including in the Supreme Court (Rattner 1994; Zureik, Moughrabi, and Sacco 1993). In the summer of 1998, I conducted the first large field survey about legal culture ever conducted among Israeli Arab-Palestinians and detected an inclination among the minority to have faith (however limited) in the Israeli judiciary, including in the Supreme Court (52 percent).[29] A similar finding was reported following a survey conducted in 2000 among the

29. For more figures and an analysis, see chapter 3.

Arab-Palestinian minority regarding legal obedience (Rattner, Yagil, and Pedhazur 2000).

Yet the minority has various—even contradictory—identities, which have produced a compound legal culture. This section points out that in general, at the macroaggregate level, the Israeli judiciary, and particularly the Supreme Court, enjoys broad specific and diffuse legitimacy. With significant and intriguing sociopolitical and cultural contingencies notwithstanding, the public support of the judiciary, and chiefly of the Supreme Court, should be explicated in a broader context.

The Supreme Court is largely perceived as an institution that supervises—and is worthy of supervising—other civil institutions such as the executive and the parliament. The latter are viewed as operating for the benefit of particular political and partisan interests and accordingly are perceived as inefficient and corrupt (Barzilai 1999a, 2000). Conversely, the Supreme Court is largely perceived through positive public myths; it is considered to be "objective," "representative of the common citizen," "trustworthy," "moral," and "responsible" (Barzilai, Yuchtman-Yaar, and Segal 1994b; Barzilai 1999a; Peres and Yuchtman-Yaar 1998). It enjoys a mythical status as an "impartial" institution, national and nonpartisan, and a guardian of the democratic process. Accordingly, it is widely supported by the public as the preferred democratic institution (Barzilai, Yuchtman-Yaar, and Segal 1994c; Barzilai 1999a; Peres and Yuchtman-Yaar 1998).

The mass media—potentially another means of civilian supervision—is publicly viewed as having particular political interests and even as inclining toward disloyalty to national interests. On the contrary, the Supreme Court, like the state comptroller, is perceived as worthy and capable of supervising the executive, the legislature, and other organs of the political regime (Barzilai, Yuchtman-Yaar, and Segal 1994b; Barzilai 1999a; Peres and Yuchtman-Yaar 1998).

The cultural and historical origins of these myths have been described elsewhere (Barzilai 1999a). Myths are not the only cultural source of judicial legitimacy. During the 1990s, the American cultural effect on public trends strengthened liberal discourse in Israeli society, especially among secular middle- and upper-class Jews. Hence, the public expects judicial activism in favor of a wide variety of individual

rights (Barzilai, Yuchtman-Yaar, Segal 1994b; Barzilai 1999a). Since the 1970s, there has been a consistent increase in the public's tendency to appeal to the Supreme Court and in particular the HCJ. Litigation has come to be perceived as a preferable public tactic for solving political conflicts or publicizing them in order to mobilize sociopolitical forces and rally public support (Ziv 2001). Israel has been described as one of the most litigious countries in the world. According to one comparative study, its rate of litigation is one of the highest among more than twenty democracies, similar to the rate of litigation in Austria and somewhat higher than that in the United States (Wollschlager 1996).

Structural variables have increased the Supreme Court's involvement in politics and bolstered its attempts to reduce the autonomy of other civil political institutions (e.g., the executive and the legislature, especially during the 1980s and 1990s). One of the most crucial structural changes in Israeli politics was the transformation from a hegemonic to a polarized and fragmented party system (Arian 1989; Goldberg 1992). Prior to the 1970s, one dominant political party, Mapai/Labor, directed the political system. After the decline of Mapai/Labor in 1973, following the Yom Kippur War, and the rise of Likud to national power in 1977, the party system became more polarized and fragmented (Arian 1989; Goldberg 1992).

Political polarization and fragmentation of political power foci, political extremism, and the incremental weakening of Israel's largest political parties, Labor and Likud, have exacerbated the public's loss of faith in the political establishment, particularly the Knesset and political parties. According to several extensive public opinion polls, much less than 50 percent of the public perceives the legislature and its political parties as important to democracy (Barzilai, Yuchtman-Yaar, and Segal 1994b; Peres and Yuchtman-Yaar 1998). In contrast, for the cultural reasons analyzed earlier, the Court is perceived as a source of salvation from sociopolitical predicaments. As will be discussed in chapter 3, even Israeli Arab-Palestinians share something of that proclivity. The Supreme Court has gained a central public position while the parliament has lost some of its power (Barzilai 1999b, 2000; Sharkansky 1999).

The parliamentary decline was mirrored in the electoral reform of 1992, which via the reenactment of Basic Law: The Government

embodied a system of simultaneous elections, one a direct election for the prime ministership and the other a proportional election for the Knesset. It primarily resulted from the resentment of the Jewish middle and upper classes, which had absorbed the ethos of individualism and were inspired by the American presidential system. They were annoyed with parliamentary multiculturalism, which was characterized by the increasing representation and political weight of ultra-Orthodox religious parties. The fact that Haredi political parties exploited the polarization and fragmentation for their own interests by participating in government coalitions only on the condition of receiving specific budgets and benefits contributed to the mood of public despair.

Additionally, different political interests motivated the protagonists of this electoral reform. The public increasingly concluded that the political establishment was incapable of coping with the central problems facing the Israeli polity. Public figures, primarily heads of municipalities, retired senior military officers, and members of the Knesset (MKs), who found it difficult to be promoted within Israel's rigid party system, presumed that electoral reform would ease their political advance. Leading business personalities, such as the heads of Israel's largest banks and industries, viewed electoral reform as a means of enhancing their engagement in the selection of candidates for the prime ministership. They also conceived of direct elections as a means of generating economic stability, as the direct electoral system was supposed to be much less sensitive to coalition pressures and demands for allocations of exclusive budgets (Barzilai 2000).

The rhetoric of individual liberalism flowed from aspirations to apply American/Western liberal standards to the Israeli setting. As countries such as Austria, Canada, France, Germany, Japan, and South Africa, which have introduced prominent constitutional reforms since World War II, cultural transplantation became intertwined with local practices (Brewer-Carias 1989). The American presidential model and to a lesser degree the French model of the Fifth Republic (which embodies a powerful chief executive who is erroneously imagined to be independent of opportunistic political coalitions and a pluralistic legislature) greatly influenced the proponents of the Israeli electoral reform. In debates organized by the proponents of reform, American liberalism and the presidential model were often men-

tioned and debated.[30] This was a reflection of the more Americanized culture, and its values were carried by prominent scholars with American legal educations.

Essentially, stable politics was seen as far more important than political and social pluralism under which religious, Arab-Palestinian, and other nonruling communities could have aired their opinions and utilized their distinct voices in the making of high and daily politics. An effective prime minister was presumed to be more alluring than articulation of sociopolitical rifts, and personal competition for the prime ministership according to the American model was viewed as more representative and democratic than a proportional parliamentary system (Barzilai 2000).[31] Now let us move back to the Court.

Facing increased political polarization and fragmentation, the Court aspired to become a hegemonic institution (Barzilai 1998; Gavison 1995; Mautner 1993). Formally, the HCJ has expanded the "right of standing" to include instances in which the appellant is not personally hurt by the "state" (Segal 1993). According to this sweeping version of the right of standing, an appellant can be heard if he or she raises issues of unconstitutionality even when no personal right has been prejudiced. Concurrently, and for the same reasons, the doctrine of justiciability, which has limited the doctrine of "political question" and expanded the range of adjudication of political issues, became the asserted judicial concept of Justice Aharon Barak and the Supreme Court (Barak-Erez 1999; Maoz 1999). In practice, however, when the Court was striving to avoid rulings on legal cases that threatened to incite direct conflicts with other political institutions, it used the doctrine of "institutional nonjusticiability," namely, as if despite a formal cause for intervention it respects the autonomy of the other political branch.[32] These self-propelled formal grounds served the Supreme Court as a platform for increased institutional

30. This observation is based on my own experience when I participated in several debates with the proponents of direct elections.

31. The system of direct elections was abolished in March 2001 due to temporary political interests. Labor, which in 1991–92 had supported the direct system, was defeated, and Ehud Barak lost the elections of February 2001 to Ariel Sharon. The latter supported the abolishment of the direct system, fearful of Benjamin Netanyahu's rising extraparliamentary popularity.

32. See, for example, HCJ 910/86 *Ressler v. Minister of Defense,* P.D. 42 (2) 441.

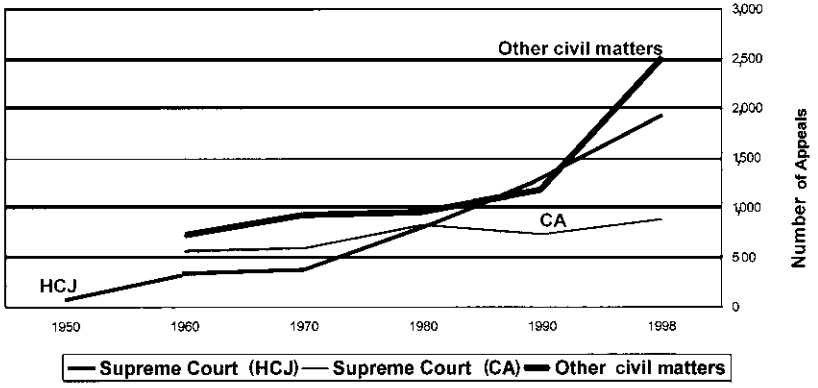

Fig. 1. Litigation in Supreme Court

engagement in political life while it attempted to limit the risk of institutional crises.

This wholesale judicial approach—which is unique from a comparative perspective—accelerated the appeals process to unprecedented levels. Figure 1 demonstrates the trend.

In 1950, the Supreme Court reviewed 422 cases in all matters; the number was increased to 2,000 in 1960 and 2,866 cases in 1970. In 1980, the number soared to 4,064 legal cases, and in 1990 it was 5,179. In 1998, the Court was under a heavy load of 8,184 cases.[33] In this context, the main increase was in litigation before the HCJ. See Figure 1.

In 1950, the HCJ reviewed 86 appeals, in 1960 it reviewed 333 cases, and in 1970 it reviewed 381. In 1980, the number rose to 802 appeals, and in 1990 the Court reviewed 1,308 legal cases. The number soared to 1,934 in 1998.[34] In practice, the Court dismissed most of the appeals. Compared to litigation in civil appeals, it is clear that the Court has become a constitutional court. Between 1960 and 1998, the litigation in the HCJ increased by 580 percent, while the litigation in the Court in nonconstitutional civil areas increased by much smaller proportions: 264 percent in civil appeals and 344 percent in other civil matters.[35]

Figure 2 shows that this increase occurred in the context of more

33. The numbers are based on *Israel Statistical Yearbook* 1997; 1999; 2000, table 21.6.
34. Ibid.
35. Ibid.

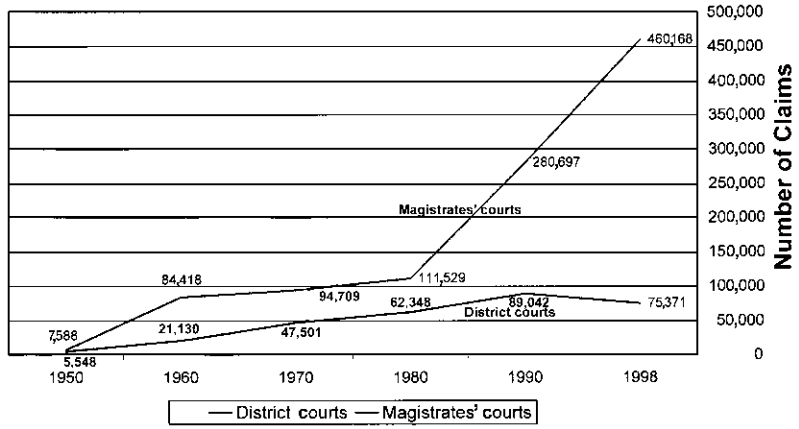

Fig. 2. Litigation in District and Magistrates' Courts

litigation in Israeli society. The overload of legal cases in district and magistrates' courts rose sharply in the respective periods as well.[36] Differences in the causes and characteristics of litigation in different types of courts are outside the subject of this chapter. The principal point is that the state's legal culture is characterized by extensive adjudication in the larger context of a more litigious culture. This trend is also prominent in American political and legal cultures and in countries affected by these cultures. Litigious cultures have been subjected to criticism, as they marginalize potential corporate models of dispute resolution (Kagan 1991, 1999).

Obviously, litigation and adjudication are interrelated and extensive adjudication has not been without ramifications. The Supreme Court is the main agent of adjudication in public affairs. It, in its role as the HCJ in particular, has reduced the autonomy of other public institutions such as religious courts, religious councils and other religious bodies, the office of the state comptroller, the military, the Broadcasting Authority, the Knesset, and the government (Barzilai and Nachmias 1997, 1998). It has also expanded its engagement in the jurisdiction of the attorney general and general prosecutor (Barzilai and Nachmias 1997, 1998; Gavison 1996).[37]

36. Ibid.

37. See, for example, HCJ 935/89 *Ganor v. Attorney General*, P.D. 44 (2) 485.

Politicians have not been inclined to oppose this extensive adjudication despite its association with the retrogression of parliamentarianism. In a polarized and fragmented political setting, the Court has gradually come to be perceived as the sole public institution that can produce satisfactory policy outcomes. Even MKs view the Court as the sole institution that can bear public responsibility for deciding controversial political issues (Dotan and Hofnung 1998). Legislators appeal to the HCJ due to their lack of faith in each other and their inability and unwillingness to resolve political conflicts and admit the costs of political responsibility.[38] Moreover, extraparliamentary movements view appeals to the Court as a means of putting pressure on the political establishment, gaining public visibility, altering legal texts, and mobilizing social and political forces that may generate reforms. Later I will explore various sociopolitical uses of litigation as a political tactic.

In Israel, as in some Western democracies, such as France, Germany, Italy, and the United States, it is believed that social and political struggles should and can be transferable to formal legal rhetoric and litigation in the courts (Kagan 1991, 1999; McCann 1994). Following the end of the Cold War and the expansion of American culture to other countries, comparative studies suggested that litigation in courts has become prominent in Hungary and Slovakia (Scheppele 1999; Wollschlager 1996). Privatization of the national economy and public goods (e.g., land), reregulation of economic markets, and more complex problems of property rights, all in the context of the sociopolitical transformation from a corporate to a capitalistic economy, have resulted in increased litigation.

In Israel, relying on internal statistics compiled by the Israel Bar and the statistics of the Central Bureau, the number of lawyers increased by 254 percent, from 8,651 in 1985 to about 22,000 in 1999.[39] It has expanded by 480 percent since 1970, when the number of lawyers

38. In a conference at the Israel Democratic Institute (1998), MKs testified that the level of confidence among members of parliament is so low and polarization so severe that they often were forced to ask for remedies and supervision from the Court and the state comptroller.

39. The numbers are based on internal membership figures of the Israel Bar Association. I would like to acknowledge the bar for its assistance.

was 4,853.[40] The number of law faculties and colleges has increased dramatically, from three to nine in the 1990s, and the prominence of judges and justices in governmental bodies, such as committees, and the state comptroller's office is unprecedented (Barzilai and Nachmias 1997, 1998).

The secular upper and middle classes, and especially their Jewish members, particularly endorse the consumption and production of legal terminology, legal knowledge, and litigation (Shamir 1994). More than ever before, they are articulating liberal, mainly American-constructed values and norms of individualism, possessiveness, privacy, entrepreneurship, personal liberty, and faith in "procedural justice" and litigation (Peres and Yuchtman-Yaar 1998; Shamir 1994).

The Supreme Court generates these liberal values and norms, which prevail among most of its justices. Since the mid-1970s, the Supreme Court has admitted its desire to become a hegemonic public institution by becoming a constitutional court. The weakness of the political establishment and the breakdown in Labor's dominance following the blunders of the 1973 war incited such a judicial behavior in the midst of increasing political polarization and fragmentation. In 1975, when the Court dismissed an appeal demanding better postwar military accountability, Chief Justice Meir Shamgar asserted that in principle the Supreme Court should enjoy the authority to conduct a constitutional judicial review beyond its capacity as an administrative court.[41]

A more significant aspiration for judicial hegemony was yet to appear. The most dramatic move of the Court was its effort to strengthen its authority as a constitutional court, which is capable of repealing laws due to their content. Since the 1980s, the Supreme Court has conceived itself as a national arbitrator that oversees the rules of the political game and their content. In 1985, a military reserve officer, attorney Y. Ressler, appealed to the HCJ asking it to declare the military exemptions granted to the ultra-Orthodox (Haredi) community null and void. Although the Court dismissed the appeal, it asserted that in principle every political action—even war and peace—is justiciable. In

40. Numbers are based on *Israel Statistical Yearbook* 1999; 2000, table 21.2.

41. HCJ 561/75 *Ashkenazi v. Defense Minister,* P.D. 30 (3) 309, 319.

so doing, it portrayed itself as a constitutional court that reviews political affairs.[42]

In 1992, Justice Aharon Barak was personally involved in initiating and promoting the enactment of Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Vocation. These laws entrenched several liberties within the statutory definition of Israel as "Jewish and democratic." In his academic writings, Justice Barak has described the passage of these basic laws as a "constitutional revolution" (Barak 1993). A careful reading of the Knesset's protocols reveals that most MKs did not comprehend the meaning of the legislation. They did not realize to what degree the justices would see this legislation as a license to activate (or at least assert) a broad constitutional review of parliamentary legislation.[43]

Some MKs, particularly those with legal educations, saw the Court's emerging hegemonic power. Yet, in the midst of the liberal mood of the Jewish secular middle and upper social classes and facing the decline of parliamentarianism, the plausibility of a broad judicial review did not instigate serious political opposition. Therefore, parliamentary power ("sovereignty") has been significantly limited as the Court gradually expands its adjudication.

While moving into its position as a national guardian, the Court largely used the terminology of individual rights. It clearly capitalized on the liberal mood of the 1990s. Since 1995, when its decision on *Bank Ha' Mizrachi* was handed down, the Supreme Court has formally used its authority to nullify laws due to their content if they severely contradict Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Vocation.[44] The term *constitutional revolution* reflects a new type of legality: legality that is manufactured by the Supreme Court at the expense of parliamentarianism. However, none of these laws expressively authorizes the judiciary to establish a broad constitutional review of parliamentary legislation. In order to justify their move toward a hegemonic position, the justices extensively used legal her-

42. HCJ 910/86 *Ressler v. Minister of Defense.*

43. See Knesset Debates, in *Knesset Protocols,* debates from December 24, 1991, and January 28, 1992, vol. 124, 1527–32, 2595–2611; debates from March 3 and March 17, 1992, vol. 125, 3390–93, 3781–93.

44. C.A. 6821/93 *Bank Ha'Mizrachi v. Migdal,* P.D. 49 (4) 221.

meneutics, which "killed" (in Cover's terms) parliamentary power. The general argument of the justices pointed to the legislature's desire to entrench human and civil rights in specific constitutional legislation, which overcomes any contradictory law. Hence, the Supreme Court is responsible for reviewing the adaptability of the Knesset's legislation to the constitutional revolution.

Not surprisingly, the first time the Supreme Court abolished Knesset legislation due to its content was in 1997. A clause in a 1995 law that dealt with the vocation of stockbrokers was voided. Although the law was declared valid, a specific clause that required experienced brokers to pass an exam was considered to be a severe contradiction to Basic Law: Freedom of Vocation. Hence, it was declared null and void.[45] This ruling well reflected the liberal element of the state's legal culture, which is concerned with the ability of the middle and upper social classes to enjoy individual rights.

The fragility of the Knesset as a polarized and fragmented body has enabled and motivated the Court to emphasize its judicial supervision over legislation. Due to its interest in avoiding institutional conflicts, the Court has only rarely abolished legislation, but it has articulated its authority to do so. It tends to transform parliamentary conflicts into adjudicative disputes and convert them from a discourse of legislation to one of individual rights. Accordingly, Aharon Barak, who was supported by a majority of the justices, ruled as follows.

> The constitutional revolution occurred in the Knesset in March 1992. The Knesset provided the state of Israel with a constitutional bill of human rights. . . . The Knesset has the authority to write a constitution. It has used its authority in legislating two basic laws regarding human rights. . . . In the normative hierarchy thus created, these two basic laws stand above the usual legislation. A contradiction between the content of one of these laws and the content of a regular law results in the cancellation of the latter. . . . The Knesset has expressed its opinion. . . . Today the Supreme Court expresses its legal opinion, which confirms this supreme

45. HCJ 1715/97 *Bureau of Managers of Investments v. Minister of Finance*, P.D. 51 (4) 367.

constitutional status. Hence, the legislature and the judiciary are being combined.[46]

In the subsequent three chapters I will explicate from a critical communitarian perspective, that is, underscoring the communal perspective of state domination, why such adjudication has resulted in grave sociopolitical costs. By analyzing a diversity of communal voices, this book shall explicate how nonruling communities have conceived and practiced liberalism as part of their communal legal cultures and which sociopolitical prices they have had to pay for opposing, mobilizing, and integrating liberalism.

National Security, Violence, National Narration, Rights, and Communities

In Israel, the importance of national security has been incorporated in the state ideology as necessary in order to maintain a Jewish and Zionist state. The national narration of violence has been legalized through state law and justified by the legal ideology of a "Jewish and democratic" state (Barzilai 1997a, 1997b). The relations between each nonruling community explored in this book and the ethos of national security have been constitutive of their legal cultures and their status within state law.

The Israeli judiciary and the rulings of the Supreme Court have assigned immense weight to arguments of national security. The HCJ tends to reject the appeals of Palestinians more than it dismisses the appeals of Israeli citizens, especially Jews. Rulings are affected by the Court's identification with what it views as the security interests of the Jewish Zionist state. Palestinians (primarily in the territories occupied by Israel in 1967) are seen as the enemy, as a menace to the Jewish collectivity, and their chances of winning appeals against the Jewish state and security services are slight (Dotan 1999; Hofnung 1991; Kremnitzer 1994; Kretzmer 1997, 2002; Shamir 1996; Sheleff 1996).

However, a careful analysis of rulings concerning the Arab-Palestinian minority in Israel shows that national security considerations have also been raised in and by the Court in rulings regarding the minority. The Court is inclined to underscore Israel's unique secu-

46. C.A. 6821/93 *Bank Ha'Mizrachi v. Migdal,* P.D. 49 (4) 221, 353.

rity situation as a state under siege and a society in arms and hence to justify discrimination in various fields (Barzilai 1996, 1997a; Kretzmer 1987; Lahav 1993b, 1993c).[47]

The Supreme Court is not a passive agent of the state. Like other higher courts in democracies (Jacob et al. 1996), it is not independent of the basic ideological and cultural traits of the state. The Court's rulings, all of them decided by Jewish and Zionist justices, have contributed to the definition of state's political identity as Jewish and Zionist. It has been articulated, inter alia, in dismissal of appeals submitted by Arab-Palestinians who demanded to return to their lands, which had remained abandoned since the 1948 war, and in the dismissal of their appeals to limit the scope of Israeli martial law.[48]

One clear example is the *Ikrit* affair. In this case, a group of Israeli Arab-Palestinians asked the HCJ to allow them to return to lands from which they had been expelled in 1948 under an Israeli military order. In the early 1950s, their expulsion had been ratified by a subsequent military order. The Court dismissed their appeals.[49]

They appealed again in 1981. The Court, so it seems, feared legally reconstructing "the right of return," and the justices again used the security argument to dismiss the appeal.

> We cannot accept the claims [of the appellants]. We must debate the appeal on the assumption that the closure order was given as law, that the military command had security considerations in mind. In order to succeed in the appeal, the appellant would have to demonstrate that the condition present during the giving of the

47. HCJ 64/51 *Daud v. Minister of Defense,* P.D. 5, 1117; HCJ 239/51 *Daud v. Appeals Committee of the Galilee Security Zone,* P.D. 6, 229; HCJ 141/81 *Committee for the Ikrit v. Government of Israel,* P.D. 36 (1) 129. See also, for example, E.A. 1/65 *Yardor v. Central Committee for the Sixth Knesset Elections,* P.D. 19 (3) 365; E.A. 2/88 *Ben Shalom v. Central Committee for the Twelfth Knesset Elections,* P.D. 42 (4) 749; and A.C.R. 347/88 *State of Israel v. Schwartz,* P.D. 42 (2) 568.

48. HCJ 64/51 *Daud v. Minister of Defense,* P.D. 5, 1117; HCJ 239/51 *Daud v. Appeals Committee of the Galilee Security Zone,* P.D. 6, 229; HCJ 141/81 *Committee for the Ikrit v. Government of Israel,* P.D. 36 (1) 129. HCJ 125/51 *Hasin v. Minister of Interior,* P.D. 5, 1386; HCJ 95/51 *Saad v. Manager of the Food Division,* P.D. 6, 132; HCJ 100/63 *Fahum v. Committee for Absentees' Property,* P.D. 17, 2271.

49. HCJ 64/51 *Daud v. Minister of Defense,* P.D. 5, 1117; HCJ 239/51; *Daud v. Appeals Committee of Galilee Security Zone,* P.D. 6, 229.

> order no longer exists, and that therefore there is no reason not to cancel the order. From the reports known to all, the situation on the Lebanese border is far from peaceful, nor has there been an extended period of calm. The line of settlements that exists along this frontier forms a part of our integrated defense. And, although there is an enclave of Arab villages near the Lebanese border, this fact does not negate the concerns of those responsible for security. The return of the appellants to their village, Ikrit, would constitute a security threat, even without calling into question the loyalty of the appellants to the state.[50]

In its antihumanistic ruling, the HCJ stigmatized several hundred refugees, who were—as the military itself admitted—expelled from their village during the 1948 war. To assert that this small group endangered Israel's security in the 1980s was not a veil of ignorance but a mask of cruelty, as there was no basis for claiming that these refugees endangered national security. In fact, the Court emphasized their loyalty to the state. It seems that the ruling was grounded in the judicial fear that such a legal precedent would restore the right of return and hence threaten the foundations of the Jewish state.

Let it be noted that the Court raised the argument of national security not only to infringe on minority rights but to limit the rights of Jewish individuals and groups that had voiced critical dissent on the political periphery. In *Shain,* for example, the HCJ ruled on the appeal of a soldier who had asked not to perform his military reserve duty in southern Lebanon, although he was willing to be posted within the Green Line. The soldier was sentenced and imprisoned for his refusal. The HCJ chose not to intervene in the considerations of the military establishment and the defense minister, a possible legal outcome according to the interpretation of the Security Service Law. Yet it emphasized in its ruling that Israel is a state in uniform in which unwillingness to follow military orders is a serious transgression. It decided, accordingly, to harshly condemn the soldier's refusal to follow military orders and to denounce any legal ground that might legitimize conscientious or political disobedience.[51]

50. HCJ 141/81 *Committee for the Ikrit v. Government of Israel,* P.D. 36 (1) 129, 133.
51. HCJ 734/83 *Shain v. Minister of Defense,* P.D. 38 (3) 393.

In the chapters that follow, I will demonstrate that this security mentality has had significant repercussions for communal practices. Yet all repercussions have not been alike, and the practices of nonruling communities regarding law and national security have varied. Israeli Arab-Palestinians have tended to refrain from legal confrontations with security arguments (chap. 3). Jewish liberal feminists have tended to use the security argument for their purposes in the context of legal mobilization (chap. 4). As we shall see, however, the security mentality has produced alienation toward the legal establishment among more radical Jewish and Palestinian feminists. Ultra-Orthodox Jews have used national security to justify their autonomy, as conscription would gravely endanger Halachic studies (chap. 5). Later we shall analyze how the security argument in the state's legal culture has diversely affected the legal consciousness, identities, and practices of nonruling communities.

The eminence of the national security argument in the political setting has resulted in the neglect of social problems and rights (Barzilai 1999a; Gross 1998). As I will demonstrate, every nonruling community, with its own sociopolitical and economic predicaments, has had to struggle with the cultural dominance of the security argument in politics and jurisprudence.

Feminists have had to grapple with the legal inferiority of women in the armed forces. They have demanded gender equality within the army or alternatively asserted the need for the exemption of women from compulsory military service. Arab-Palestinians have had to face the tendency of state law to exclude the minority from the Jewish "society in arms." Ultra-Orthodox Jews have consistently struggled to strengthen their political position inside and toward governmental coalitions despite not serving in the army. Within the Jewish population, Oriental Jews cannot successfully mobilize state law to achieve social equality as long as national security is so prominent on the agenda, deflecting social consciousness as trivia.

With the infusion of some liberal values and norms and a limited decline in the public proclivity to praise the armed forces and other security authorities, the prominence of the national security argument in rulings has dwindled somewhat (Barzilai 1999a). For example, in *Schnitzer,* which symbolized the outset of this trend, the HCJ ruled that security needs do not outweigh values such as freedom of

expression.[52] In this case, which dealt with the issue of whether military censorship should be imposed on a newspaper's criticism of the Mossad, the Court ruled that the military censor had failed to prove that the article constituted a "clear and proximate danger." Furthermore, the HCJ determined that it was up to the litigant claiming the need of censorship—namely, the state—to justify such a claim as lawful.

Nevertheless, even in this liberal ruling the Supreme Court reaffirmed that a piece can be censored prior to its publication even if the risk to national security is uncertain. This ruling was far stricter, and less liberal, than certain rulings in the United States. There the judicial test has held that censorship prior to publication is unconstitutional unless the state proves that publication poses a clear and present threat to national security.[53] Moreover, theoretically liberalism reduces the priority given to national security as a collective value because it encourages individual rights, placing them in principle above collective values. However, liberalism does not abolish the collective value of national security. At best, it presupposes that collective safety is contingent on the preservation and articulation of individual freedoms. Hence, liberalism may justify curtailment of certain individual liberties for the preservation of national security.

Liberalism (as a fervent commitment to individual rights) and national security (as a collective value) coincide, and the exact practical relations between them are historically and contextually contingent. Between 1993 and 1996, in the course of Israel's "liberal moments" and the Oslo peace process, and up to 2002, no significant overall change occurred in the judicial emphasis on national security arguments. Yet the Court handed down a few salient rulings that somewhat hampered the judicial tendency to rely on national security arguments (Barzilai 1997b; Gross 1998).

One major salient ruling addressed the torture of Palestinians, who were suspected by the Shabak, Israel's internal security service, of committing or planning terrorist acts. The justices ruled that several cruel physical interrogation methods were unlawful. While in the past

52. HCJ 680/88 *Schnitzer v. Chief Military Censor,* P.D. 42 (4) 617.

53. See, for example, *New York Times v. United States,* U.S. 713 (1971).

similar appeals had been dismissed,[54] this time the appeal was upheld and the Court issued an injunction and ordered the Shabak not to use these methods of interrogation.[55] After almost five years of delay, and despite a series of previous appeals, which were dismissed (Kremnitzer 1989, 1998), the Court made a legal change, and in it the effect of liberalism was evident. It offered a broad interpretation of Basic Law: Human Dignity and Freedom. The Court pointed out the essential contradiction between the liberal dictum of preventing individual degradation and danger to life, even under conditions of detention, and utilization of brutish physical methods of interrogation.

Tighter judicial supervision of the security authorities notwithstanding, this liberal ruling had significant weaknesses. For the first time in the state's history, the Court recognized torture as a legally justified method as long as it seems under specific circumstances to be a "reasonable interrogation." Furthermore, even in instances in which torture is unlawful the investigators may invoke the criminal defense of "necessity."[56] Indeed, the justices confined the lawful spectrum of torture and formally excluded it as a permanent public policy. However, they legalized future utilization of brute interrogations in specific, indefinite instances. In turn, they transformed the Court into the sole public body with powers of oversight over the security authorities.

In practice, Israel has experienced a security-oriented liberalism. This means that national security as state violence has been used as a criterion for preserving, eliminating, and granting rights. Therefore, interactions between liberalism and the security mentality have had various effects on nonruling communities. As will be shown, these interactions have elevated and empowered the state's pressures on nonliberal communities to change their practices and reduce their level of autonomy. On the other hand, the decline in the ethos of national security due to liberalism has enabled liberal members of

54. HCJ 8049/96 *Hcamdan v. Shabak,* November 14, 1996, Dinim 59, 112. For analysis of district court rulings, see "Legislation Which Permits Physical and Mental Pressures in Shabak's Interrogations." Policy Paper of Be'Tzelem, Israel Information Center for Human Rights in the Territories, Jerusalem, 2000.

55. HCJ 5100/94 *Public Committee for the Prevention of Torture in Israel v. Israeli Government and the Shabak,* P.D. 53 (4) 774.

56. Ibid.

nonruling communities to better mobilize state law, though not without sociopolitical costs.

Chapters 3, 4 and 5 present an exploration and analysis of the legal cultures of nonruling communities from their own perspectives and in their own voices vis-à-vis state domination and violence. The relations between communal practices and the state are often characterized by deep conflicts. Each chapter is devoted to the legal consciousness and identity practices of a nonruling community with distinct social characteristics. The study of each community is based on unpublished and primary sources. I will devote the next chapter to the Arab-Palestinian minority.

Chapter 3

The Arab-Palestinian Community in a Jewish (and Democratic) State

This chapter primarily examines the legal consciousness and practices of identity among the Arab-Palestinian minority. State law excludes the minority by framing it as religious groups that are entitled to a confined religious and juridical autonomy. Yet the community has essentially been placed outside state power foci, which allocate collective goods. Hence, this chapter is not a story about the sanctioning of legal pluralism but is about its suppression in the midst of liberal "globalization." Such suppression has resulted (among other phenomena) in collective violent resistance to the state. Its most prominent expressions were the violent and deadly clashes of Israeli Arab-Palestinians with Israeli security forces in October 2000.

This chapter considers violence to be communal resistance to state domination, in a broad legal cultural fabric, and entails critical communitarian analysis of state law and liberalism in modern political regimes. These regimes grant individual rights, and more rarely specific, group-affiliated rights, while avoiding recognition of the community's meaningful identity. This chapter analyzes the inability of modernity and liberal nationalism to address the grievances of a national minority. From the minority's perspective, as this chapter shows, domination and liberalism breed an ambivalent communal legal culture. By delving into state-community relations, we can see and learn about legal consciousness and practices (e.g., litigation and violence) and the relationships among these practices.

The convergence of elements of critical communitarianism significantly improves our understanding. State domination, on the one hand, focuses our attention on various legalistic strategies toward the nonruling community. Legal consciousness and identities of the nonruling community in the context of its social being, on the other hand,

focus our attention on communal hermeneutics and the costs and benefits of identity practices of litigation and violent dissent.

In the Israeli context, the boundaries between the Jewish state and the Arab-Palestinian minority are multidimensional and multifarious. I shall explicate different identities of the very same community and exhibit its practical interactions with state law. As we shall observe, conventional distinctions based on the binary epistemology of modern law versus customary law are insufficient. More intricate empirical and theoretical explorations will follow. This chapter delves into legal culture through communal voices and demystifies three prevailing theoretical notions: first, that liberalism can and aspires to resolve problems of national minorities; second, that communal rights necessarily endanger national sovereignty; and, third, that violence is an apolitical characteristic of nonliberal minorities.

A Portrait of a Predicament: The Social Existence of an Indigenous Community in State Law

Since the formal inception of Israel in 1948, Arab-Palestinians under its control have been a religious, cultural, and national indigenous minority. With the conclusion of the 1948 war, Palestine's Arab population of around 1 million people dropped to about 160,000 in Israel following vast expulsions and migrations of Arab-Palestinians from lands occupied by Israeli military forces (Kimmerling and Migdal 1993). About 111,000 among the minority were Muslims, and others were mainly Christians, Bedouins, and Druze. That minority numbered about 1 million, or around one-fifth of Israel's total population, toward the beginning of 2001.[1]

This minority has never been part of the Jewish and Zionist metanarratives. Accordingly, the Jewish majority considers the minority to be a security menace to the state (Barzilai 1997b; Smooha 1989–92). This has been articulated in military and security restrictions imposed on the minority and in collective exemptions from obligatory military service. Israel's application of martial law to its minority (1948–66) reflected one of the extremes of the state's view of indigenous Arab-Palestinians as a "fifth column" subject to criminalization

1. *Israel's Statistical Yearbook,* 1994, vol. 45, table 2.1, p. 43.

(Korn 1999). Despite the relaxing of military and security restrictions during the 1970s, the state authorities have continued to conceive of minority members as a security and military threat (Lustick 1980, 1989; Rouhana and Ghanem 1999).

Since the beginning of the conflict between the Arab states, Palestinians, and Israel the minority has been caught in a political trap. To the Arab states, Israeli Arab-Palestinians are Israelis, but to Israel they are Arabs or Palestinians. Hence, the issue of identity has become immensely significant to their basic interactions with the state and its laws. As Adal Mana, an Israeli-Palestinian activist, has phrased it: "the minority can be neither entirely Israeli nor entirely Palestinian."[2]

The Intifada, the Palestinian insurrection in the West Bank and Gaza Strip (1987–93), made the lives of the minority even more tormented. The violent and fierce struggle between the Palestinian and Zionist national movements sharpened the dilemma of Israeli Arab-Palestinians concerning their future as citizens of the Jewish state. Most minority members held opinions different from those of most Israeli Jews regarding the Arab-Israeli conflict in general and the Israeli-Palestinian dispute in particular. Broad support for grand territorial compromises as solutions to the Arab-Israeli conflict and sweeping support for the establishment of a Palestinian state alongside Israel were far more widespread and meaningful among the minority than among Israeli Jews (Barzilai and Keren 1997; Bishara 1999; Smooha 1989; Smooha and Ghanem 1998).[3]

Since 1987, and more intensively with the collapse of the Oslo process and the eruption of the Al-Aktza Intifada (2000–2001), Palestinian and Arab nationalism has taken a deeper root in that community (Bishara 1999; Ghanem 1997; Smooha 1989, 1998). According to formal state law, such a national identity does not exist in Israel. Moreover, until the Oslo interim agreement in 1993, political recognition of such an identity could be construed as "terrorism" and thus as a criminal offense.[4] State law does not ignore indigenous Arab-Palestinian national sentiments; it aims to subdue them.

The Arab-Palestinian minority has always been Israel's most

2. Lecture delivered in Givat Haviva, May 1996.

3. Survey of Tami Steinmetz Center, Tel Aviv University, March 1995.

4. Prevention of Terrorism Act, 1948.

oppressed community. It has always faced severe social and political restrictions in many aspects of daily life. Most minority members earned monthly incomes in the lowest three-tenths of the Israeli economy. These incomes were significantly lower than those of Israeli Jews (Semyonov and Lewin-Epstein 1993).[5] The percentage of Arab-Palestinian academics in Israel was almost one-third of the rate among Jews: 7 versus 19.6 percent.[6] The gaps in university enrollment between Arab-Palestinians and Jews were enormous: minority members made up only 7 percent of undergraduates, 3 percent of master's degree students, and 3.5 percent of doctoral students.[7] The trend is historical; since the 1950s, the minority has always significantly lagged behind the Jewish majority.[8]

The continued oppression of the minority was legalized by means of Israel's constitutional status as the "state of the Jewish people" and a "Jewish and democratic state." Formally, Arab-Palestinians are full members of the state, as citizens in a democracy, but in practice they suffer systematic discrimination. Yoav Peled, in his demystification of citizenship, found that the minority has enjoyed some liberal rights but has been deprived of the ability to shape the republican sphere of public goods (Peled 1992). Furthermore, as was shown in chapter 2, the minority has also been deprived of its political rights.

The minority has been marginalized in public debates over the future of the country, and its political parties have not been included in governmental coalitions. This situation, which has lasted for 54 years, has articulated a larger cultural environment. In parliament, Zionist political parties have tended to estrange the minority, especially during wars and security crises such as guerrilla attacks. Popular atavistic perceptions of the minority as a fifth column have been pronounced during such times; Jews view Israeli Arab-Palestinians as enemies of the state, allies of Israel's neighboring Arab countries, and collaborators with the Palestinians in the West Bank and Gaza (Barzilai 1992; Barzilai and Keren 1997).

Throughout Israel's history, most minority members have viewed

5. *Israel's Statistical Yearbook,* 1994, vol. 45, table 11.1, p. 324.

6. Ibid., table 22.3, p. 639.

7. Ibid., 1998, vol. 49, table 22.32, p. 692.

8. Ibid. See the figures in the tables cited in notes 5–7. It is important to note that the figures are official, as they were published by a state bureau.

state institutions as Jewish rather than collective civic institutions. Therefore, they have tended to place only partial faith in them (Dagani 1991, 10–11, 15–16; Rattner, Yagil, and Pedhazur 2000; Smooha 1989–92). Despite being politically and socially oppressed, most Israeli Arab-Palestinians have aspired to associate themselves with the Jewish majority. For example, in a public opinion poll conducted in 1995 it was found that more Arab-Palestinians than Jews were interested in communal or personal Arab-Jewish relations: 90 percent among Arab-Palestinians and 50 percent among Jews.[9] The Israeli Arab-Palestinian political culture reflects an ambivalent disposition: opposition to the Jewish characteristics of the state, yet general loyalty to state authorities (Amara 1998). As I will show, their legal consciousness and identity practices toward state law reflect the same ambivalence.

While the Jewish majority considered the peace process (1993–2000) to be riddled with dangers and challenges, the Arab-Palestinian minority was inclined to view it as brimming with opportunities for greater equality (Barzilai and Keren 1997).[10] Minority members considered the peace process as a partial solution to the dilemma of how to respond to Arab-Israeli-Palestinian animosity, on the one hand, and be loyal to Israel on the other. Hence, some minority political leaders desired to serve as brokers between the Israeli government and the Palestinian Authority in the West Bank and Gaza. They believed that Arab-Israeli-Palestinian peace would reduce the prominence of the security ethos in Israeli Jewish politics and in turn would facilitate their acceptance as loyal citizens (Barzilai and Keren 1997).

Analyses of majoritarian attitudes toward the minority have exhibited to what a significant degree intolerance and animosity have been dominant (Peres and Yuchtman-Yaar 1998; Sagiv-Siphtar and Shamir 2000,[11] Shamir and Sullivan 1983). The low socioeconomic and political status of Israeli Arab-Palestinians, their economic dependence on Jews, confiscation of their lands, and their political underrepresentation in state institutions have rarely been debated in the national

9. Survey conducted by the Tami Steinmetz Center, Tel Aviv University, March 1995.

10. Ibid.

11. In Sagiv-Siphtar and Shamir's survey, the tolerance toward the minority was detected as greater than tolerance toward some specific (Jewish and Muslim) political groups.

public arena (Barzilai 1997c; Benziman and Manzur 1992; Cohen 1990; Ghanem 1997; Kedar 1998; Kimmerling and Migdal 1993; Landau 1971; Lustick 1980; Alhag 1996; Morris 1990; Peled 1992; Rekhess 1989, 1993; Saban 2002; Semyonov and Lewin-Epstein 1993; Shamir 1996; Smooha 1980, 1989–92; Yiftachel 1998, 1999). The hegemonic Zionist political culture has not framed the minority problems as meriting a major national debate, systematic reforms in public policy, or prompt solutions.

Voting patterns of minority members reveal that their aspirations to improve their social, political, and economic standing notwithstanding they are dependent on the Jewish majority. As we shall see, dissent and dependence are reflected in their legal culture (i.e., legal consciousness and practices of identity). Let us look briefly at these voting patterns and then return to social existence and legal culture.

During the 1950s, most Arab-Palestinian voters supported the satellite parties of Mapai. These parties reflected the political dependence of the minority on the Jewish political elite and the latter's desire to prevent the former from organizing itself independently. However, the more Israeli Arabs began to consider themselves Palestinians the less they voted for satellite parties. In the 1980s, the satellite parties evaporated altogether, and minority members voted for independent political lists or Zionist parties. As table 1 demonstrates, this electoral trend continued into the 1990s.

Arab-Palestinian votes for Labor, Likud, the National Religious Party (NRP), and even ultra-Orthodox (Haredi) political parties such as Shas may have stemmed from a few primary factors. First, Arab-Palestinian supporters of Jewish political parties felt that they could help them to obtain government funds. Second, the Jewish political parties encouraged Arab-Palestinian voting by turning directly to prominent leaders of *hamoulot* (broad families) and *mouchtarim* (leaders of municipalities) for their electoral support. Markedly, the ruling political parties have been better able to deliver benefits to Arab-Palestinian leaders and their followers (Lustick 1980). Hence, the Zionist political parties were able to gain significant numbers of Arab-Palestinian voters and to continue the subservience of the Arab-Palestinian minority to the Jewish majority.

Third, as Israeli Jewish politics became more divisive, especially in the early 1980s, minority members found themselves relevant in the

TABLE 1. Division of Votes of the Israeli-Arab Electorate for the Knesset Elections (in %)

	Election														
	1 (1949)	2 (1951)	3 (1955)	4 (1959)	5 (1961)	6 (1965)	7 (1969)	8 (1973)	9 (1977)	10 (1981)	11 (1984)	12 (1988)	13 (1992)	14 (1996)	15 (1999)
Satellite parties[a]	53	55	57	58	46	42	40	36	21	13	0	0	0	0	0
Maki	22	16	16	12	23	1	1	—	—	—	—	—	—	—	—
Rekach/Hadash	—	—	—	—	—	23	29	37	51	38	33	34	23	37	22
Advanced List	—	—	—	—	—	—	—	—	—	—	18	14	9	—	—
Democratic Party and Balad	—	—	—	—	—	—	—	—	—	—	—	11	15	25	48
Subtotal: national lists	22	16	16	12	23	24	30	37	51	38	51	59	47	62	70
Mapai/Labor[b]	10	17	22	20	24	24	16	12	10	26	23	17	20	17	8
Herut/Likud + Religious	15	11	5	8	7	8	10	12	8	12	9	9	13	5	22
Others	—	1	—	2	—	2	4	3	10	11	17	15	20	16	—
Subtotal: Jewish parties	25	29	27	30	31	34	30	27	28	49	49	41	53	38	30
Total	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100

Source: Data are from publications of the Central Bureau of Statistics and from Osatzki-Lazar and Ghanem 1996.

[a]Satellite parties were Arab lists, which were part of Jewish political parties, primarily Mapai.

[b]Including, during relevant periods, the Labor Federation, Rafi, and Mapam.

establishment of dovish ruling coalitions. Thus, despite increasing Palestinian awareness among the minority, chiefly since the 1980s, 45 percent of its votes still went to Zionist political parties, including 21 percent to the Labor Party alone. The system of direct elections for the prime minister only reinforced this electoral tendency. Thus, 88 percent of Israeli Arab-Palestinian voters supported Shimon Peres in 1996, and only 4.8 percent voted for Benjamin Netanyahu (7.2 percent were disqualified). In the absence of an Arab-Palestinian candidate, the possibilities were limited to the two Zionist Jewish candidates.

A similar pattern of dependence on the Jewish majority was repeated in 1999 when an Arab-Palestinian was a candidate. Azmi Bishara, a vigorous Israeli Palestinian leader, was a candidate for the position of prime minister, but a few days before Election Day, as his impending electoral defeat became evident, Bishara decided not to run. Ehud Barak was considered in the polls to be the probable winner, particularly if the minority would support him. Taking into account Barak's promise to allocate more goods to the minority, Bishara urged his followers to vote for Barak. A decisive majority of Arab-Palestinians did vote for Barak (about 96 percent) and assured him an unequivocal victory over Netanyahu.

In both national elections, 1996 and 1999, the Jewish majority considered the Arab-Palestinian minority to be an important political constituency that under conditions of political polarity could be decisive in winning a national election. Yet in both elections the minority was marginalized after the ruling coalition was established, in 1996 by Netanyahu-led Likud, which resented the minority for its dovish proclivity and decisive support of Peres and Labor; and in 1999 by the Barak-led Labor Party in response to the minority's non-Zionist identity. In both instances, the Arab-Palestinian community was politically dependent on and discriminated against by the Jewish state, its elite, and its allocation of public goods.

Despite this subordination, support of independent Arab-Palestinian political parties has been another significant facet in minority cultural trends. Traditionally, Rakach (part of Maki before 1965), the Arab-Palestinian and Jewish communist party, has been the main political force in the community. Arab-Palestinian support of its political list had articulated an element of Marxist protest against the Jewish Zionist state. With the rejuvenation of Palestinian nationalism in Is-

rael, it expressed the goal of dividing Palestine into "two states for two people." In Rakach's statements, as in the behavioral patterns of its supporters, the Marxist conception was replaced by Palestinian nationalism (Rekhess 1989, 1993; Kaufman 1997).

This reality of deprivation, dependence, and a narrowed public sphere, mostly legalized in state law, incited the rise of the Islamic movement in the mid-1980s. The movement has generated the conjunction of an Islamic religious fundamentalist outlook and Palestinian national aspirations among the community. The impoverished sociopolitical status of many Arab-Palestinians, state-sponsored economic and social oppression, and heightened criticism among minority members concerning the irrelevance of Rakach's political approach to their predicament, incited broader public acceptance of the messianic outlooks espoused by the Islamic movement. By means of a return to the roots of Islam, the Koran, and the commandments of Sharia, the Islamic movement claimed that it could elevate the Muslim Palestinian minority to spiritual unity with it and grant the political power that the minority desperately craves (Meyir 1989). In an alternative sphere of religiosity and local (not national) protest and reconstruction, partially autonomous from the state's power foci, the Muslim movement conveyed the sociopolitical grievances of a deprived community and critically protested against state law.

Since its foundation, the Islamic movement has become one of the strongest political entities among the minority, and its political-religious activists, especially in municipalities like Kfar-Kasem, Um el Faham, Kfar Kaneh, Hilhuliya, and Kfar Bara, have become prime players in the lives of Arab-Palestinians.

Rhetorically at least, the Islamic movement has challenged the basic legitimacy of state law. It holds that all of Palestine is an Islamic land historically in the possession of Muslims (Wakf). Yet, facing political reality, its spokesmen have admitted that Israel is a fact with which reconciliation must be achieved.[12] In many ways, its efforts have been directed inward to the severe problems of lack of educational infrastructure, crime, youth delinquency, and poverty. It has not solely been a means of revitalizing Islamic religiosity in Israel but

12. This statement was made, for example, in a lecture by Abdala Darwish, the Islamic movement's leader, in 1995 at Tel Aviv University.

has also mirrored aspirations for communal reconstruction. Such communal religious attachments contradict the aspiration of state law to control the evolution of the minority's political life. This junction of state efforts to monitor and control the minority and Islamic religious fundamentalist consciousness has become a source of communal resistance to state law.

The deadly events of October 2000 made this conflict even more evident. The Islamic movement led many of the most violent demonstrations. Yet it also monitored the level of dissent and prevented further escalation. It used violence as a means of resisting state law and achieving the political aim of delegitimizing its Jewish Zionist characteristics. Following the attacks on the Pentagon and the World Trade Center on September 11, 2001, its spokesmen expressed sympathy for Islamic fundamentalism but halted any direct conflict with state authorities. Hence, ambivalence and dependence are part of the Islamic movement's legal culture.

Before I examine legal consciousness and practices of identity among minority members regarding law, you (my readers) deserve a more detailed explanation of the ways in which state law has monitored and controlled the minority. The next section renders a more intimate exploration of how state law has professed democracy, and even liberal egalitarianism, and yet has oppressed the minority.

The Illusive Aspects of the "Rule of Law": Unveiling Partiality

Chapter 2 explored Judaism and Zionism as the state's main historical and ideological tenets in law. Yet democracies are obligated to assert the concept of egalitarian "rule of law" in order to be perceived and legitimized as fair regimes that allocate public goods based on equitable public policies. The rule of law, therefore, should not be conceived as directly discriminating against minorities. Liberalism as a component of formal legal and political rhetoric, and as a practical phenomenon in daily life, may sharpen the paradoxical existence of the state's particularistic identities and their political preferences and formal commitments to impartiality and egalitarianism. The issues examined in this section inquire into this antinomical actuality concerning the Arab-Palestinian minority.

State law has mainly defined Arabs residing in Israel in terms of religious groups. In one of its first laws, the Order of Deserted Property, 1948, the government was empowered to enforce laws in any territory occupied during the 1948 war while preserving "religious and worship rights" as long as these rights "do not infringe on public security and order."[13] Since then, non-Jewish courts, inter alia, the Sharia courts, Christian courts, and Druze courts, have received state recognition as having exclusive religious jurisdiction over their respective groups in personal status affairs under the possible review of the Supreme Court. The Supreme Court has rarely intervened in their jurisdiction, and often it has empowered their jurisdiction.[14] The state has inherited the Ottoman and Mandate recognition of religious nonruling communities and has been forced to formally respect it so as not to be delegitimized in the domestic and international arenas. Recognition of the religious facets of the minority has formally marginalized its other identities.

The kadies (a *kadi* is a Muslim judge) are nominated by a professional committee composed in accordance with the Kadies Law, 1961. A committee of nine members is responsible for nominations. Its composition is as follows: two *kadies,* the minister of religions, another governmental minister, three MKs (two of them must be Muslim) and two Israeli lawyers (one of them must be a Muslim).[15] While a majority of five members of the committee should be Muslim, its chairman, who controls its agenda, is the minister of religions, often an Orthodox Jew and customarily a member of the NRP or an ultra-Orthodox political party.

The chief justice of the Sharia Appeals Court, who is the highest legal authority in the community, attorney Ahmad Natur, has remonstrated that most *kadies* have not been jurists.[16] Indeed, a closer look at Israeli law reveals that a Muslim *kadi* (judge) is not required to be a jurist. He (a woman has never been nominated to a *kadi* position) must be an expert on the Sharia and should demonstrate "involvement in social and communal life in Israel and with a contribution to

13. Clause 2 (b).
14. See for example, HCJ 409/72 *Said Chatar v. Haifa Druze Court,* P.D. 27 (1) 449.
15. Clause 4.
16. Ahmad Natur, interview by author, January 31, 1999.

the public."[17] Similarly, advocates who are permitted to regularly argue and represent clients in Sharia courts are not required to be lawyers.[18] The state is not interested in having a professional non-Jewish judicial body, which would be autonomous from direct state political control. The state is interested in a religious body with partial religious autonomy, the Sharia court, which in actuality is subject to supervision by the Jewish Orthodox and ultra-Orthodox establishment in the Ministry of Religions.

Yet partial religious autonomy has also been useful to the elite *kadies.* Legal training and the nomination of jurists to the bench would have put pressure on the *kadies* to be more exposed to the transnational values of Western and liberal rhetoric that have underscored gender equality, individualism, and secularism. The *kadies* have strenuously resisted criticism by Israeli Palestinian feminists as to their alleged discrimination against women. Paradoxically, Palestinian feminists wish to see more (not less) state legal intervention in the religious autonomy of the Sharia courts in order to attain more gender equality.[19] Hence, state domination in the domain of communal courts is based on co-optation.

Budgeting is another major component of state domination. The internal religious affairs of the Arab-Palestinian community are budgeted by the Ministry of Religions. In 1998, Arab-Palestinian lawyers, arguing before the HCJ that the minority was deprived, appealed against the legality of the 1998 national budget. The appeal called for equal and proportional distribution of the budget for religious purposes. The contentions about discrimination against the minority were denied by the political establishment as unfounded and were dismissed by the Court as too general.[20] The political establishment was unwilling to admit discrimination, and the Court dismissed arguments of illegality in the disproportional allocation of funds to the minority. It ruled that the appellants did not exhibit concrete damage and that no remedy could be rendered due to the generality of

17. The Kadies Regulations (Procedures of Deliberations and Work of the Committee for the Nomination of Kadies), 1996, clause 11 (11).

18. The Regulations of Sharia Advocates, 1963.

19. Hassan Manar, interview with author, February 24, 1999.

20. HCJ 240/98 *Adalah v. Minister of Religions,* P.D. 52 (5) 167.

the appeal.[21] In the 1990s, the minority constituted around 19 percent of Israeli population, yet its share of the ministry's budget was around 1.9 percent. Hence, the ability of the minority to fulfill its religious needs was severely constrained.

However, in the 1990s, during its liberal phase, the HCJ became more committed to the rhetoric of liberal equality. Following the previous case, and subsequent to *Kaadan*,[22] Arab-Palestinian attorneys appealed to the Court again, aspiring to utilize its judicial commitment to more equality in the allocation of public goods among individuals who belong to different groups, as was articulated in *Kaadan*. This time they neglected arguments concerning a communal right to equal and proportional allocation of funds. They pointed to the damage caused by discrimination in the national budget of 1999 concerning maintenance of Christian and Muslim graveyards.[23] The Court recognized the state's duty to equally allocate money for the maintenance of graveyards of different religions according to their respective needs. Since the justices were convinced that all (or most of) the budget of the Ministry of Religions was devoted to the maintenance of Jewish graveyards, they upheld the appeal and ordered the minister to equally allocate funds for that specific purpose. While no communal right was established and state domination was preserved, judicial liberalism imposed some very limited restrictions on public policy concerning the minority.

State domination over the minority was not directed solely to the confinement of its religions but also was used for monitoring its collective memories. I will demonstrate this by means of an analysis of state law's approach to Muslim history, education, and the Arabic language. Formally, state law protects all religious sites in Israel without distinction.[24] Yet in regulations issued by the minister of religions only Jewish religious places were mentioned as protected sites.[25] While the state officially supports equality, in practice it discriminates against non-Jewish communities. Arab-Palestinian lawyers correctly raised the claim that without a specific reference in the regulations the state

21. Ibid., Dinim 55, 162.
22. HCJ 6698/95 *Kaadan v. Jewish Agency,* August 3, 2000, Dinim 57, 573.
23. HCJ 1113/99 *Adalah v. Minister of Religions,* Dinim 57, 796.
24. Protection of Holy Sites Law, 1967.
25. Protection of Holy Sites Regulations, 1981.

is not obliged to allocate money for the protection of non-Jewish religious places (Adalah 1998). The state fears that these places will become centers of political mobilization and resistance. Moreover, the state is unwilling to contribute to the memorialization of the Arab-Palestinian past. In the Jewish state, the meaningful past should be Jewish only because it is believed that "history" should legitimize Zionism.[26]

The state, not communities, has full control over antiquities. Hence, it restricts the minority's access to places of significance to that minority. If the state wishes to do so, it can declare a place as a national reservation and expropriate it.[27] The liberal phases in Israel have not changed that situation. Liberals have shown little interest in collective memories and communal cultural preservation, devoting many more efforts to individual rights. Therefore, liberalism has not accommodated the minority's collective past within the legal language of individualism. The ability of the minority to identify itself with the past through observance of festivals has been restricted as well. State law officially recognizes no Arab-Palestinian festival.

Suppression of the minority's collective memories is not only reflected in state law and utilized in public policies, but it has been framed through state law within the discourse of individual rights. The monitoring of collective memories in the context of individual rights can be seen in the status of the Arabic language in Israel. Arabic is one of the main characteristics of the Arab-Palestinian community, with its diversity of religions, origins, and histories. Mandate law defined English, Arabic, and Hebrew as the formal languages of Palestine.[28] Israeli state law did not alter that definition for the same reasons non-Jewish religious communities were not formally abolished after Israel was

26. This approach is reflected in state's restrictions on funds allocated to non-Jewish cultural institutions. This resulted in appeal HCJ 175/71 *Music Festival in Abu-Gosh v. Minister of Education* P.D. 25 (2) 821. The Court justified the ministry's position of not financially supporting a festival of Christian religious music, claiming that freedom of religion does not include the state's obligation to support the dissemination of religion. The Court also ignored the fact that Jewish religious institutions are financially supported by the state. It is interesting to note that an Orthodox Jewish justice, Justice Kister, wrote the ruling.

27. Law of Administration of Antiquities, 1989; Law of National Parks, Natural Reservations, and National Sites, 1963.

28. Article 82 of the Palestine Order in Council, 1922.

founded in 1948. Hence, the state has a formal commitment to maintain Arabic as an official language (Gontovnik 1999). Practically, however, the use of Arabic is closely monitored and restricted.

Many road signs in Israel are written in English and Hebrew but not in Arabic. Following an appeal, in 1999 the state consented to alter the situation in five years.[29] Failure to recognize a situation, formalized in law, in which a minority of around 19 percent has Arabic as its first language, would have been a severe blow to the state's rhetorical commitment to equality. In practice, however, Arabic is not considered the equal of Hebrew, and those who opt to use Arabic suffer discrimination. Knowledge of Hebrew is a requirement for obtaining citizenship. In this instance, the language of law used another type of language to frame hegemonic culture and monitor collective memories.[30]

Arabic is not recognized as a formal language in Israeli bar exams and public professional organizations. No Israeli state organ, including the Supreme Court, has adopted a policy of publishing in Arabic, despite the fact that it is a formal national language. State documents are written in Hebrew and often translated into English. The state has been unwilling to commit itself to transparency and accountability to its Arab-Palestinian citizens. However, the increasing prominence of liberal values in jurisprudence should have enabled Arab-Palestinians to express their needs and aspirations in Arabic. Occasional concessions in this regard have come at a severe sociopolitical and legal cost. I exemplify this by turning to one of the most fascinating legal cases in Supreme Court history, one that is often neglected in academic debates.

In September 1993, the Court published its ruling on a dispute between the municipality of Natzrat-Ylit (a Jewish city in Galilee) and an engineering company, Reem, that constructed houses in an area that was mainly populated with Israeli Arab-Palestinians.[31] For obvious reasons, the company desired to advertise the availability of its housing projects in Arabic. Yet much earlier, in 1964, the municipality of Natzrat-Ylit had decreed that all public advertisements in its jurisdiction should be primarily in Hebrew; only one-third of any

29. HCJ 4438/97 *Adalah v. Ma'atz,* February 1999, Takdin 98 (1) 11.

30. See Citizenship Law, 1952, clause 5 (A) (5).

31. C.A. 105/92 *Reem Engineering Ltd. v. Municipality of Natzrat-Yilit,* P.D. 47 (5) 189.

advertisement might be written in Arabic. In 1992, the company appealed to the Supreme Court, asking it to reverse a District Court ruling that favored the 1964 regulation. In a detailed ruling written mainly by Justice Aharon Barak, the Supreme Court upheld the appeal and proclaimed the 1964 regulation null and void. In their unanimous ruling, all three justices directed the municipality not to prevent the publication of Reem's advertisement entirely in Arabic.

Such a ruling, in the context of the peace process and the 1992 Basic Law: Human Dignity and Freedom, may seem to be a progressive achievement, a significant step in the protracted struggle to achieve equality (although equality was not mentioned in the ruling). A closer analysis provides a more critical evaluation of the *Reem* ruling.

The Supreme Court could have argued that Arabic has been recognized in formal law as an official language in Israel. Yet the Court based its ruling on the principle of freedom of expression, a major principle in the liberal canon. Accordingly, the appellant had a right to advertise in Arabic if it presumed that Arabic better served its interests. The appeal was upheld not based on the status of Arabic as a communal language but due to the right of every individual to use any language that he or she prefers. Hence, Arabic was deprived of its importance as the language of a significant minority.

Paradoxically, most of the ruling was not devoted to the legitimacy of Arabic but to the national supremacy of Hebrew. The judicial point of departure was that "the establishment of Israel was associated with the renaissance of Hebrew."[32] Epistemologically, the justices identified Hebrew as the language not only of the Jewish population but of the state. Liberal discourse provided a convenient way to phrase the legal dilemma: "the question before us is the relation between the value of freedom of speech and the public interest of the Hebrew language."[33] Thus, the Court blurred the distinction between the majority's (Israeli Jews') interest and the public's (including Arab-Palestinians') interest, as if the minority does not exist in the legal field. All the justices emphasized that Arabic is the language of the Arab citizens of Israel. Yet the minority is denied the collective right to articulate itself in its own language because it is not recognized as a collective carrier of rights.

32. Ibid., 197.

33. Ibid., 202.

Hence, the legal remedy rendered to the appellant was constructed in the sphere of individual rights. Fueled with a more liberal consciousness, the Court somewhat equalized the ability of individuals to use Arabic if and when it does not constitute a clear and proximate danger to the status of Hebrew.

Correspondingly, the willingness of the Court to admit the individual right to publish in Arabic was contingent on the possible damage it could inflict on the public usage of Hebrew. The justices were very clear about the supremacy they attributed to Hebrew. Freedom of expression in Arabic, they ruled, might be denied "if the status of Hebrew would erode," and they noted that "it may be necessary to reevaluate the matter, in order to give more weight to the public interest regarding the Hebrew language."[34] Under the veil of a progressive ruling, the Court's decision was regressive because Arabic was excluded as a language with public status: "the individual has the right to choose his or her means of expression when this does not concern relations between the individual and the state."[35] If the Court had turned to the Mandate legislation of 1922, which is still valid, it would have been forced to recognize Arabic as a national language.

The Supreme Court has constructed and articulated liberties in a way that has individualized the minority. "Arab citizens of Israel," in the Court's terminology, are not recognized as a community that should be granted a collective right to use its own language. Rather, they were given the same legal status to speak their language as anyone, even a tourist, who enjoys individual freedom to use any language he or she desires. Under institutional pressure from other state organs, which routinely use only Hebrew, the justices (all of them Jewish Zionists) were loyal to the symbolic supremacy of Hebrew in the state's Jewish and Zionist ideology.

Legal pluralism became more illusive and the legal intersection between hegemonic Hebrew and subordinate Arabic was consolidated in the Court's ruling. Again, the theoretical distinction between legal pluralism as a myth and the struggles between nonruling communities and the state is crucial (Twining 2000; Santos 1995; see also

34. Ibid., 207.
35. Ibid.

Connolly 1995). Since *Reem* was ruled, the lingual practices of state authorities have been guided by the attorney general's legal opinion. It declares that state authorities should be encouraged to use only Hebrew. In the case of Arab municipalities, they should use not only Arabic but Hebrew as well, as Hebrew is the dominant language.[36]

Monitoring language, and more generally culture, is utilized through state supervision over schools. Formally, minority schools are an indivisible part of the Jewish educational system. The National Education Law, 1953, and its associated regulations subject schools to state control. The law professes egalitarianism as if the state provides an impartial education. It defines (clause 1) *national education* as an education granted by the state "without a link to a partisan body, ethnic body, or any other organization outside the government and under the supervision of the minister [of education] or an official whom the minister has authorized." However, formally the law recognizes and in practice implements the autonomy of religious Zionist and Jewish ultra-Orthodox systems of education.

Israeli Arab-Palestinians have not been similarly acknowledged. State law formally ignores their existence as a community and denies their interests in an autonomous education grounded in their collective histories. Clause 4 of National Education Law, 1953, only mentions that "in non-Jewish educational institutions the program of teaching shall be adapted to unique circumstances." In practice, state law concerning education has been utilized for systematic oversight of and discrimination against the Arab-Palestinian community (Alhag 1996). A formal change occurred during Israel's liberal phase in the 1990s. The Regulations of National Education Law (an Advisory Council for Arab Education), 1996, established a council that was supposed to enrich Arab education within the frame of state education. Moreover, for the first time a formal law admitted the need to form a teaching program that pays attention to the unique culture, religion, and history of the minority. Yet in practice this advisory board has rarely assembled, and its constitutive effect has been very limited (Aben-Ousaba 1997). Furthermore, these regulations reemphasize state supervision over the educa-

36. Internal letter of opinion from Attorney General Eliakim Rubinstein to all government attorneys in the ministries and municipalities, letter number, 1999–0004–17502, archive number 4–590–22.

tion of Israeli Arab-Palestinians and therefore exclude the possibility of educational autonomy for the minority.

My findings thus far should be summarized. State law invites discrimination against the minority in several ways. First, direct discrimination is expressly embodied in state law. Second, implicit discrimination, often through regulations and bureaucratization, points to the paradoxical existence of both official egalitarianism and substantive discrimination. Third, practical discrimination has been utilized through public policy within the shadows of state law. Liberalism has somewhat reduced the severity of the first type of discrimination due to its egalitarian assertions about individual equality. It has increased, however, the second and third types because individualization of the legal discourse has severely infringed on recognition of the minority as a national community with collective needs and rights. With this in mind, we are ready to take a more intimate look at the community's legal consciousness, identities, and practices of identity.

The Communal Mirror of State Law

One may presume that democracies constitutionally and politically render equality to all their citizens irrespective of their communal ties. The self-declared political triumph of Western liberalism is to a large extent a common view produced by the Western conception of liberal modernity and democracy. This is a state-centered approach that measures the qualities of a legal system and political regime by the extent to which individuals may or may not enjoy their rights. Yet, nonruling communities exist, as practices and constructs, and they interact with and struggle against the state (Greenhouse, Yngvesson, and Engel 1994).

State law that mainly represents the power holders (Barzilai 1997a; Mills 1956) tends to marginalize the identity practices of nonruling communities or even subdue them. More rarely, it may recognize and articulate these identity practices. Nonruling communities do not enjoy the same choices. In a reasonably managed state, such communities may ignore and evade, and alternatively resist, a very specific facet of state law, but often they cannot or do not desire to reject the state's whole legal setting. Even deprived communities tend to obey state law due to their perceived vulnerability (Jaros and Roper 1980).

Hence, nonruling communities have developed a variety of tactics vis-à-vis states, and they have mobilized law as a tool in their political struggles. At this point, law is not merely a structured entity of force and narrative. It is a language that frames a terminological environment that may protect the community. It may also become a source of political behavior, for example, in litigation that helps the minority to address and challenge issues. However, since mobilization of state law legitimizes the state, it may become a sword that can be used against the minority.

At a deeper level, various collective identities exist among the minority, and they may constitute and articulate diverse practices toward law. Occasionally, nonruling communities are characterized by practices that are uniquely contingent on nonstate social forces. These practices may contradict the conceptions, images, and interests embedded in state law. In that case, what the legal field and political regimes experience is a mixture of various practices of identities vis-à-vis law.

Studies have claimed that the legal practices of communities are more diverse when the communities are characterized by collectivist orientations in comparison with communities with individualistic orientations (Bierbrauer 1994). The former, like the Arab-Palestinian community, may establish independent forums of dispute resolution and resist state interference in religious and traditional matters (Sierra 1995). If modern law inclines to be individualistic (Friedman 1994; Wieacker 1990) while community law is mainly customary and collective, then we may identify at least one source of the collision between states and nonruling communities that should apply to the tensions between the state and the Arab-Palestinian minority. Later I will reject this post-Roman dichotomy between modern and customary law as not comprehending the relations between states and nonruling communities.

Before suggesting complementary explanations concerning identities and legal consciousness, I shall continue with a few more theoretical remarks. Law embodies certain concepts of time, and modern law tends to impose a secular, accumulative, and linear one (Greenhouse 1989; Saban 2002; Shamir 1996). Nonruling communities tend to emphasize the indeterminacy of time, and hence they may suggest alternative or complementary systems of law and justice (Shamir 1996; Sierra

1995). Other studies have pointed to diffuse legitimacy as a possible marker between states and nonruling communities. The latter are perceived as conferring lower levels of diffuse legitimacy than ruling communities do (Rattner 1994; Zureik, Moughrabi, and Sacco 1993).

I suggest, however, that we should avoid binary distinctions concerning states and nonruling communities and rather should explore the blurred boundaries between them. Furthermore, most studies presume the existence of a defined community identified in positivist legal terms, which maintains concrete legal relations with state authorities. I claim, however, that nonruling communities are to a large extent the result, a source, and the articulation of identity practices that are at once within, outside, complementary to, and against state law. To erroneously presume a binary distinction between the state and nonruling communities is to adopt a state conception that promotes its own exclusivity.

Heretofore, examinations of the legal status of and dispositions among the Israeli Arab-Palestinian community have presumed a rather fixed identity of that minority. My research verifies several of the main findings of previous studies. Israeli Arab-Palestinians have less faith in the judiciary than Israeli Jews; the minority has not rendered the courts with the same level of diffuse legitimacy as the Jewish majority; and the minority has felt deprived (Rattner 1994; Rattner, Yagil, and Pedhazur 2000; Zureik, Moughrabi, and Sacco 1993). I also share the finding that massive disobedience—a collective resistance—on the part of the minority is a real possibility if the Jewish state does not alter its policy of discrimination.

Yet I am interested in another dimension of relations between states and nonruling communities. A community does not have one coherent, fixed identity, and it cannot be sufficiently conceptualized at the behavioral level of faith and confidence. I argue that different types of identities in the same community in different political and social settings constitute multifarious interactions between state law and the nonruling community. Moreover, looking from a communal perspective one may see that the community's identities cannot be reduced to those of religion and customs and that the state itself is contributing to the creation of communal identities.

The following observations and their analysis stem from an in-depth field survey that I conducted in July 1998 among a representative

sample of the Israeli Arab-Palestinian minority.[37] The questionnaire was based on stories in Arabic that were told to the respondents by qualified Arab-Palestinian interviewers about various events concerning law, politics, and society, from land expropriations and demonstrations to conflicts between Sharia courts and the Supreme Court. Through these personal interviews, conducted in Arabic, I have learned more about the ways in which the community perceives, locates itself, and interacts with communal and state law in various sociopolitical settings.

Almost all minority members hoped that Israel would become a civic state jointly governed by Jews and non-Jews (96.5 percent). However, when asked about the political reality, only about one-third defined contemporary Israel as "a democracy of all its citizens" (37.6 percent).

As figure 3 shows, most Arab-Palestinians conceive of Israel as a "Jewish state" controlled by Jews or a "Jewish and democratic state" in which Jews control the state but the minority participates through elections (61 percent). My findings illustrate how the minority has struggled with this perceived duality—ingrained in legal ideology—of democratic procedures and a state controlled by Jews.

The more a community member believed in Israel as a state of all its citizens, the more he or she was inclined to feel equal to the Jewish citizens of Israel (Pearson correlation = .358, <.000, N = 317). Generally, Israeli Arab-Palestinians tended to feel a sense of collective deprivation, as reflected in table 2. As we shall see, this general feeling applies to certain concrete aspects of communal life.

When asked about a general sense of collective equality or discrimination against minority members, 49 percent responded that there is no equality between the Jewish and Arab citizens of Israel; 16.6 percent replied that equality has never existed or exists only with regard to certain issues. However, a large proportion, 34.4 percent, responded that equality does exist.

Within this context of legal consciousness, the data identified several collective identities. The minority was characterized by nonharmonious politics of identity. Deprivation/discrimination, agrarian

37. I would like to acknowledge Tel Aviv University's Research Authority, which granted me research money in 1997 and 1998 to fund this survey.

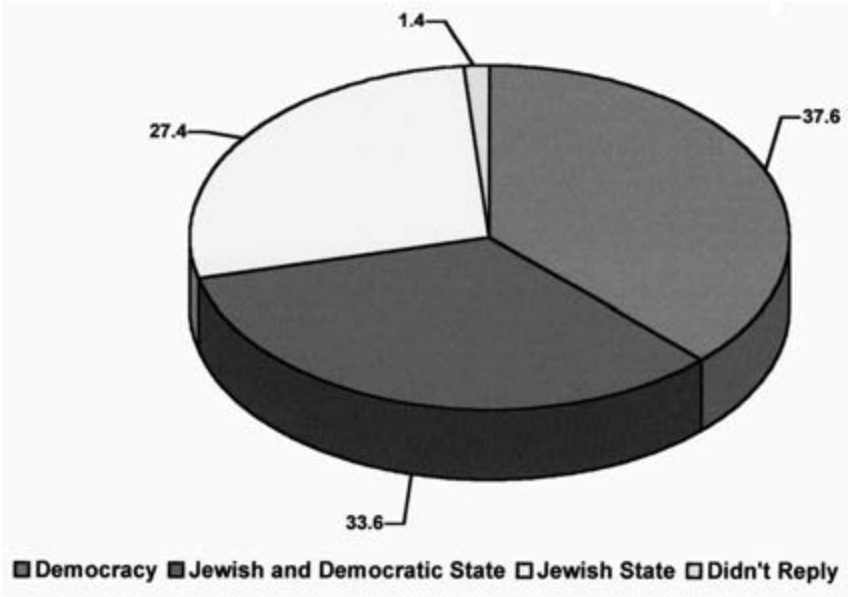

Fig. 3. Israel as a "Jewish and democratic state" (in %, $N = 500$)

attachments, national affiliation as Israeli Arabs and Palestinians who reside in Israel, and religion were the main collective identities at the grassroots level. Table 3 presents the results of a factor analysis that points to these communal identities. The four factors explain 75.39 percent of the total variance.

One collective identity was a sense of discrimination/deprivation. The perception of procedural justice and its absence in the courts was one aspect of this collective identity. Community members were

TABLE 2. Sense of Collective Equality ($N = 500$)

Sense of Equality	Frequency	Valid Percentage
Equality	172	34.4
Equality in specific fields	83	16.6
No equality	245	49.0
Total		100

Note: The question was, Do you feel that equality exists between Jewish and Arab citizens of Israel? The categories were as follows: 1, Yes, very much (13.6%); 2, Yes (20.8%); 3, Contingent on the subject (16.6%); 4, No (36.6%); 5, Definitely no (12.4%). I have collapsed categories 1 and 2 as equality and categories 4 and 5 as no equality.

asked whether they were being treated with equality or discrimination in magistrates' courts, district courts, and the Supreme Court (see table 4).

The proclivity discovered in table 4 was heterogeneous. There was a sense of collective discrimination/deprivation among community members. Collapsing the categories of discrimination, the results are 34.2 percent (magistrates' courts), 26.4 percent (district courts), and 26 percent (Supreme Court). In addition, 8.6, 15.4, and 14.4 percent perceived relative discrimination and relative equality in the courts, respectively. Larger percentages responded that the minority enjoyed equality in the courts: 45.8, 46.4, and 47.8 percent, respectively. On average, when 7 marks a complete collective identity of equality, 1 a complete collective identity of discrimination/deprivation, and 4

TABLE 3. Factor Analysis and Collective Identities

	Component			
	Factor 1	Factor 2	Factor 3	Factor 4
Equality/discrimination in building permits and destruction of buildings	.212	**.871**	.002	−.107
Equality/discrimination in job opportunities	.138	**.874**	−.190	−.049
Equality/discrimination in land expropriation	−.121	**.803**	.085	.134
Equality/discrimination in freedom of expression	.415	**.642**	.260	−.342
Equality/discrimination in magistrates' courts	**.964**	.109	.103	.127
Equality/discrimination in district courts	**.948**	.123	.119	.166
Equality/discrimination in the Supreme Court	**.920**	.077	.269	.055
Self-definition of degree of religiosity	.011	.074	**.726**	.416
State law vs. religious autonomy	.286	.201	.348	**.619**
State law vs. killing for family honor	−.110	.216	.026	**−.717**
Demonstrations against land expropriation	.069	−.223	**.779**	−.226
Self-definition of nationality	.259	.061	**.696**	.085
State law vs. religious custom	.156	.055	**.785**	.165

Note: The results in boldface demonstrate the following collective identities.
Factor 1: collective feelings of discrimination or equality in court.
Factor 2: collective feelings of discrimination or equality concerning social and political rights.
Factor 3: agrarian, national, and religious identities.
Factor 4: religious identity.

TABLE 4. The Sense of Collective Equality in Courts (in %)

	Sense of Equality				
	Equality	Relative Equality/ Relative Discrimination	Discrimination	Refused to Answer	Total
Magistrates' courts	45.8	8.6	34.2	11.4	100
District courts	46.4	15.4	26.4	11.8	100
Supreme Court	47.8	14.4	26.0	11.8	100

Note: $N = 500$. The question was, Do you think that Israeli Arabs are treated equally or in a discriminatory manner in comparison with Israeli Jews in courts? Each category (type of court) received a scale of eight possibilities from 1 (total discrimination) to 7 (total equality). Zero meant the respondent refused to answer the question. I have collapsed values 1, 2, and 3 as discrimination; category 4 is partial equality and partial discrimination; and values 5, 6, and 7 were collapsed as equality.

the median point, the tendency has been heterogeneous but leaned more toward a collective identity of discrimination/deprivation (magistrates' courts, 3.78; district courts, 3.89; and the Supreme Court, 3.99; $N = 500$).

Although comparable figures about the Jewish public have shown a much higher level of confidence in the state judiciary (Barzilai, Yuchtman-Yaar, and Segal 1994b; Rattner, Yagil, and Pedhazur 2000), the majority of Arab-Palestinians is not alienated from the Jewish/Israeli judiciary (for similar findings, see Rattner, Yagil, and Pedhazur 2000, 16). It seems, therefore, that state law and its ideology have become part of the community's legal culture and accordingly the community has some sense of equality in state courts. This tendency reflects some communal beliefs in state procedural justice, namely, a communal faith in the ability of some minority members to "have their day in court." The communal perceptions of various types of courts are closely related, as the factor analysis demonstrates. In other words, the respondents had a concrete perception of the state judiciary without significantly differentiating between the magistrates', district, and Supreme courts.[38]

Another aspect was a sense of discrimination/deprivation concerning rights. Moving from procedural justice to rights exposed a different trend among minority members (see table 5).

38. The correlations between the sense of collective discrimination or equality in courts, regarding magistrates' courts (ec1), district courts (ec2) and the Supreme Court (ec3), were as follows: ec1-ec2 (.911, <.000, $N = 343$); ec1-ec3 (.804, <.000, $N = 354$); ec2-ec3 (.854, <.000, $N = 324$).

When asked about an important aspect of democracy, that is, freedom of political expression, the general feeling was one of discrimination (41.4 percent). Others (15 percent) sensed relative discrimination and relative equality, and 39.4 percent felt that they were treated equally. The average concept was (on a scale of 1 to 7) 3.62 ($N = 500$), which pointed to the heterogeneous proclivity with a tendency toward a collective identity of discrimination/deprivation. Freedom of political expression not only involves procedures but also a substantive democratic right. Hence, the minority was inclined to perceive more deprivation concerning this substantial democratic right than with respect to the purely procedural issue of judicial accessibility.

When minority members were asked about property and social rights, the picture became more problematic. When asked about equality in the granting of building permits and the destruction of "illegal houses," job opportunities, and land expropriation, the sense of collective discrimination/deprivation was pronounced: 65.6, 57.4, and 63.6 percent, respectively. Others sensed relative discrimination and relative equality: 15.8, 21.2, and 19.8 percent, respectively. In this context, in the spheres of property and social rights, the minority had a very prominent sense of discrimination, with only small percentages perceiving the situation conversely (those who believed in equality were 12.4, 20.6, and 11.8 percent, respectively). The average scores point to the same conclusion (2.67, 3.27, and 2.70, on a scale of 1 to 7; $N = 500$), and they tended to articulate a stronger collective

TABLE 5. Sense of Collective Equality regarding Rights (in %)

	Sense of Equality				
	Equality	Relative Equality/ Relative Discrimination	Discrimination	Refused to Answer	Total
Building permits[a]	12.4	15.8	65.6	6.2	100
Job opportunities	20.6	21.2	57.4	0.8	100
Land expropriation	11.8	19.8	63.6	4.8	100
Freedom of expression	39.4	15.0	41.4	4.2	100

Note: $N = 500$. The question was, Do you think that Israeli Arabs are treated equally or in a discriminatory manner in comparison with Israeli Jews regarding each of the following issues? Each issue received a scale of eight possibilities from 1 (total discrimination) to 7 (total equality). Zero meant the respondent refused to answer the question. I have collapsed values 1, 2, and 3 as discrimination; category 4 is partial equality and partial discrimination; and values 5, 6, and 7 were collapsed as equality.

[a]The question referred to building permits and the demolition of "illegal buildings."

identity of discrimination/deprivation regarding social and property rights than concerning other issues. As the factor analysis demonstrates (table 3), interactions between the perceptions of discrimination/deprivation concerning the various social, property, and political rights were strongly associated and constitute a prominent aspect of the collective identity of discrimination/deprivation.[39]

Collective identities of discrimination/deprivation concerning procedural justice and rights were interrelated.[40] The more a respondent perceived collective discrimination/deprivation of Arab-Palestinians in courts the more he or she was inclined to perceive collective discrimination/deprivation of Arab-Palestinians in rights. Overall, one major collective identity was that of discrimination/deprivation concerning the social existence of the minority and its inability to utilize remedies in and through state law. This communal identity was largely associated with state discriminatory policies and was constructed by the state. Other communal identities were framed within the community by its own social forces.

The Arab-Palestinian minority shared strong feelings of agrarian attachment. Yet the Jewish state controls about 96 percent of all land and has prevented Arab-Palestinians from settling on it (Kedar 1998; Shamir 1996; Zreik 1999). The minority regarded landownership, destruction of "illegal" houses, and building permits as major components in its public and private life (see table 5).[41] Furthermore, Arab-Palestinians also desired to oppose land expropriation, which has been legalized in state law.

The respondents were asked whether the following sequence of events reflects their daily lives: "Lands were confiscated by the state. Subsequently, the mayor of one Arab municipality wanted to organize

39. I have marked the variables as follows: building permits and destruction of houses, eq2; job opportunities, eq3; land expropriation, eq4; and freedom of political expression, eq5. The correlations are as follows: eq2-eq3 (.433, <.000, $N = 334$); eq2-eq4 (.412, <.000, $N = 326$); eq2-eq5 (.405, <.000, $N = 326$); eq3-eq4 (.363, <.000, $N = 317$); eq3-eq5 (.336, <.000, $N = 326$); eq4-eq5 (.389, <.000, $N = 312$).

40. The correlations are as follows: ec1-eq2 (.243, <.000, $N = 314$), ec1-eq3 (.301, <.000, $N = 308$), ec1-eq5 (.275, <.000, $N = 321$), ec2-eq2 (.236, <.000, $N = 282$), ec2-eq3 (.263, <.000, $N = 285$), ec2-eq4 (.144, <.016, $N = 278$), ec2-eq5 (.398, <.000, $N = 295$), ec3-eq2 (.185, <.002, $N = 286$), ec2-eq3 (.262, <.000, $N = 286$), ec3-eq4 (.134, <.026, $N = 276$), ec3-eq5 (.409, <.000, $N = 300$).

41. For discussion of the *Kaadan* ruling, see chapter 2.

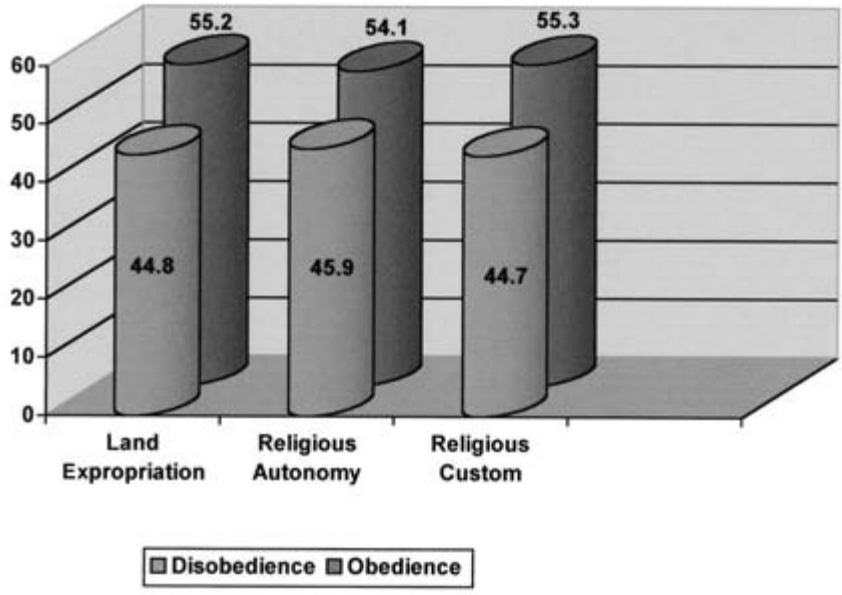

Fig. 4. Obedience and disobedience (in %, $N = 500$)

a demonstration, but the police refused to grant permission for the demonstration. An appeal by the mayor to the Supreme Court, against the police, was dismissed. Should the mayor organize a demonstration despite the authorities' refusal to grant permission?" (see fig. 4). Some 44.8 percent replied that the political interest of preventing land expropriation was more important than state law, including the Supreme Court ruling; they justified disobedience and the organization of an "illegal" demonstration against the establishment. Conversely, 55.2 percent asserted that state law should be respected and preserved. This finding is very straightforward. Despite their relative weakness as a minority, almost half of the community's members have asserted their willingness to resist state law under conditions of conflict between their desires as a community to be attached to the land and formal state law.

A collective identity of communal discrimination/deprivation was significantly associated with a collective identity of communal attachment to land. The less a respondent sensed collective equality concerning procedural justice (i.e., equality in the courts) and equality in

rights the more he or she was inclined to disobey state law. Although the statistical correlations were not very strong, the variances in the willingness to disobey state law were significantly associated with the sense of collective equality or discrimination/deprivation regarding building permits and the demolition of "illegal" buildings (Pearson = .233, <.000, N = 390), land expropriation (Pearson = .116, <.024, N = 377), freedom of political expression (Pearson = .318, <.000, N = 404), magistrates' courts (Pearson = .105, <.036, N = 400), district courts (Pearson = .149, <.004, N = 364), and the Supreme Court (Pearson = .134, <.01, N = 369). The systematic segmentation of and discrimination against the minority in and through state law not only resulted in a collective identity of discrimination/deprivation among the community's members. It also produced a readiness among almost half of the minority population to clearly assert a willingness to disobey state law and resist the establishment if communal agrarian interests are at risk and the state restricts other avenues of political expression.

State law has suppressed the minority's claims as an agrarian community while defining it as a religious community. Religion is, indeed, another strong element of Arab-Palestinian communal life in Israel. As figure 4 demonstrates, in instances of a direct conflict between a religious custom (law) and state law, a large proportion of the public, 44.7 percent, declared its willingness to disobey state law and 55.3 percent asserted that they would obey state law. The respondents were also asked about an instance in which the Supreme Court upholds an appeal against a ruling of a Sharia court based on the argument that the Sharia ruling contradicts criteria of "modern law, state law." In figure 4, we see that 45.9 percent asserted that the Sharia court should disobey the Supreme Court's ruling, whereas 54.1 percent argued that the Sharia court should obey state law and accept the Supreme Court's ruling. In the sample, 19 percent declined to answer or did not know what to answer.

The survey found a rather strong proclivity to disobey state law if it contravenes or infringes on the communal religious autonomy. The more a respondent defined himself or herself as religious the more he or she tended to resist state law under the conditions described earlier (Pearson = .247, <.003, N = 138). The statistical associations between variances in responses to the question about disobeying the Court's

ruling and a collective sense of discrimination/deprivation were significant (freedom of political expression, Pearson = .232, <.000, N = 334; magistrates' courts, Pearson = .173, <.001, N = 338; district courts, Pearson = .274, <.000, N = 304; and Supreme Court, Pearson = .216, <.000, N = 312). The more a respondent had a sense of collective discrimination/deprivation concerning freedom of expression and procedural justice the more he or she was inclined to disobey state law due to a collective identity of religion. Additionally, a collective identity of religion was positively and significantly associated with a collective identity of communal agrarian attachment (Pearson = .146, <.003, N = 405).

Palestinian or Arab national identity did matter, and it was articulated as another collective aspect of communal life. Only 1.4 percent of minority members defined themselves as Israelis. Most minority members (60.8 percent) defined themselves as Israeli Arabs, 19.8 percent conceived of themselves as Palestinians residing in Israel, and 18 percent defined themselves as Arabs. There was a significant statistical association between national identity among community members and their collective identity of discrimination/deprivation concerning rights and procedural justice.[42] The more a respondent identified himself or herself as non-Israeli, that is, as Arab or Palestinian, the more his or her sense of collective discrimination/deprivation increased.

National identity significantly affected the minority's inclination to disobey state law. The closer a respondent felt to an Arab or Palestinian national identity the more he or she was inclined to disobey state law (Pearson = .104, <.019, N = 500). A collective identity of Arab or Palestinian nationalism particularly affected disobedience of state law if state dicta contravened the minority's basic beliefs and interests, as in the case of agrarian attachment (Pearson = .192, <.000, N = 500) or religious autonomy (Pearson = .266, <.000, N= 405). My study found that Arab or Palestinian nationalism was positively and significantly associated with resistance to state law (see fig. 5).

In the context of land expropriation, a majority of Arabs (61.1 per-

42. I have marked national identity as ni. The correlations are as follows. ni-eq2 (.180, <.000, N = 390), ni-eq3 (.129, <.011, N = 390), ni-eq4 (.166, <.001, N = 377), ni-eq5 (.278, <.000, N = 404), ni-ec1 (.223, <.000, N = 400), ni-ec2 (.281, <.000, N = 364), ni-ec3 (.244, <.000, N = 369).

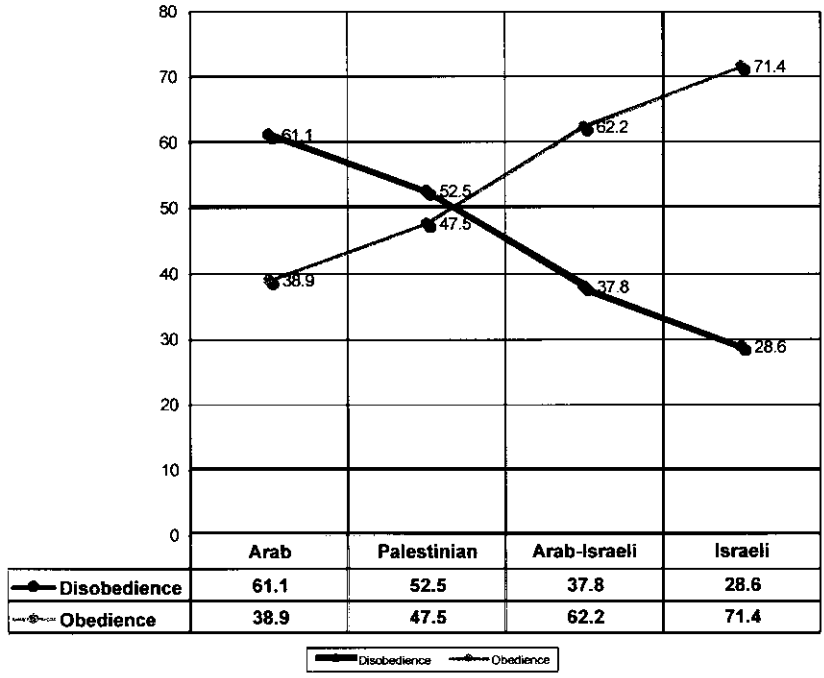

Fig. 5. Palestinian nationalism and obedience (in %, $N = 500$)

cent) and a majority of Palestinians residing in Israel (52.5 percent) asserted that political interests were more important than obeying state law. In comparison, among those who described themselves as Israeli Arabs only 37.8 percent believed that political interests justify disobedience. The more a respondent identified himself or herself as Arab or Palestinian the less he or she was inclined to obey state law. The interaction between nationality and religious beliefs augmented the potential for dissent from state law.

When religious Arab-Palestinians were asked about their willingness to obey/disobey state law in the context of land expropriation, 68 percent preferred to disobey it, while only about 58 percent among traditional and 38 percent of secular Arab-Palestinians articulated the same dissent. In the context of religious autonomy, 66.7 percent of religious Arab-Palestinians articulated a willingness to disobey state law. On the contrary, 42.3 percent among traditional Arab-

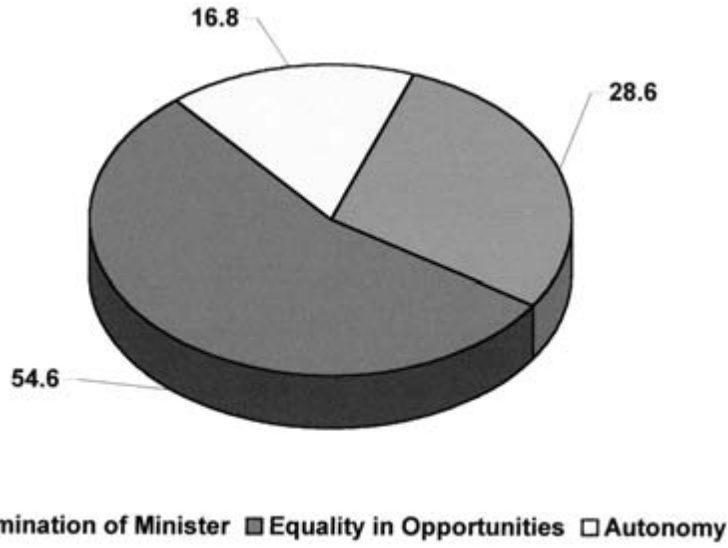

Fig. 6. Possible political reforms (in %, $N = 500$)

Palestinians and 28.6 percent of secular Arab-Palestinians expressed the same sentiment.

Following this exploration of collective identities let us continue with an analysis of legal consciousness and legal action. The hegemony of state law resulted in a bounded victory (see fig. 6). Although there was support among minority members for autonomy (16.8 percent), most (83.2 percent) considered the legal system to be a fitting framework for dealing with the problems of daily life (as long as no concrete conflict between state law and communal identity occurred). Furthermore, as shown in the figure, when community members were asked to suggest the best remedy for their political predicament most Israeli Arab-Palestinians endorsed the concept of greater equality of opportunity (54.6 percent).

Others, 28.6 percent, responded that the best solution would be the political nomination of an Arab-Israeli minister to the national government or the nomination of an Arab-Israeli judge to the Supreme Court. Only 16.8 percent favored a radical shift from the centrality of state law and identified autonomy within Israel as the best remedy. Thus, the minority, characterized by a multiplicity of collec-

tive identities, articulated an ambivalent legal culture. It evinced a willingness to resist and disobey state law in instances in which it directly contradicts communal collective identities. Yet the minority was inclined to presume that state law may also render remedies. This latter disposition is reflected in table 6.

When asked to state the most useful ways in which they might realize their political aims, community members were inclined to see legal actions as useful, as follows: parliamentary struggles, 62 percent; appeals to the Supreme Court, 60.6 percent; and legal demonstrations, 59.2 percent. As table 6 indicates, the minority tended to perceive the basic rules of the democratic political game as potentially beneficial for its collective purposes. A similar proclivity was detected concerning dispute resolution in the realm of private law (see fig. 7).

The respondents were told a story concerning a dispute between two Muslims who disagreed over the stipulations of a lease contract. Most respondents believed that a state civil court could best resolve this private contractual dispute between two community members (51.4 percent). Only 26 percent presumed that a communal religious (Sharia) court would be the most appropriate forum. Only a few community members advocated resolving the dispute either within the broad family or by using private Arab-Israeli arbitration (17.8 percent), with only sparse support of arbitration if the private judge were a Jew (.2 percent). Looking at the same findings from another angle,

TABLE 6. Political and Legal/Illegal Actions (in %)

	Sense of Effectiveness				
	Not Effective	Relatively Effective	Effective	Refused to Answer	Total
Parliamentary struggles	26.4	9.8	62.0	1.8	100
Appeals to the Supreme Court	17.2	18.2	60.6	4.0	100
Legal demonstrations	22.2	17.8	59.2	0.8	100
Illegal demonstrations	70.8	15.0	12.4	1.8	100
Violence against property and politicians	71.6	11.8	15.8	0.8	100

Note: Sample size, $N = 500$. The question was, What do you think is the most effective mode of action in order to achieve the political aims of Israeli Arabs? Regarding each mode of action the respondents were given a scale of eight possibilities from 1 (not effective) to 7 (very effective). Zero meant the respondent refused to answer the question. I have collapsed values 1, 2, and 3 as not effective, category 4 is relatively effective; and values 5, 6, and 7 were collapsed as effective.

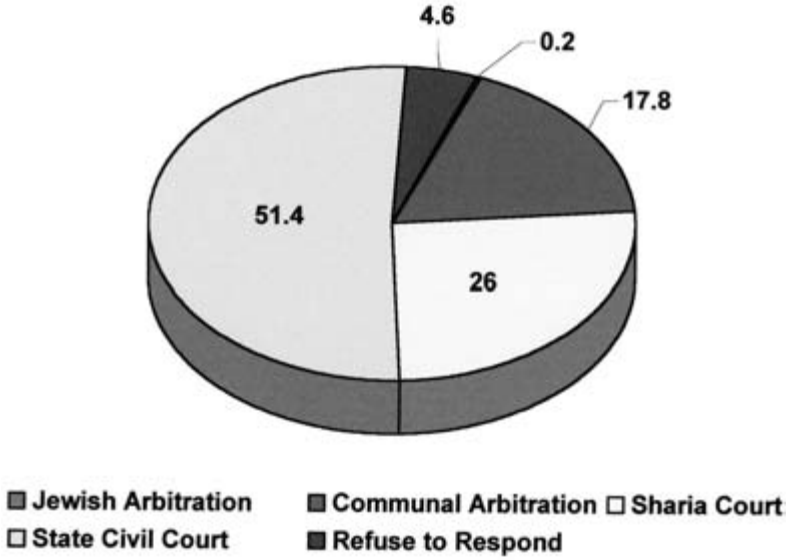

Fig. 7. Dispute resolution in the private realm (in %, $N = 500$)

while some thought that a religious/traditional forum or a religious/traditional figure could best resolve a contractual dispute between two community members (37 percent), a majority advocated adjudication by a state civil court.

Yet, as we have seen, there was also readiness for collective disobedience. Previously, I considered the plausibility of disobedience under specific conditions of conflict between state law and communal identities. Furthermore, table 6 shows that even when no direct conflicts occur the propensity toward disobedience and violence does exist, though in a more limited degree. About 12.4 percent advocated illegal demonstrations, and 15.8 percent expressed support for damaging Jewish property and harming political officials. Support of unlawful extraparliamentary opposition and violence against state law was affected by the collective identity of discrimination/deprivation concerning freedom of expression and particularly procedural justice.[43] The

43. I have marked illegal demonstrations as pa4 and violence against Jewish property and political officials as pa5. The correlations are as follows: pa4-eq5 ($-.13$, $<.01$, $N = 394$), pa5-eq5 ($-.109$, $<.03$, $N = 397$), pa4-ec1 ($-.191$, $<.000$, $N = 389$), pa4-ec2 ($-.13$, $<.015$, $N = 354$), pa4-ec3 ($-.109$, $<.039$, $N = 359$), pa5-ec1 ($-.313$, $<.000$, $N = 392$), pa5-ec2 ($-.238$, $<.000$, $N = 357$), pa5-ec3 ($-.306$, $<.000$, $N = 363$).

less the respondent trusted courts as a source of justice and the less he or she has believed in his or her right to freedom of expression the more he or she tended to advocate illegal and even violent extra-parliamentary opposition.

Since "illegal" and violent actions are also acts of resistance, the communal identity of non-Israeli nationality also affected the collective tendency toward illegal (Pearson = −.102, <.025, $N = 484$) and even violent opposition to state law (Pearson = −.20, <.000, $N = 491$). To summarize, taking into account the fact that violence in a nonhegemonic legal culture does not require mass mobilization in order to cause serious harm, we should underscore violence as a form of communal resistance that reflects alienation from the rules of the democratic game.

So far we have looked at the legal consciousness and identities of the Arab-Palestinian community through its grassroots voices. I have underscored the duality of communal loyalty and disobedience and resistance, which are related to distinct facets of the community. Communal legal culture generates rather autonomous sociopolitical forces of religiosity, nationality, and agrarian attachment.

As critical communitarianism claims, state law is a significant part of that legal culture. On the one hand, state law and legal ideology, within the context of certain democratic elements in the general political culture, create a collective belief among minority members in the ability of democratic procedures to effectively address the minority's grievances. On the other hand, state law and its ideology generate, legalize, and legitimize deprivation of and discrimination against Arab-Palestinians, and they have been a source of communal resistance. The next section delves into practices of identity with regard to law among members of the Arab-Palestinian elite.

Elite Dispositions toward State Law

The most prevalent Arab-Palestinian elite approach to state law has been the clamor for equality with the Jewish majority (Bishara 1999). This instrumental outlook is based on recognition that since the inception of the state Arab-Palestinians have suffered from a broad cleft between their formal political and their actual rights. However, they make a pragmatic distinction between state (and legal) ideology and

state law. The first is regarded as a source of deprivation, while the second is considered to be a source of potential remedies and even reforms. Demands for more political representation of minority members in governmental coalitions, ministries, and parliamentary committees are some of the expressions of this outlook.

Additionally, the elite has called for the state's formal recognition of the financial crisis facing Arab municipalities and equal governmental funding based on the same criteria that have been applied to Jewish municipalities. Another voice in that context calls for appointing Israeli Arab-Palestinians to key positions in central state institutions—in government, the Supreme Court, the upper levels of the public administration, and the Foreign Service. Additional demands include the promotion of Arab-Palestinian intellectuals in institutions of higher education and broader media coverage to expose the minority's sociopolitical plight (Barzilai and Keren 1997).

A more critical approach among the Arab-Palestinian elite claims that the approach of incrementally reforming state law is insufficient because state law is not an autonomous entity free of state ideology and its mechanisms of reproduction. As long as Israel remains a Jewish state, as the law decrees, no national, socioeconomic, or political equality between Arab-Palestinians and Jews will be possible (Rouhana 1998). Protagonists of this state-oriented outlook call for the separation of religion and the state, the cancellation of the Law of Return, and the repeal of other laws that consolidate the constitutional fundamentals of the Jewish state. They underscore the necessity of removing Judaism as a fundamental from the state ideology and its laws and point out that such a move is a prerequisite of equality of rights in a genuinely civil society (Bishara 1993; Rouhana 1998).

The third approach is as critical as the second but from a somewhat communitarian perspective. It found enhanced expression after the 1980s, following the eruption of the Intifada and the brute utilization of Israeli Jewish forces against it. This political approach calls for Israeli Arab-Palestinian cultural autonomy. Special attention is focused on the autonomous construction of Arab-Palestinian educational curricula and the use of Arabic as a primary, practical, and ideological language in the educational instruction of Arab-Palestinians (Alhag 1996; Amara and el-Rahman 1999).

The idea of autonomy emphasizes the uniqueness of Israeli Arabs as

Palestinians residing in Israel. They are loyal to state law as a given procedural framework but disagree with the state's endorsement of Judaism in a binational country that should be governed by all its citizens. Additionally, it has challenged the liberal opposition to tangible aspects of the minority's self-determination and the liberal fear of split sovereignty and the destruction of "national solidarity" (Kymlicka 1995; Tamir 1993). Protagonists of such a viewpoint do not expect instantaneous and exorbitant reforms in state ideology, legal ideology, and state law. They endeavor to achieve incremental state recognition of their collective status as members of the Israeli Arab-Palestinian community.

As we have seen, all of these approaches have been espoused by public segments of the minority. Yet the Arab-Palestinian elite cannot generate comprehensive reform of state law because the hegemonic Jewish political culture is antagonistic toward these political viewpoints. Even during and after the Oslo peace process (1993–2000), and for as long as the security myth remained influential, Israeli Arab-Palestinians were suspected by the Jewish majority of being disloyal to the state (Peres and Yuchtman-Yaar 1998). The outbreak of the October 2000 resistance further cemented that Jewish outlook (Yuchtman-Yaar and Hermann 2002). The lack of separation between Jewish Orthodoxy and the state and the crucial role played by Orthodox Judaism in the political establishment have affected the proclivity of the Jewish political elite to view with suspicion Israeli Arab-Palestinian protests against discrimination.

Traveling in Arab-Palestinian villages, seeing the poverty, unpaved roads, and utterly neglected streets, and watching the desperate, unemployed youngsters make clear the fact that at the outset of the twenty-first century Israeli Arab-Palestinians are still caught in a grave sociopolitical predicament, with little chance that their elite will be able to solve their problems. Liberalism in a few segments of the Jewish population and "constitutional revolution" as a major self-asserted liberal product have had some limited effects on the minority. Rulings like *Kaadan* have created expectations of social change. When these hopes are dashed, they may create even more serious frustrations and violence.

The significant gap between the state's liberal egalitarian assertions and the predicament of the minority has been challenged through

communal legal mobilization and litigation. As our survey has pointed out, litigation and mobilization of state law are supported by the majority of Arab-Palestinians. Moreover, Arab-Palestinian attorneys in the broader context of an emerging Arab-Palestinian civil society have utilized state law for communal purposes. The next section examines this legal mobilization and litigation.

Narrowing the Spaces: Mobilization, Litigation, and Politics

The sociopolitical mobilization of state law through grassroots, and especially political, activities has been expanding among Arab-Palestinians since the end of the 1980s. Around fourteen Arab-Palestinian nongovernmental organizations (NGOs) that engage in legal and sociopolitical activities are formally registered with Ittijah (the Union of Arab Community-Based Organizations in Israel) and function as political organizations. This does not include the joint activities of the minority's and Jewish social activists, cause lawyers in such organizations as the Israeli Association of Civil Rights, Be'tzelem, and other Jewish and Jewish-Arab-Palestinian NGOs in Israel. The legal activities of these NGOs have principally embraced four issues: civil rights, gender equality and violence against women, restoration of rights to confiscated lands, and education.

Most of these organizations are small and possess few financial resources. They are predominantly advocates of Palestinian equality under Israeli law and conceive of their actions as generating community ties and rights within and vis-à-vis state law. Sixteen other Arab-Palestinian NGOs endeavor to meet grassroots communal needs without engaging in litigation.[44] Among their organizational aims, gender equality, protection of battered women, and education are particularly salient.[45] In instances in which legal controversies are involved these organizations turn to the political organizations for legal assistance.[46] Hence, the minority is characterized by multifarious autonomous activities that reflect a growing civil society in the community. State law as a source of alienation, and expectation, and as a target and means

44. This number is based on the membership records of these NGOs in Ittijah.
45. This information is based on Ittijah documents.
46. Hassan, interview.

of action in the political sphere, has become an important focal point in the minority's efforts to resolve its predicament and promote its interests.

Challenging state law has not been an anonymous practice in the annals of Arab-Palestinians. The minority's political lists and a few cause lawyers have challenged the law during parliamentary debates (e.g., and inter alia, the Israeli Communist Party, Maki, and later Rakach). Challenges have also been raised in the course of extraparliamentary activities (e.g., Al-Ard) and by the appeals of cause lawyers to the Supreme Court (e.g., Sabri Jaris). However, attempts by Arab-Palestinian NGOs to use state law for communal purposes have predominately taken place since the 1990s (Ziv 2000).

Litigation has been employed by relatively young Arab-Palestinian lawyers who grew up under military rule (1948–66) and later were educated at Israeli and American universities (see Ziv 2000). I met them on several occasions. They prefer to speak Arabic, but they are fluent in Hebrew and English. Personally, they are affiliated with Palestinian national political bodies in Israel. They tell me about their deep criticism of the Jewish-Zionist regime. As lawyers, they believe, with some doubts about their professional mission, in their ability to attain more equality for the minority. Among ten active Arab-Palestinian attorneys of Adalah in 1999, seven were educated at American universities.[47] As we shall see, they believe in the power of legal language and the terminology of rights to effect some significant legal alterations and in turn some sociopolitical reforms. The Arab-Palestinian community, partly more attentive to the potential of litigation and partly more confident in its economic and political power (Ghanem 1997), has become more open to the activities of NGOs in the sociopolitical and legal fields. It has encouraged these activities for the communal purposes of improving its well-being, while state activities are seldom considered to be as applicable and efficient.[48]

47. Adalah, 1999 annual report.

48. This analysis is based on interviews I conducted with Dr. Amal Jamal (February 10, 1999), Ms. Manar Hassan (February 24, 1999), and attorney Hassan Jabareen (January 25, 1999). It is also based on my participation in three conferences held in Jerusalem and Tel Aviv in 1997, 1998, and 2001 about cause lawyering and civil, social, and human rights. The first conference was organized by Professor Ronen Shamir and the second by Professors David Kretzmer and Amos Shapira and the Minerva Center for Human

The main Israeli Arab-Palestinian NGO that has mobilized state law for resolving communal sociopolitical problems is Adalah ("Justice" in Arabic). It was established in November 1996 as a political organization that litigates in state courts as a useful way to generate messages and attain legal remedies for the minority. Adalah's purpose is laid out in its documents, as follows.

> The main purpose of the Adalah organization is to make use of Israeli law, comparative law, and the international standard of human rights in order to achieve equality of rights, as individuals, and as a group that is a national minority composed of the indigenous people of the country. By initiating legal challenges and in its public activities that have direct ramifications on the national minority's rights as a group, Adalah is focusing its attention on the following nine issues: land and housing, employment, education, language, culture, religion, unrecognized villages, women, and the allocation of governmental funds.[49]

Traditionally, Arab-Palestinians have not appealed to the Supreme Court. Awareness of being outside the Jewish and Zionist metanarratives and the general fear of being dismissed in court by means of national security arguments have prevailed.[50] Limited access to private lawyers has further reduced potential litigation for the community's members. The lack of media coverage and other organizational sustenance that might rally public support for appeals have also hindered the evolution of a litigious legal culture within the community (on litigious cultures, see Kagan 1991, 1999). Attorney Hassan Jabareen, Adalah's chairperson, vigorously expressed his awareness of the problems of dealing with state law. He informed me about instances in which a possible legal cause had emerged yet likely appellants decided not to litigate due to their fear that adjudication would make things even worse. The dilemma was not whether an appeal might be upheld or dismissed but whether adjudication would result in delegiti-

Rights. The third was organized by Dr. Eyal Gross and Dr. Guy Mundlak of Tel Aviv University.

49. Adalah, "List of Litigation" (May 20, 1998), 1.

50. Jabareen, interview.

mizing the minority's national identities since the state is Jewish and Zionist. Indeed, litigation is not necessarily considered in terms of achieving legal victories (Feeley 1992; McCann 1994). Furthermore, in the case of Israeli Arab-Palestinians, litigation has been aimed at achieving political and symbolic benefits other than winning in court.

Litigation in state courts is a controversial issue among the minority. What Robert Kagan has called "adversarial legalism" (1991, 1999) is a debatable norm among minority lawyers and human rights activists (Esmeir 1999). Feminist organizations, which constitute a prominent portion of Arab-Palestinian NGOs, engage primarily in such grassroots activities as assistance to raped and battered women and preventing women from being murdered due to "family honor."[51] Litigation, on the other hand, is often considered to be superfluous and costly, with no tangible sociopolitical benefits for the community. Even following the *Kaadan* affair,[52] in which the Supreme Court ruled that discrimination against Israeli Arab citizens in matters of land allocation is prohibited, many Arab-Palestinian attorneys continue to perceive state law as Jewish and Zionist.[53]

Some Arab-Palestinian grassroots organizations emphasize the dilemma of nationality because litigation in Israeli (Jewish) courts legitimize the Jewish-Zionist state whatever the consequences of a specific legal case. In one instance, the chair of an Israeli-Palestinian NGO told me that he had refused to address the Israeli Supreme Court using its formal name, the High Court of Justice, because "it has never done justice to the minority."

Other Arab-Palestinian grassroots organizations do not completely oppose litigation in state courts; rather, they view it as secondary to their grassroots activities. As Mr. Hassan Agbariea phrased it in response to my query, "we do not deal with litigation, but if necessary we use this avenue."[54] Arab-Palestinian MKs are not inclined to use litigation in Israeli (Jewish) courts, unless it might add value to their political image in the community.[55] While among Jewish MKs frequent appeals

51. *Al Fanar* 1992.

52. HCJ 6698/95 *Kaadan v. Israel,* August 3, 2000, Dinim 57, 573.

53. See debates at the Hebrew University, Jerusalem, Minerva Center for Human Rights, April, 2000; Debates in the Association of Public Law, Jerusalem, June 2000.

54. Hassan Agbariea, telephone interview by author, August 12, 1998.

55. See, for example, HCJ 983/97 *Bishara v. Minister of Internal Security* (unpublished).

to the HCJ have been used in order to create an image of liberalism, Arab-Palestinian MKs could be considered in their own community as too conservative and cooperative with the Jewish state. Moreover, dismissals of their appeals might be portrayed as further delegitimizing their communal identities and interests.

Adalah has articulated communal expectations so as to benefit from the emerging liberal rhetoric of the judiciary, particularly the Supreme Court. The polarized and fragmented Knesset, with significant Jewish Orthodox effects, is not considered to be conducive to equality, while judicial professionalism is perceived as less discriminatory. Adalah is composed of mainly Arab-Palestinian lawyers with a complementary education at American universities. They have been academically socialized in a more open Israeli society under the liberal transnational discourse of civil and human rights. Hence, they view state law not only as a set of coercive restrictions but as a potentially dynamic entity that can generate some rights and in turn may produce opportunities for the minority.

Adalah is similar to Western policy-oriented NGOs that have mobilized state law by acting within the structure of the state's political power (Epp 1998; McCann 1994). These organizations are not composed of revolutionaries but of pragmatists. They accept the prevailing legal terminological environment and utilize it for their own needs and interests. As Adalah's chairperson, Hassan Jabareen, explained: "The Israeli Supreme Court has already recognized the existence of women and reformist Jews as groups under Israeli law. There is no such acknowledgement of Israeli Arabs. We have tried to change the Court's language."[56] It should be underscored that the *Kaadan* ruling, described earlier, does not recognize Arab-Palestinians as a community either. It articulates a liberal perspective of civil rights within the Jewish state and recognizes Arabs in Israel as individuals but not as a distinct community in the legal sense.

In its appeals to the HCJ, Adalah has neither addressed the requirement to reform the structure of the political regime nor directly criticized national narratives of Judaism and Zionism. Its appeals have used conventional legal causes, such as discrimination against citizens, within the rules of the political game. The organization aspires

56. Jabareen, interview.

to narrow the space between Israeli Jews and Arab-Palestinians by using state law as a social language. From that perspective Adalah, which is affiliated politically with both the communitarian and state-oriented critical approaches within the minority, reflects a fashionable cultural trend of litigation, articulating a presumption that cause lawyers can be effective political agents where politicians have failed. Adalah's appeals have included demands for road signs in Arabic, as an additional formal language, for public transportation for Arab students from their villages to their schools, for state assistance to Arab students with learning difficulties in accordance with the formal criteria implemented regarding Jewish students, and for proportional budget allocations.

In order to claim equality in the implementation of public policy, Adalah utilizes formal state law, liberal arguments, and previous commitments made by the political establishment. State law has been mobilized to restrict bureaucratic arbitrariness in its dealings with the minority. By using the same language of equality and discrimination that Jewish litigants do, Adalah as the minority's NGO can accommodate formal state law and construct it as equally applicable to the minority. Subsequent to Iris Young's distinction between challenging state power and challenging its allocation of resources (1990), Adalah does not intend to restructure state power, as might be expected given its political affiliations with national Israeli-Palestinian groups. Rather, due to its actions in state law, it challenges policy, not the metanarratives that allow discriminatory allocations of public resources.

Such legal action has been used in appeals concerning unrecognized Arab-Palestinian villages. Several thousand community members reside in settlements that have not been formally recognized by the state. Adalah prefers to deal with this urgent issue by appealing to the HCJ, demanding basic medical assistance for newborns and their mothers. In another appeal, the Ministry of the Interior was asked to register an unrecognized village as a formal address in the appellant's identification papers. Israeli public policy concerning unrecognized villages reflects the ethnocratic fundamentals of the state, its tendency to decivilized non-Jews residing in Israel, and its conception of their rights to land use (within the Green Line) as a significant challenge to the state.

Prior to 2001, Adalah preferred to approach this problem by appealing for very distinct and limited legal remedies while neglecting issues

of grand policy such as the "right of return" and Israeli land laws. It argued instead for equality between citizens in the allocation of the collective goods required for basic human needs. The requested legal remedies were narrowly defined so as to isolate the justices from state narration, institutional pressures, and the public majoritarian mood. As Hassan Jabareen explained to me, "we are using legal terminology in such a way that the justice will feel that he or she may be seen as politically incorrect [if the appeal is dismissed]."[57]

This mode of legal action has been effective to some extent. In 1997–2000, Adalah submitted twenty-five appeals to the Supreme Court. Its rate of success has been 50 percent if all legal cases, including pending appeals, are taken into account and 67 percent if only the eighteen legal cases that have been decided are considered. Yet in most legal cases (75 percent of the successful appeals approved by the Court) the final legal result was based on out of court settlements.[58] In these settlements, the organization received some of its legal reme-

57. Ibid.

58. The legal cases are the following: HCJ 6672/2000 *Jazi Abu-Kaaf v. Minister of the Interior* (pending); HCJ 6099/2000 *Committee of Arab Mayors v. Ministry of the Interior* (approved after an out of court settlement); HCJ 5221/2000 *Dahala v. Regional Municipality of Ramat Ha'Negev* (approved after an out of court settlement); HCJ 1964/2000 *Mahmoud Mahameed v. IDF* (dismissed); HCJ 727/2000 *Committee of Arab Mayors v. Prime Minister* (pending); HCJ 1399/2000 *Ittijah v. Ministry of Religions* (approved after an out of court settlement); H.C. 1631/2000 *Kaman Sawaed v. Magistrates' Court* (pending); HCJ 989/99 *Adalah v. Registrar of Political Parties* (approved after an out of court settlement); HCJ 8534/99 *Parents Committee in Segev Shalom v. Government Appointed Council in Segev Shalom* (approved after an out of court settlement); HCJ 1113/99 *Adalah v. Minister of Religions* (upheld); HCJ 5838/99 *Regional Council of the Unrecognized Villages in the Negev v. Ministry of Labor* (dismissed); HCJ 4112/99 *Adalah v. Municipality of Tel-Aviv-Jaffa* (pending); HCJ 5734/99 *Omar Imbaraki v. Mayor of Nazra'ah* (dismissed); HCJ 7960/99 *Sawahed v. Regional Council of Misgav* (pending); HCJ 240/98 *Adalah v. Minister of Religions* (dismissed); HCJ 2422/98 *Adalah v. Ministry of Labor* (approved after an out of court settlement); HCJ 1/99 *Wakim v. Israeli Police* (approved after an out of court settlement); HCJ 5913/98 *Wakim v. Israeli Police* (approved after an out of court settlement); HCJ 2773/98 *High Follow-Up Committee on Arab Affairs v. Prime Minister* (pending); HCJ 1276/97 *Adalah v. Minister of Religions and Minister of Finance* (dismissed); HCJ 4438/97 *Adalah v. Public Works Department* (approved after an out of court settlement); HCJ 3607/97 *Sawahed v. Minister of the Interior* (upheld); HCJ 5562/97 *Zoabi v. Municipality of Afula* (upheld); HCJ 7115/97 *Adalah v. Ministry of Health* (pending); HCJ 2814/97 *Follow-Up Committee on Arab Education v. Minister of Education* (dismissed).

dies, while state organs (the Court, government, the public bureaucracy, the military, the police, and the legislature) did not see those arrangements as substantial alterations in the status quo. For all actors, it has been a rather utilitarian way to preserve legitimacy. From this perspective, litigation is not necessarily about winning and losing but about symbols of communal action. Let me elaborate.

For the state, out of court settlements, framed within the legal terminological environment, are better options than granting complete, formal equality through acknowledgment of community rights. Dotan and Hofnung (1998) and Dotan (1999) explored several hundred legal cases of out of court settlements in other matters in which the Supreme Court preferred some narrow compromises, with no or minimal publicity, over salient and sweeping rulings. Thus, the Court can render some limited legal remedies, according to certain expectations and compliance with legal texts, without endangering the hegemonic political culture.

For Adalah, out of court settlements have been a symbolic success, useful for its organizational maintenance within the community. As neo-institutional studies have shown, organizations, particularly professional organizations of cause lawyers, have constructed law as their symbolic capital in order to survive and maintain themselves (Edelman, Uggen, and Erlanger 1999; Sarat and Scheingold 1998). Adalah aspires to exhibit some degree of legal success in its adversarial strivings. Legal success within spheres of state law has assisted Adalah in framing itself as an effective communal organization at the intersection of the sociopolitical and legal fields. Additionally, these out of court compromises have created concrete (though very limited) public benefits, such as the incremental process of formally framing more equality and possible grounds for the good reputation of Adalah in the hectic spheres of human rights activists and competitive Israeli NGOs.

Litigation for community purposes is a type of political participation. While private lawyers may conceive of litigation solely as a sword intended to defeat the adversary, communities and their attorneys conceive of public litigation as a part of their political struggles (Sarat and Scheingold 1998), as in the instance of Adalah. Its attorneys manifest national Palestinian and communitarian aspirations (Esmeir 1999; Jabareen 1999; Zreik 1999). This collective identity of communal Palestinian nationalism is a dominant type of collective identity among

Adalah male and female cause lawyers. This identity is a source of empowerment and a motive for political participation.

Litigation is seen as one way to impose collective pressures on the state, as other extraparliamentary means of political participation have done in Israel and a diversity of other regimes (see Barnes, Kaase, and Allerbeck 1979; and Epp 1998). The organizational aim of litigation is to frame a more responsive legal terminological environment in the spheres of state law and to further empower communal litigation by the minority's cause lawyers as an avenue of political struggles and reforms. As table 6 demonstrated, Adalah can mobilize a significant portion of community members who believe in the possible effectiveness of legal actions in state law.

Yet legal effectiveness illuminates only one facet of minority litigation. It has another facet as well. Communal litigation may be an expression of political dissent within the domain of state law. Adalah's lawyers do not urge resistance but they do mobilize and support minority dissent. They distinguish between their public mission, on the one hand, and the job of private attorneys, either Jews or Arab-Palestinians, on the other. The latter often decide to submit a legal case to court, or withdraw it from court, due to profit calculations in civil matters and according to the prospects of winning and the costs of losing in public and criminal matters. Minority attorneys operate more as cause lawyers who have political commitments to their community. Minority litigation serves as a means of informing community members about their predicament. Hence, such litigation can raise communal political consciousness. If a private lawyer loses a legal case, he or she may lose a client. The minority's litigious NGOs, on the other hand, serve other purposes. If they lose a legal case, it can be used to inform their community about its collective problems, signal its symbolic location in state spheres, and mobilize minority members to oppose the majority.

In practice, litigation has had only a minor effect on the mobilization of Arab-Palestinians. None of Adalah's appeals has resulted in mobilization of parliamentary and extraparliamentary forces. Adalah's appeals have not bolstered the community's political struggles against the establishment, nor have they fostered large internal reforms inside the community. Dr. Amal Jamal, an expert on Palestinian discourse, suggests that its litigation has neither affected nor shifted the discourse

of Israeli Arab-Palestinians.[59] A feminist considers Adalah to be a conservative body that opposes reforms in the Sharia courts in order to maintain a patriarchic status quo.[60]

Adalah's effectiveness in gaining limited legal remedies notwithstanding, its ability to generate sociopolitical change is very doubtful. This is not only due to the gap between formal legal gains and praxis. Rather, it is a predicament of the minority's litigious NGOs in principle. Operating in hostile state spheres, challenging an intolerant hegemonic political culture, and attracting no significant media coverage have restrained the communal legal ability to induce social change. Moreover, litigation within the boundaries of state law has particularized the minority's claims as isolated legal cases at the expense of communal rights and broader claims against public policy and the political regime. Litigation has converted major policy issues concerning the political regime to single instances while reducing deficiencies of state power to the illusion of unintentional political mistakes. Communal litigation has been neither a good avenue for policy reform nor an effective means to change state power and national cultural structures.

Distinct legal achievements in "small" legal cases may incrementally improve the minority's situation in specific localities. However, the costs are high—the minority legitimizes state law while using it as a language that may, incrementally and in limited ways, narrow the space between the majority and the minority to some degree. And it may not improve the situation, despite some legal achievements, due to the limited ability of litigation to mobilize collective dissent against the state. Adalah's experience prior to 2001 was primarily associated with the latter possibility.

Summary

This chapter has primarily explored the ways in which the minority has located, reacted to, and acted toward law. Instead of looking at one type of legal practice (e.g., litigation), it has delved into a compound

59. Jamal, interview.
60. Hassan, interview.

communal cultural fabric in a political context. This allowed me to analyze a field of identities and practices and to see one type of legal practice (e.g., violence as collective resistance) in a broad context. The minority has a distinct, collective, legal culture partly functioning as a counterhegemonic force against fantasies of liberalism and global culture. It is composed of its own legal consciousness, identities, and practices in a context of social existence, state ideology, state law, legal ideology, and transnational liberalism.

Similarities exist between the legal culture of the Arab-Palestinian elite and the legal culture of the Arab-Palestinian public. Expectations regarding equality in social, property, and political rights prevail among the public and the elite alike. However, the elite has been more prone to rhetorically criticize state law and even to challenge its legitimacy. The elite, which includes Arab-Palestinian lawyers, is prone to articulate ideological opposition and emphasize Palestinian nationality as a source of collective dissent. On the contrary, the Arab-Palestinian public is less ideological, less knowledgeable about state law, and more concerned with the social and property issues of daily life, such as job opportunities and housing. It largely supports legal action for that purpose.

Various communal identities explored in this chapter articulate public attitudes toward state law, from total negation to full acceptance. Paradoxically, as my fieldwork shows, state law and legal ideology both affect the community's legal culture by shaping identities and legal consciousness. State law forms communal identities through the formalization of religious identities, land expropriation, discrimination, and suppression, which has resulted in the minority's collective dissent and the reemergence of Palestinian nationalism and religious fundamentalism. Legal consciousness is shaped through the duality of democratic institutional accessibility, however limited, and supervision of these state institutions over the minority. Liberalism as a confined ethos in state law enables the state to particularize the community by atomizing its presence in jurisprudence and politics. Liberalism also encourages the litigation often utilized by Arab-Palestinian lawyers educated in Israel and the United States. Communal litigation has had limited achievements and problematic ramifications.

The sociopolitical effectiveness of litigation is extremely doubtful, and its costs are controversial among minority members. In daily life,

the minority has to adjust itself to discriminatory norms and to expect their gradual alteration. The willingness and ability of the Arab-Palestinian political elite to mobilize state law in order to change the state have been limited. Hence, this task has been taken on by grassroots and political organizations, which have used state law as a shield and a sword. Yet litigation, with problematic results that legitimize current state law and neglect other political avenues of collective struggle, may unintentionally create despair and violence, as products of unfulfilled collective expectations, and transform conventional political modes of participation into a violent collective opposition.

Only a few months after the liberal *Kaadan* ruling was accepted with celebrations among Jewish liberals, Arab-Palestinians, unimpressed by that ruling, violently demonstrated in collective resistance against the Jewish state. Although liberal jurisprudence may result in isolated humanistic rulings, it is neither capable of nor aspires to accommodate significant communal identities. A critical communitarian approach that underscores nonruling communities is important in its ability to illuminate law, culture, and politics from an alternative perspective that does not originate in the state's concept of legality.

This has been my critical communitarian story about Arab-Palestinians who reside in Israel as a multifarious and compound community of identities and practices toward law. That story could not have been told from an individual or state perspective alone. The first would have generated an illusion of free individuals who are autonomous from their communal goods, virtues, deficiencies, and characteristics. The latter would have formalized Arab-Palestinians as a religious entity grounded in state law. Both perspectives are becoming very partial and therefore erroneous if Arab-Palestinians are being investigated as they should and for what they have constituted—a nonruling community with its own internal conflicts, boundaries, spaces, power structures, and practices of identity.

The experience of Israeli Arab-Palestinians demonstrates that even direct government efforts to impose one system of law (state law) on one communal identity formalized in state legality (a religious identity) will fail. However, the relations between the state and nonruling communities are not necessarily confrontational. Nonruling communities and minorities in particular are weaker than the state, and they may conceive of state law as instrumental for attaining limited aims.

The state may conceive of one communal identity as desirable for its interests while other identities may be seen as harmful. This cycle of interaction, based on the weakness of nonruling, deprived communities and on categorized inclusion for purposes of exclusion in state law and policies may help state law to obtain obedience in the short run and yet to incite collective violent resistance in the long run. But it also may persist for generations and generations, making segmentation and deprivation by, vis-à-vis, and in state law an open-ended, tragic realm of politics, law, and society.

Chapter 4

Feminism, Community, and Law

Feminist Communitarianism: Why Communities Should Matter amid "Universalism"

My analysis of the legal culture of feminists entails the need for feminist communitarianism. Feminist communitarianism is not an oxymoron. Feminists and communitarians have ascribed significance to social reciprocity and criticize the private-public dichotomy while underscoring a contextually embedded self (Frazer and Lacey 1993). Yet, nonfeminist communitarians have neglected gender equality for the same reasons that many other (male) political theorists have downplayed the predicament of women, as a reflection of male domination in human epistemology and philosophy (Grimshaw 1986; Okin 1989, 1990). The importance that communitarians have attributed to communal public good has not by itself rendered a nonfeminist conception of social relations, culture, law, and politics.

Unfortunately, certain communities have deprived women of their basic right to equality. This has been a severe problem in some communities but certainly not in all communities. It is also a severe problem in any nonegalitarian human setting. This deprivation is not a necessary conceptual defect of communitarianism. Most communitarians have not justified depriving individuals of their rights; on the contrary, they yearn to empower individuals, men and women alike, through legitimization and legalization of their communal ties (Etzioni 1991, 1995a, 1995b; Gutmann 1992, 1994; Putnam 2000; Taylor 1994). This necessitates, inter alia, more consciousness-raising among women and more communication among women who have experienced a similar predicament and are aware of their conjunct sphere.

Okin's criticism of MacIntyre notwithstanding (Okin 1989), a community may become a friendly sphere of public communication. It may

spur mutual help among women in a space that makes such communication among deprived women the only means of challenging injustice, subordination, sexual colonization, and violence (Abu-Lughod 1995; Ferguson 1995; Freedman 1995; Grimshaw 1986; Ruddick 1989; West 1998). We shall see this in the following analysis. Communities may also be sources of collective resistance in order to attain social rights and deconstruct male domination (Bart 1995; Freedman 1995; E. Honig 1995). There is neither solid empirical evidence nor a theoretical basis for the claim that communities necessarily situate individuals in a nonnegotiating, nonempowering, and deradicalizing space.

Weiss and Friedman have shown in their survey of feminist communities how women can empower each other, even though feminist communities are not necessarily harmonious (1995). Conceiving communities as necessarily coercive spaces is highly myopic. Within feminist communities, different interactive voices exist as to the scope and meaning of their boundaries. Do they include only heterosexual women or also lesbians; should they include only one ethnicity or a multiplicity of ethnic identities; and so on. Similarly, which feminist issues should be components of grassroots consciousness-raising? Furthermore, debate exists as to whether and how women should prioritize their ethnic, social class, and other cultural identities in order to constitute feminist communities that narrate a common constitutive sisterhood (Ferguson 1995). As this chapter and the next will demonstrate, there is a diversity of communitarian solutions in theory and practice to the predicament of women even within coercive communities.

Feminist noncommunitarian thinkers have regarded communities in skewed and hyperskeptical ways. Marxist feminism has presumed that communities are necessarily patriarchal and constitute structures of domination (Hartsock 1983). This may be true in some communities, for example, religious fundamentalist communities, but such an overwhelming essentialist claim ignores the fact that male domination and violence exist in a diversity of social structures. Hence, Hartsock's Marxist criticism of male domination addresses some instances in some communities, including male domination within the proletariat (E. Honig 1995; Pateman 1989).

Marxist feminism, however, cannot constitute theoretical criticism of communitarianism since it has downplayed the issue of which

purpose a community generates and how communal practices may assist women to overcome joint problems. There is no necessary contradiction within communitarianism between moral unity and gender equality. Communitarians have different conceptions of which "good life" a community should advance (Barber 1984; MacIntyre 1984, 1988; Sandel 1982, 1996; Unger 1976; Walzer 1983). A careful probing into feminist communities will show that, as in the case of national minorities (see chap. 3), nonruling communities may generate autonomy within their spaces. Furthermore, examining feminist communities as heterogeneous and multifaceted settings should prevent us from reducing feminist experiences to essentialist simplicities.

Communitarians have been criticized for encouraging tradition at the expense of women's liberty (Okin 1989). I share Okin's criticism of MacIntyre's tendency to favor some ancient traditions as bases of justice. But opposing the content of specific traditions does not substantiate a theoretical criticism of communitarianism. It entails neither traditionalism (Unger 1976) nor an essentialist antitraditionalist stance, as Okin would like a theory of rights to do. In her all-encompassing criticism of tradition, Okin is in fact opposing cultural relativism outside the middle way of individual liberalism. Ironically, the same philosophy of individual liberalism that, according to Okin's study, has failed to resolve the feminine predicament is her last source of (imagined) solutions.

Not all families are patriarchal, and tradition is not necessarily the cause of women's deprivation in the family. Comparative studies have shown that women have been severely domesticated in nontraditional families, while in traditional societies women may join the general labor market (Semyonov, Lewin-Epstein, and Brahm 1999). Furthermore, violence against women is not necessarily contingent on tradition. As we shall see, violence against women and children is a general phenomenon, and tradition may be a cause of communal resistance against violence. Minow and Shanley (1997) have argued that communitarian-based theories may ignore women's rights. Their criticism applies to instances in which the definition of the communal good contradicts feminine liberty.

But the possibility that tradition will confine women's rights more than any other type of patriarchy is debatable. Furthermore, communitarianism encourages reciprocity and friendship and not (necessarily)

coercion through tradition. The empowerment of women to enjoy personal rights is contingent on political culture and the values held in the family. Minow and Shanley have in fact framed a neocommunitarian approach while constructing an argument about relational rights that should be practiced through interaction in the family as a subcommunity in which each member has a mutual and equal responsibility (1997). Without conceiving of a family as a subcommunity what prevents relational interactions from maintaining preexisting male domination?[1] Further, without the communal morality of a family, what prevents its collapse and a sharp increase in male violence and divorce rates, as has happened in most Western countries and Israel? Communitarians such as Selznick have conceived of nonruling communities as frameworks of solidarity, equality, and sharing. These values should challenge power and make nonruling communities and subcommunities, families included, less violent, better preserved, and more just (Selznick 1992).

I share Okin's argument that justice should be a virtue of the family (Okin 1989). But, contrary to her critique, communitarianism can and should embrace such a notion since mutual affection is contingent on fair and equal sharing between women and men. Hence, through cultivating values of communal reciprocity that transcend individual utilitarianism, communitarianism may empower women, promote justice, and prevent male violence, as it should.

The same can be said when criticizing the liberal defense against communitarianism. As Nussbaum (1999) has elaborated, liberalism is not necessarily about egoism. Yet, the difficulties of liberalism in challenging human misery in collectivities, such as women, may be significantly resolved or at least significantly mitigated through communitarian theory and practice (Weiss and Friedman 1995). Nussbaum, who has developed a neo-Rawlsian approach to justice, finds that despite her efforts to endorse the human search for individual capabilities and free choices, women need the assistance of other women if overcoming their personal predicament.

Nussbaum narrates her argument through the partly told life story of Metha Bai, a young Indian widow with two young children. Her

1. For empirical studies that examine male domination within families according to economic, symbolic, and social criteria, see Okin 1989.

caste prohibits women from working outside the home. Metha and her children are dependent on her aging father. Facing the danger of starvation, she and her children may die. Nussbaum perceives her as the victim of a traditionalist community that ignores the universal dictum of gender equality and the right of women to work outside the household. Nussbaum would like to provide Metha Bai with capabilities and choices (1999, 29–54). These can be ingrained, she presumes, in universal norms detached from the cultural relativism of tradition.

Here Nussbaum fails. First, she imagines that a desirable norm (women are as entitled as men to work where they like) has become a universal norm while the figures in her book show the opposite. Second, she views "choice" as a given and objectified notion, while people with the same set of norms are making various choices with different meanings attributed to the same choice. Third, she presumes that universalism is in fact being practiced in human life. Fourth, she presumes that communitarianism necessarily sanctifies tradition at the expense of gender equality, yet she learns from Metha's story the opposite. In 1994, Metha went to a widows' conference where she applied for and received a loan. She returned to her family (Nussbaum 1999, 53–54). Nussbaum transcends this story to conclude that communities of women do matter and that communities of "affiliation and empowerment" are vital to gender equality (1999, 54).

Can universalism suggest a transnational set of self-implemented rights-based principles of gender equality? As I shall demonstrate in reference to comparative empirical studies, male domination and discrimination against women have been evident in cross-national analysis. Furthermore, universalism aims to transcend concrete local definitions of a moral good, and it aims to ignore differences in identities and cultures (Benhabib and Cornell 1994). Since identities are constituted through local practices, and due to their effects, in turn, on the generation of practices, universalism evades women's local experiences and their local legal practices. Within this absence, nonruling communities may constitute and articulate legal practices in and toward state law. These practices substantiate and utilize general egalitarian assertions in the context of communal good. Hence, nonruling communities enable individuals with concrete identities to utilize universalism for their benefit.

I argue that if feminists are taken as a community, communitarianism under the critical analysis that I suggest is the most appropriate theory for comprehending communal life and it serves the aim of gender equality and justice. The dilemma that this chapter grapples with is whether a communal legal culture of feminists exists and what this means for the future of feminist struggles.

This chapter argues that communal legal culture has been constituted among feminists through their identity practices, legal consciousness, gender identities, state law, state ideology, legal ideology, and social existence. In this context, I argue, liberal feminism has had problematic and even damaging effects on feminism, despite some achievements. While liberal feminists like Okin trust liberal legalism as a force that may generate gender-free societies, my study raises severe doubts about such aspirations. Since my approach is critical communitarian, this book suggests a comparison of different groups of feminists that have interacted among themselves based on a common moral ground. I show that the radical feminist approach may better empower a feminist community facing state domination, male legal ideology, violence, and transnational liberalism in law.

Since a feminist community may be characterized by conflicts and heterogeneity, postmodern fears that communities may hinder identity politics (Young 1995) are focused on women's experiences in some communities but cannot constitute a valid criticism of communitarianism in principle. This radical criticism of communitarianism from a nonessentialist, hyperindividualistic point of view returns us to the concept of mutual communication that is open to unassimilated otherness (Young 1995). We shall see that feminist communities may be a space in which different individuals and groups are practicing legal culture in order to change the allocation of goods and power in multifaceted ways.

Gender discrimination is a global phenomenon that is widespread in many democracies despite routine egalitarian and liberal assertions in political regimes about gender equality (Crompton and Mann 1986; Hall 1993). Women have been subject to men's political and socioeconomic control (Crompton and Mann 1986; Rossi 1985; Weisberg 1993). Men have distanced women from centers of political power, and they have formed dominant political cultures (Brown 1995; Butler 1990; Fraser 1995; MacKinnon and Dworkin 1997). Empirical cross-national stud-

ies have shown that with few exceptions women are not part of the ruling elite and are underrepresented in public power foci (Epstein and Coser 1981; Siaroff 2000). Liberal and critical thinkers have contended that in practice women have always been discriminated against in democracies. While liberal thinkers and liberal feminists would describe this as a problem of discrimination in the allocation of public goods (Barry 1995), critical thinkers and radical feminists would describe it as a matter of oppression through power (Young 1990).

Legal cultures have articulated and constituted submission to, reformation in, separation from, and resistance to that reality of men-controlled political settings in modern democracies. This reality has not been propitious for women's expression of their distinct cultural voices (Gilligan 1982). Men have constructed state law because, as we discussed in chapters 1 and 2, law is a major project of states. State law aspires to control a variety of aspects of human life from naming us through regulation to the construction of legal relations and the formation of public policies (Frug 1998; Kamir 2001; MacKinnon 1987). Feminists believe, as we shall see, that jurisprudence should be humanistic and not masculine (West 1998). From Gilligan's concept of a different cultural voice and legal inclusion to MacKinnon's concept of gender subordination and legal deconstruction, all feminists believe that gender equality should prevail.

Yet, as we shall see, the variances among feminists have been significant and have been associated with contentions concerning the state, law, equality, identities, and strategies to form and apply public policy of gender equality. The notion of "woman" is itself constructed, reflected, and generated through a feminine, multifaceted, social existence; identities; legal consciousness; and practices of identity within a communal context. The lack of one fixed essentialist and objective notion of woman spurs a diversity of legal practices. While postmodern feminism has reduced identities to individualized experiences, I find that a critical communitarian perspective is important for understanding feminist culture (Crenshaw 1995; Cuomo 1998). It includes the tendency of postmodern feminism to grasp the vitality of identity's construction/deconstruction through life experiences (Brown 1995).

Some distinct characteristics notwithstanding, Israel has experienced many of these aspects. Thus, women's presence in government, the legislature, the Supreme Court, and public administration has

always been typified by underrepresentation (Azmon 1990; Bogoch and Don-Yechiya 1999; Herzog 1994a, 1994b, 1999).

This chapter is devoted to examining legal culture among Israeli feminists from a critical communitarian perspective. The next section demystifies myths of egalitarian universalism and suggests a critical analysis of gender discrimination against women in state law. Next I deal with two facets of the feminist community. The third section explores radical feminist consciousness, identities, and practices, particularly the mobilization of state law and grassroots activities. The fourth section examines the dynamics of state law, violence and equality, and legal mobilization in the activities of liberal feminist organizations, which have dominated the feminist community. The conclusion discusses feminists as a community under state domination and transnational liberalism.

Women and Men: Equality or a Salad Bowl?

Knowledge in the modern world is an asset that may breed equality. There has been no significant formal gap between years of education among men and women in Israel. It is possible, however, to find differences in educational orientations. Men have been inclined to make up a greater percentage of students in technological fields, while in the liberal arts women have been a majority. Yet in the 1990s the numbers of men and women with academic educations were roughly equal.[2] More women than men earned first (undergraduate) degrees (51.3 percent). The figures concerning graduate studies were different. Women made up only 41.3 percent of Israelis who completed graduate programs. Furthermore, most women aged thirty to forty years were engaged in household work. This reflected women's displacement from public life to concentrate solely upon pregnancy and motherhood (Izraeli and Gaier 2000; Semyonov and Kraus 1993; Stier and Lewin-Epstein 1999).[3] Thus, men outnumbered women by a rate of 340 percent at managerial levels.[4]

2. *Israel's Statistical Yearbook,* no. 45 (1994), table 22.3, p. 639. This trend has not changed since.

3. Ibid., table 22.3, p. 700.

4. Ibid., table 12.18, p. 390.

The subservient status of women in Israel has been maintained through two primary cultural elements: national security and Jewish Orthodoxy. Contrary to the situation with Israeli Arab-Palestinian women, most Israeli Jewish women have participated in the generation of the ethos of national security and the ethnocratic state, which is significantly based on Jewish Orthodox symbols. These narratives have had effects on women's legal practices. All Israeli women (especially Arab-Palestinians) are secondary to men in their ability to access public power foci. Yet, as Kimberlé Crenshaw has pointed out, the intersectional aspect of gender discrimination has been crucial (1995). Arab-Palestinian women have suffered twice—first due to their nationality and second due to their gender. The same narratives that discriminate against Arab-Palestinian women in comparison with their Jewish counterparts also generate discrimination against Jewish women in comparison with Jewish men (Semyonov and Lewin-Epstein 1993; Shavit 1992).

Jewish Israeli society has always been characterized by a military discourse that emphasizes the differing roles that men and women play. Women in the armed forces have primarily been used in administrative capacities, while in the civilian sphere they have largely been viewed in the context of a one-dimensional role, as mothers of future soldiers. The ethos of militarism has framed, in practice, gender stratification by asserting that inherent biological differences between men and women "objectively" necessitate gender differentiation and the superiority of men as military fighters (Azmon 1990; Barzilai 1992; Herzog 1994a, 1998, 1999; Shohat 1993).

The legal embodiment of compulsory military service has further promoted gender stratification and discrimination against women. The duration (regular and reserve) of military service, its conditions, the professional possibilities available to women, and the conditions of advancement to senior military ranks have lowered women to secondary status in the military. Men serve for longer periods, many professional courses are aimed only at them, and women's promotion in military ranks has always been inferior to that of men. The military is a male-dominated organization in which women must adjust as subordinates.

The male-dominated military has epitomized and incited a collective security mentality that underscores the supremacy of national

security over social issues and hampers public debates over gender discrimination and equality (Bar-Tal 1991; Bar-Tal and Antebi 1992; Barzilai 1996; Ventura and Shamir 1990). Hence, women have found it arduous to publicly protest against their deprived status (Hermann 1995; Herzog 1998, 1999). Public remonstrances against gender inequality have often been viewed as opposed to the perceived need for "unity" in the face of grave national security challenges.

Orthodox Judaism has also contributed to discrimination against women. The Jewish Halachic tradition has largely barred women from public life (Boyarin 1997). In the Orthodox hermeneutics of Judaism, women are meant to take part in family-related matters and to be marginalized in public life (Boyarin 1997). On the other hand, the HCJ ruled in *Shakdiel* (1987) that women could be elected and appointed to local religious councils.[5] In *Poraz*, which was ruled on later in the same year, it added that women could also serve in municipal bodies involved in the election of municipal rabbis.[6] Thus, the Court was motivated by secular values and ruled against the positions of the chief rabbinate and the Orthodox establishment.

In *Shakdiel* and *Poraz*, liberal interpretations of state law were preferred to the political arrangements of the Orthodox and secular status quo. Accordingly, the Court advocated equality in opportunities for women to serve in public bodies that render religious services. The reception of American liberal values increased in the 1990s and propelled legal assertions of the importance of gender equality. In 1996, the Law of Equal Salary to Female and Male Employees formally abolished gender discrimination in salaries and benefits for the same work and guaranteed pay equity. Further, it constituted an employer's duty to provide the employee with requested information concerning jobs, salaries, and benefits in his or her workplace. It established that in cases in which an unequal salary for an equal job has been shown the employer must carry the legal burden to disclaim the possibility of gender discrimination.

Enactment of laws against gender discrimination has been a major component of feminists' efforts to create equality. Sexual harassment is another issue in this context.

5. HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, P.D. 42 (2) 221.
6. HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa*, P.D. 42 (2) 309.

The Knesset enacted the Prevention of Sexual Harassment Law (SHL) in 1998. Although this legislation was initiated by a coalition of feminists, it does not expressly mention women. Like other liberal laws, the SHL refers to women and men according to the principle of sameness. Equality in public policy has been justified through the "sameness" of women and men. Hence, the particular problems of women are not expressly referred to in the SHL. Liberal feminists, as we shall see, have not emphasized the potential or existence of a separate feminist consciousness and its distinct manifestations. The SHL was intended to hinder the sexual annoyance of women by defining *harassment* as a criminal offense and a civil wrong. However, the sameness principle prevented the specific mention of women (for a similar criticism, see Brown 1995; and Butler 1990). The SHL covers a variety of prohibited acts from repeated remarks about one's sexuality to sexual coercion and violence against men and women alike. Though blind to sexual harassment chiefly directed against women, clause 7B imposed on employers of more than twenty-five workers the duty to publish a policy that forbids sexual harassment.

Additionally, legislation entrenched opportunities for women in the public sector and constructed a formal space for appointments of women to leading public positions. In 1993, clause 18A of the Governmental Companies Law, 1975 (GCL), was enacted. It ordered ministers to nominate as many "as possible" members of an "underrepresented sex" to the directorates of governmental companies in such a way that they would "achieve the proper representation" of members—either men or women—who are underrepresented in a governmental company. In 1995, that precept was embodied in the Municipalities Order, which constructed a formal space for better representation of both sexes. A more progressive enactment was stipulated in the State Service Law (Nominations) (SSL). The officer of the state service has formally been authorized to initiate a policy of affirmative action in the state bureaucracy. Affirmative action has been expanded to public companies through clause 96B in the Company Order. Here, the law has been more far reaching. Public companies have been ordered to have at least one public representative from the opposite sex in their directorates, if all the others are from the same sex. None of these laws mention women, and yet feminist sociopolitical forces initiated them, as we shall see, and they have been intended to improve women's status.

Affirmative action is a public policy that aims to remedy deprivation through systematic preference given to underprivileged citizens while taking into account their communal membership. This public policy is utilized at the expense of citizens with the same relevant merits who belong to more privileged or less deprived communities (for a similar definition, see Jacobs 1998, 726). Similar to the law of some Western democracies, Israeli state law in the 1990s incrementally unmasked male-dominated stratification. Nonetheless, women's ability to enjoy legal acknowledgment of their deprived status has been confined within the structure of political culture and regime. Let me explain this by turning to history.

In the 1950s, state law conceived of Jewish nationality as a melting pot (Lahav 1993a). Gender equality was perceived in state law as a required ethos for an egalitarian society and a self-propelled reality within the homogeneous Jewish nationality. The Women's Rights Equality Law, 1951, was legislated during the first Knesset. It has since become a prominent symbol of gender equality. A circumspect analysis of parliamentary protocols detects the sociopolitical forces that generated this law and shows that Jewish national homogeneity was favored over feminist interests to underscore a distinct feminine consciousness.

All the female MKs who participated in these parliamentary deliberations demanded an overall reform of the deprived status of women, including particularly the reform of family law. However, they demanded reform in the status of Jewish Israeli women while justifying applicability of the Sharia to Muslim women.[7] They articulated the state's Zionist perception and advocated reforms in the law since Jewish women had actively participated in Zionist struggles and the 1948 war (see also Lahav 1993a).

MK Rachel Kagan of the Women Party (Wizo), who submitted the bill, proclaimed that "the woman in Israel has patiently waited. . . . She has assumed all the duties imposed on men, and she has done so due to her goodwill and in accordance with the laws of our state."[8] Then she asserted that her proposal was as important as the Law of

7. *Protocols of the Knesset,* vols. 8–9 (March 27, 1951), 1455–59; (June 26–27, 1951), 2087–2108; (July 17, 1951), 2165–92.

8. Ibid., 1455.

Return: "both laws deal with rights' restoration; the Law of Return grants to every Jew . . . the right to return to his homeland, and the Law of Women Equality intends to grant a female her right to be an equal citizen."[9] MK Ada Mimon (Mapai Party), who had vigorously supported the proposal, asserted how much the state "needs the creative powers and the activities of women in all spheres of life."[10] MK Esther Raziel-Naor (Herut) emphasized the military burden placed upon women as justifying their demands for equality: "in a state that knows enough to demand from the woman not less than she demands from a man, maybe even more—because conscription of women is more difficult—in such a state there is an obvious need to pay attention . . . to the solution to this severe problem of equality in rights."[11]

From the national Zionist perspective of Jewish homogeneity, gender equality was considered to be integrated into the Zionist vision. Accordingly, a Jewish state was erroneously conceived as a harmonious sphere in which men and women would constitute one national cohesive public with the same political consciousness.

Feminist struggles for gender equality in the 1990s reflected a liberal shift from a belief in a national homogeneity to a recognition of feminine difference, national heterogeneity, and the need for affirmative action. Accordingly, women's predicament, consciousness, and interests may be in opposition to those of men who share the same nationality. Thus, a formal achievement for parliamentary feminists was attained when in 1998 a new law was legislated, the Agency for the Advancement of Women's Status. It articulated this shift. The law was enacted after a parliamentary conflict with the religious parties, which had rejected the original proposal of the Parliamentary Committee for the Advancement of Women's Status to enact it as a basic law. Its formal importance, however, was significant. The law recognizes women as a deprived public, and it aims to constitute governmental coordination of institutional efforts to form and enforce a public policy of gender equality. It also recognizes violence against women as a national problem that should be challenged by state organs.

Before explaining why this legislation has not addressed significant

9. Ibid., 2087.
10. Ibid., 2092.
11. Ibid., 2098.

aspects of women's predicament, let me accentuate another aspect of state law. A process of liberalism, however limited, within the sphere of state law has been articulated in judicial rulings.

One transparent instance was a ruling on the appeal of the Israel Women's Network.[12] The HCJ determined that appointments of board members to governmental companies should reflect better representation of women. It based its ruling on clause 3A of the GCL. This clause in practice requires that women with appropriate skills be appointed to boards of government companies in a way that ensures that both sexes will have "appropriate representation." In 1998, the same liberal, American-inspired, feminist lobby filed a similar legal case against two other governmental companies. The Court enforced its previous ruling from 1994 on additional governmental companies and established the GCL as its judicial policy.[13]

Courts in democracies rarely rule in opposition to prevailing public moods in order to maintain their privileged status (Jacob, Blankenburg, Kritzer, Provine, and Sanders 1996; Mishler and Sheehan 1993). The rulings of the HCJ reflected a societywide trend. According to a survey conducted during 1991, 60 percent of Israelis declared that it was necessary to improve women's status (Dagani 1991). Israel has participated in the transnational, American-led, liberal rhetoric of gender equality. Despite the liberal mood, differences existed among the respondents. Men were less supportive than women of state policies intended to enforce gender equality. Men tended to be rhetorically sympathetic to gender equality but were less approving than women of ways to realize it. Thus, on the issue of advancing gender equality by means of governmental investments in women's occupational training programs, 48.9 percent of women were in agreement with such programs compared to 34.5 percent of men. With regard to government investments in day care facilities to enable women to work, 71.6 percent of women were in favor but only 56.8 percent of men (Dagani 1991).

Similar results were found on whether the state should pass legislation in support of gender equality: 65.9 percent of women and only 48.2 percent of men agreed. Concerning reserving positions for

12. HCJ 453/94 *Israel Women's Network v. Israeli Government*, P.D. 45 (5) 501.

13. See chapter 2, in the section "Judicial State Law and the Political Regime."

women at work, including in public administration, 52.5 percent of women were in support compared to 31.3 percent of men (Dagani 1991). As was explored in chapter 2, particularly since the beginning of the 1990s, Israeli political culture has rhetorically emphasized the value of gender equality as part of the global trend. Yet it is very doubtful whether the utilization of this value was widespread.

Can affirmative action significantly hinder gender discrimination against women? There is disagreement over the social and political utility of affirmative action, even according to those who completely support gender equality. Affirmative action legally advances the status of women in that it allows women to advance in the workplace. However, it focuses on individual rights and not on the collective rights of women. Hence, it is possible that the liberal achievement of advancing women's status in a public company will prevent the collective advancement of women as a single social community. The fact that an upper-class woman with a high academic education has been nominated to a glorious public position does not indicate that the same right to enjoy affirmative action is accessible to most women. This would be the case even if in imaginary world affirmative action were applicable to every workplace, since it renders a group-affiliated not a community right.

A more severe criticism of affirmative action follows. This policy grants legitimacy to the existing social stratification between men and women and among women. However, the few women who benefited from affirmative action would not use their positions to alter the political culture since the existing culture had brought them to leadership positions. They would perpetuate the political culture and the masculine premises that have led to discrimination against women. Hence, even in countries where affirmative action has been implemented, studies have reported discrimination (Okin 1989). Furthermore, most women are economically dependent on their husbands. Affirmative action perpetuates this economic subordination, as it serves mainly privileged women and not the feminine public (Brown 1995; Weisberg 1993).

Nevertheless, critics of affirmative action find it difficult to cope with the possibility that social change is often incremental. The argument is that court rulings and parliamentary legislation might be able to incrementally bring about long-term changes in the position of

women. I will investigate this issue later when dealing with the achievements and failures of liberal legislation and rulings.

Let me demonstrate the possible ramifications of liberalism for women's status. In 1995, the Supreme Court ruled on the *Alice Miller* case.[14] This case did not deal with affirmative action, but it reflected the liberal approach to the status of women in Israel. Ms. Miller appealed to the HCJ asking it to instruct the Air Force to allow her to take the examinations for its school of aviation since she was capable of passing the tests and being trained as a pilot. The Air Force noted, for its part, the difficulties involved in recruiting and training women as pilots and particularly in posting women as active combat pilots. In the past, the Court had preferred not to interfere in the military's decisions regarding the training and recruiting of military personnel. In 1975, it had ruled that the legal system could not impose its opinion on the military.[15]

In *Miller,* the Court could have ruled as it did in 1975. Instead, it decided in her favor. Similar to other Supreme Court rulings of the 1990s, the Court ruled that it would enforce the norm of gender equality. It did not obligate the Air Force to include women among its pilots. However, it did insist that the military accept the right of a woman to be tested for entry into the pilots' training course. In this instance, the Court abolished an unlawful gender-structured policy in one of the strongholds of Israeli male heroism.

Unfortunately, Alice Miller's story did not end as happily as might have been expected. A few weeks after she started her course, the media reported that she was dismissed from the program due to "psychological inappropriateness." Nevertheless, the legal case was of some impact. Following the ruling, internal instructions in the Air Force were altered to enable its aviation training course to be open to female applicants. As of 2002, two women had been successfully trained as navigators and one as a combat pilot. Later I will analyze whether this resulted in a change in women's status.

To conclude this section, feminist organizations have had to struggle within a fabric of social and political predicament, in multifaceted avenues of legal practices. On the one hand, feminist organizations have

14. HCJ 4541/94, *Miller v. Minister of Defense,* P.D. 49 (3) 94.

15. HCJ 561/75 *Ashkenazi v. Minister of Defense,* P.D. 30 (3) 309.

had to grapple with a tendency to discriminate against and displace women, and challenge the economic dependence of women on men and frequent instances of male violence against women. In 1997, it was reported that 200,000 Israeli women were battered but only 15,444 criminal investigations had been initiated against suspected violent husbands.[16]

Empirical evidence has shown that legislation in the 1990s that attempted to impose severe sentences on rapists and to reduce the severity of domestic male violence and sexual harassment had only a limited effect on public institutions, including court sentences (Bogoch and Don-Yechiya 1999). Thus, liberal legislation and court rulings notwithstanding, the number of women murdered in Israel by their husbands, lovers, or friends has not changed since the beginning of the 1990s.[17] The number of sexually abused women has constantly grown since the beginning of the 1990s.[18] Despite the SHL, women have suffered from sexual harassment twice as often as men, and the percentage of women who report sexual harassment increased from 30 percent in 1994 to 48 percent in 1997.[19] It may be that the SHL has encouraged more complaints by women against their employers, but the phenomenon of sexual harassment has remained significant.

Despite the law of 1996, which mandated pay equity, women earn significantly less than men. In 1997 and 1998, women earned 30 to 40 percent less than men in the same job.[20] Despite the fact that women in the civil job market (on average) had more academic education than men, they constituted 70 percent of minimum wage earners and were unemployed more often than men.[21]

16. "Report of the Parliamentary Committee for the Advancement of Women's Status," 1998, 57.

17. "Israel Women's Network: Data and Figures" 1998, 81. The figures are based on official statistics published by governmental agencies.

18. Ibid., 84. In 1992, 562 women arrived at hospitals with violent injuries, including 15 cases of sexual abuse. In 1997, 1,410 arrived at hospitals, including 101 women who had suffered sexual abuse. These figures are based on the Ministry of Health's official reports.

19. Ibid., 90–91.

20. "Report of the Parliamentary Committee for the Advancement of Women's Status" (1998), 33. The same figures appear in the annual report of the Treasury Office, 1997.

21. "Israel Women's Network: Data and Figures" (1998), 33–34, 38, 42.

On the other hand, feminist organizations could have mobilized more sympathetic media coverage and more liberal rhetoric of gender equality. The compound fabric of cultural and institutional ambiguity inflamed a variety of distinct dispositions and practices among feminists who had been focusing on the dilemma of how to react to and interact with state law.

Feminists are a nonruling community. They share—as we shall see—the common good of gender equality, some common practices, and a similar consciousness. They share similar predicaments of social existence. Feminist organizations interact with each other and so do feminists from various organizations. They engage in joint activities, participate in discussions, publish together, and share a sense of being a community with its own practices. The next section dwells on the communal legal culture of feminists.

On Feminist Epistemology, Legal Action, and Radical Feminism

Feminist epistemology and action are not a recent phenomenon in Israeli political life, despite the rise in the quantity and prominence of feminist organizations, which have been inspired by the prominent rise of feminism in American jurisprudence, politics, and philosophy since the 1970s. Historical evidence points to feminist activities during the Yishuv (prestate) period among Jews and Palestinians (Hassan 1998). The sole successful electoral endeavor of a feminist political party was in the 1950s, when a united list of the Organization of Zionist Women and the Organization for Women's Rights won one Knesset seat. Since then, including in the national elections of 1999, all attempts of feminist political lists to be elected to the Knesset have failed.

Overall, political representation of women in the Knesset has been low, and it has never exceeded 11 percent, with thirteen MKs (Hermann 1998, 83). Political representation of women as ministers and deputy ministers has been low as well. The number of ministers has never surpassed three, and the number of deputy ministers has never exceeded two. Similarly, the number of women elected to municipal councils and as mayors or heads of municipalities has been much lower than their 51 percent in the overall population (Bezhauwi 1998; Herzog 1994a, 1999; Sharfman 1998; Israel Women's Network: Data and Figures 1998). Comparative studies have shown that out of

twenty-seven democracies only Japan, Lichtenstein, and South Korea were characterized by smaller percentages of women in the legislatures, while only Japan was ranked lower than Israel in the percentage of women serving as cabinet ministers (Siaroff 2000).

Political party activities have been a small fraction of the potential and practices of feminism. They have demonstrated, however, the challenges facing feminists who aspire to mobilize public resources in a state that has diverted its efforts to issues of nationality, Judaism, and national security. The very limited success of women in procuring political representation has inspired activities of the feminist grassroots and policy NGOs that have challenged state law. Both types of NGOs in the feminist community have operated in spheres characterized by a rather harsh male-dominated reality.

Policy organizations have advocated legalistic reforms for the purpose of cultivating women's rights. Their efforts have been focused on institutional foci of state law. Grassroots organizations have been much less involved in institutionalized rights discourse, and they have been much more active in localities where state law is thought to be absent: families, centers, and shelters for women victimized by male violence and localities of prostitution.

A feminist consciousness, says Mrs. Ester Eilam, a conspicuous and outspoken leader of Israeli grassroots feminism, is grounded in practice: "experience builds consciousness. The direction is not linear."[22] Eilam has devoted her time to assisting women who were raped or otherwise abused by their male spouses. Rehabilitation of prostitutes has been another focus of her efforts to redeem women from their predicament and constitute a feminist consciousness.

Much like Catharine MacKinnon's writings, Eilam-led radical feminism has led to criticism of fashionable liberal feminism. Radical feminism has attempted to consolidate autonomous feminism, which has been neither Marxist nor liberal (see Benhabib 1992, 1995; and Greenberg, Minow, and Roberts 1998). Radical feminists like Eilam consider state law to be predominantly male made due to men's control over the state's power foci. Hence, they consider liberal endeavors to mobilize state law to be superfluous.

Eilam is skeptical of all feminist organizations, particularly those

22. Ester Eilam, interview with author, February 2, 1999.

aimed at mobilizing state law, because she views feminist organizations as rife with compromises that may reduce radical practices to submissive cooperation with the political establishment. However, facing the lack of general and institutionalized interest in resolving women's predicament, most radical feminists consider grassroots feminist organizations to be indispensable to the feminist community (Calas and Smircich 1996).

In spring 1972, Eilam established a grassroots feminist organization. In our conversations, she eloquently recalled how she and other radical feminists, like Marsha Friedman, were affected by the Western, primarily American feminism of the 1970s. Values of gender equality and even criticism of male-made state law have been more accepted in Israel since the relative decline of the national security myth: "it was so different and so detached from the matters that were considered to be important for Israelis before the 1973 war."[23]

Radical feminism has not been interested in liberal legislation and associated court rulings. Women's subordination to male hegemony—Eilam claimed, while using a critical terminology initially elaborated by MacKinnon (1989)—cannot be deconstructed as sociopolitical and legal subjugation without the construction of independent feminist epistemology. Such epistemology should not be contingent on state law, state power, and male terminology. Current state law is male made, and its mobilization generates acculturation of male conceptions of the "objective" and "natural" subservience of women to men.[24] Radical feminism has offered alternative practices based on demobilization of state law and improvement of women's conditions through grassroots social activities in communal localities in which state law has been particularly unhelpful (e.g., saving battered women) and damaging (e.g., helping prostitutes) (Brown 1995; MacKinnon and Dworkin 1997).

The epistemology of radical feminism has been affected somewhat by Marxism. Legal reforms in state law, it is argued, do not breed proper solutions to women's social and economic problems because they do not alter the basic social structures that enable the subjugation of women (Eilam 1994).[25] Liberal reforms are considered dangerous

23. Ibid.

24. For similar arguments in the theoretical literature, see Young 1990.

25. For similar arguments in the theoretical literature, see Brown 1995; and Meehan 1995.

because they may enable the political elite to evade the need to resolve problems of the gender-structured society. By using reforms as affirmative action, the elite is mitigating obvious problems like the underrepresentation of women in the state bureaucracy while the hidden causes of gender discrimination, such as the economic dependence of women on men and men's control over culture formation, remain intact.

A grassroots conception of legal demobilization conceives liberal NGOs as elite organizations, detached from the daily problems of women and intended to serve personal and bourgeois political interests. As Eilam has vigorously phrased it while challenging liberal feminists: "they are coming from a bourgeois background of white women with a leisure time."[26] Alternatively, radical feminism has attempted to practically help women who have been subjected to male exploitation and abuse. Through grassroots activities, a feminist consciousness is supposed to be created. About twenty feminist organizations and centers operate in Israel to assist women with their daily problems. Radical feminists established most of them.

Radical feminism aspires to locate women's self-constructed consciousness outside the coercive spheres of male-made state law (Benhabib 1995; Butler 1990; Frug 1998; MacKinnon 1987, 1993; Minow and Shanley 1997; Young 1990). Communication of personal experiences and articulations of these experiences as concepts about women's miseries are the fundamentals that radical feminists offer as a basis for communal action (Benhabib 1995). Policy-oriented goals, argue radical feminists, are derivatives of the principle of sameness. This principle results in a paradox. Women aspire to be like men, and hence they adopt male ways of thinking and modes of behavior. Indeed, policy-oriented goals based on the presumption of sameness may promote certain facets of gender equality in dimensions such as political representation. Yet, due to marginalization of women's problems, policy-oriented goals based on the sameness principle maintain a separation between the public setting in which women may be (very slightly) better off due to liberalism and the private sphere in which women are subject to male coercion and violence.

Radical feminism in Israel shares the epistemological, theoretical,

26. Eilam, interview.

and ideological critiques of MacKinnon (1989), Minow (1987), Fraser (1997), and Polan (1993). MacKinnon has criticized state law as male-made law that constitutes state domination. Minow considers social grassroots interactions to be an alternative to naive rights' discourse, while Fraser conceives critical epistemology as a response to the entrenched interests of hegemonic and patriarchic power. Polan (1982) has emphasized social class as a cause of gender discrimination against underprivileged women.[27] Hence, Eilam observes: "what happened in the 1980s was the destruction of feminist ideology. Current feminism has become a wholesale feminism. Once I knew what feminism was. Nowadays, in order to be legitimate, it has lost its essence. The male establishment accepts 'feminism,' but what have I gained?"[28] On the contrary, radicals are interested in women's daily experiences as grounds for a feminist legal consciousness.

Radical feminism has its boundaries, too. Lesbian consciousness has more clearly transcended conventional norms of heterosexual gender, and it has been articulated as a collective protest against patriarchy, which is based on oppressive heterosexual binary configurations (Ault 1996; Rich 1993; Wittig 1993). Radical feminism, predominantly heterosexual, has definitely not adopted a lesbian approach to state and law (Abelove, Barale, and Halperin 1993; Weisberg 1993).

Lesbian members of feminist organizations are inclined more vigorously than other feminists to resist prevailing oppressive norms and myths about women's sexuality—such as, for example, women's passivity and submissiveness (Rubin 1993). State law, even in its more liberal forms, imagines and stigmatizes women as weak and passive and the world as heterosexual. Men harass, women are being harassed, men are active, women are passive, men initiate, women react, men are strong, women are weak, men provide, women are dependent, and so on.

The facts that a woman may love another woman and be her permanent spouse and that sex does not need to be dominated by men and is not necessarily heterosexual have often been outside or on the margins of state law. Especially for a lesbian feminist, heterosexuality

27. For Israeli feminist writings that share the ideas of radical feminism, see Herzog 1999; and Berkovitch 1999.

28. Eilam, interview.

(penetration and reproduction) is an ideology of male power that makes feminine characteristics such as pregnancy and motherhood a cause of discrimination against and deprivation of women. The ideology of heterosexuality should be debunked as an exclusive criterion for rights and obligations (Abelove, Barale, and Halperin 1993; Rich 1993; Seidman 1996). In that sense, lesbian feminism has contributed to the evolution of a critical legal consciousness in the feminist community that has deconstructed the patriarchic logic and ideology of state law (Butler 1990; MacKinnon 1989).

Like their counterparts in Western countries (Abelove, Barale, and Halperin 1993), Israeli lesbian feminists are primarily a distinct group within a larger community of feminists. The dilemma has not only been whether and how to promote a separate organizational structure but how to constitute a collective identity within the larger community of feminists.

The dilemma of how to generate a feminist consciousness that is conducive to reciprocal relations among women is controversial within radical feminism (Benhabib 1995; Young 1990). More established radical feminism has searched for an autonomous and noncontingent consciousness of femininity. It has done so by attempting to depoliticize grassroots activities in various localities. This radical feminism has deconstructed patriarchic relations in a perceived unified field in which the battle of the sexes is solely gender stratified.

Radical feminists in Israel have placed their identity above national security and territorial issues. As Eilam, a dovish protagonist, explained to me: "if a female settler [in the Occupied Territories] is telling me 'yesterday when I traveled back to my home in the territories, I was stoned,' I cannot sympathize with her because she is talking about a general issue. But if she tells me her emotions, her experience as an individual, I want to listen and I can sympathize with her."[29] As Martha Minow has suggested (1987) radical feminism underscores that the private experiences of women should become a feminist consciousness while these experiences cannot be grasped by man-made law, liberal or conservative.

The concept of a unitary feminist consciousness that supersedes and overshadows other identities has long been contended in feminist

29. Eilam, interview.

literature (Butler 1990). This concept has a political advantage from the perspective of collective action. It enables women to consolidate a diversified coalition of organizations that struggle against gender discrimination (Bezhauwi 1998). Yet, crosscutting sociopolitical cleavages are a major issue in radical feminism. Do African American females suffer from the same deprivation as white American females? Are African American and white American feminists talking the same sociopolitical language? (Crenshaw 1995). Diane Polan (1993) has justly claimed that women face different challenges based on the social oppression they have suffered. State law is not necessarily only man-made because women have always been part of the bourgeois power strongholds in which state law is framed. Accordingly, resisting state law should not be solely focused on its male portrayal. It should involve demystification of its other oppressive facets (Brown 1995).

Let us examine the nonharmonious structure of the Israeli feminist community, which, like its counterparts in other countries, has multifaceted identities and practices. In its composition, the feminist community is multicultural. It includes lesbians and heterosexuals, Jews and Arab-Palestinians, religious and secular women, and women of different ethnic origins. As in Western countries, the unitary "nature" of that diverse community has become a myth. While sharing the common goal of gender equality and other characteristics, different feminist organizations have articulated various concerns, and their composition and leadership have been divided according to lines of nationality, ethnicity, religiosity, and sexual preference. Radical feminism is united in its willingness to be systematically critical of state, society, and law as gender-structured phenomena. Yet it has had various sociopolitical voices. Its unitary facade has constantly been challenged from within the feminist community itself.

In communal feminist debates about legal mobilization and other practices, three voices have been particularly important within radical feminism; the voices of Oriental (Mizrachi), Arab-Palestinian, and lesbian feminists. All three voices have opposed the presumption of a unitary feminist consciousness and imbued multicultural feminism with a diversity of identities and practices.

Lesbian feminists are inclined to oppose state law more than heterosexual feminists do because it has ignored their rights, for example, property rights that lesbian couples have not been able to enjoy due to

their homosexuality. Israeli law has taken rights from lesbians based on the hegemonic predominance of heterosexuality in the legal field (Yonai and Spivak 1999). Fears of being disempowered in feminist organizations notwithstanding, in the last twenty years more lesbian feminists have publicly declared that lesbians have to distinctly mobilize social resources to fulfill their collective needs. One of the most straightforward feminist leaders, Marsha Friedman, proclaimed in 1987: "A lesbian is what I am." Others have called for cooperation within and between feminist organizations in order to frame an emphatic political agenda for lesbians. Heterosexuality, nonetheless, has been hegemonic in the feminist community.

Most feminists and most of their organizations, liberal and radical alike, have had grave doubts about whether to publicly assist in mobilizing distinct public support for resolving lesbians' problems. They have been fearful of stigmatization as homosexuals and have attempted to deny the relevance of lesbians in the feminist struggles. Lesbian feminists have shared the general sense of women's subjugation and the need to collectively struggle against gender discrimination. Nevertheless, heterosexual feminists have reduced the significance of lesbian partnership in the core ideas of the feminist community.

Hence, lesbians have not gained prominence in general feminist organizations. They face the dilemma of how to practice their lesbian identity. Being part of larger feminist organizations may prevent them from raising their distinct voices, while operating apart as lesbians may hinder their effectiveness. Heterosexual feminists often prefer not to cooperate with lesbians, fearing that this may damage their ability to mobilize resources and change conditions. Even radical feminist leaders prefer to appear to be representatives of heterosexual, "normal" women. Identification with symbols of "insanity" and "abnormality" is considered to be a threat to the ability to create a strong feminist coalition and generate social change.[30]

The political isolation of lesbians has been severe. The Parliamentary Committee for the Advancement of Women's Status has only rarely discussed the status of lesbians in law, politics, and society. During 196 sessions held between July 1996 and January 1999, problems

30. In my personal interviews with feminists, they have stressed the fact that they are "not lesbians."

concerning lesbians were discussed only twice.[31] Feminists, including radical feminists, were embarrassed when I asked them about their desire to promote lesbian interests. Heterosexual "normality," however constructed, has dictated the reluctance of many feminists to try to represent all women, including homosexuals. In Foucault's terms (1980), the ideology of heterosexuality, which has been the basis of discipline in the feminist community, has dictated marginalization and disempowerment of lesbians.

Lesbian feminists have tended to be radical due to their criticism of heterosexuality as an exclusive and binary ordering ideology of state, law, politics, and society (Butler 1990). However, lesbians and heterosexual radical feminists have experienced despair and even alienation from state law as a constitutive force of patriarchy. This sense of communal affiliation has not only imposed limits but has confined lesbians to a small space to express some of their concerns as a partial escape from their epistemological and practical isolation.

National identities have affected feminism in Israel. Jewish feminists have been prominent in their attempts to generate a vigorous peace process between Israel, the Arab countries, and the Palestinians in the Occupied Territories.[32] For liberals, peace has been a matter of proper public policy. In contrast, radical feminists in their theoretical and philosophical writings describe war as an essentially male-made phenomenon. Accordingly, opposition to wars and militarism has been a constitutive component of the feminist construction of a collective consciousness.

Particularly for Israeli Jewish feminists—both radical and dovish—liberal feminists' efforts to achieve Arab-Israeli-Palestinian peace have mirrored strivings to overcome an intersectional paradox of being a victim as a woman and an executioner as an Israeli Jew. While radical feminists have been preoccupied with grassroots activities in order to create an alternative feminist consciousness, liberal feminists who are part of the establishment, like MK Naomi Hazan and MK Yael Dayan, in addition to extraparliamentary liberal female activists, have joined forces to establish and lead such groups as Women in Black and Voice of Peace, which aim to affect national decision-making processes.[33]

The Arab-Palestinian voice has been somewhat different. As mem-

31. Unpublished roster of the committee found in the Knesset archives.

32. Naomi Hazan, phone interview with author, February 2, 1999.

33. Hazan, interview; Dafna Lemish, interview with author, January 20, 1999.

bers of the minority, most Palestinian feminists consider internal colonialism to be their main threat. Coercion has been identified not only with patriarchy and the economic power of men but with religion and Zionist suppression of Palestinian national sentiments. Religion also means the subjugation of women in traditional Palestinian society, a Muslim society that perceives women as subordinate. In extreme but not necessarily rare cases, Palestinian women have faced the threat of being killed due to *Al-Sharaf* ("family honor") (Shalhoub-Kevorkian 1998).[34]

They suffer a double discrimination since both religion and nationality have marginalized them in Jewish society. Various Palestinian feminists have emphasized different aspects of their misery; some have underscored the national Palestinian aspect and others the gender issue (Al-Fanar 1992; Esmeir 1999). Overwhelmingly, however, Palestinian feminism has aimed to develop a distinct gender-state concept from a radical perspective, while Jewish radical feminism has been more inclined to develop a unified, cross-national, and autonomous concept of gender.

This is how Palestinian feminists described feminism when parliamentary elections were looming. Efforts have been made to use Palestinian nationalism to struggle against internal communal patriarchy, as the following quotation demonstrates.

> The political parties of the Palestinian sector within the 1948 borders have begun their preparations for the elections for the Knesset. . . . they need us and they count on women's support, which virtually will obey the men's dictates. . . . Due to this grim reality, we in Al-Fanar think that it is time that we, Palestinian women, express our interests and use them for our benefit and the benefit of our society. . . . Therefore, we call on every Palestinian woman not to vote for a candidate who refuses to condemn the crimes of "honor," and refuses to act to remove these crimes from our society, and refuses to remove other phenomena of woman's oppression. (Al-Fanar 1991, in *Noga* 1992).

Al-Fanar is not only a Palestinian nongovernmental organization but a radical feminist organization that has conducted legal struggles

34. Manar Hassan, interview with author, February 15, 1999.

against the subordination of Palestinian women to domestic violence. It has focused on destroying a communal notion that constructs men as responsible for preserving the family's purity and honor (*Al-Sharaf*) and legitimizes the killing of women suspected of improper sexual relations (Shalhoub-Kevorkian 1998).

Palestinian feminists resist Zionism as a source of internal colonialism, yet they have mobilized state law to provide legal assistance in their struggles against the Muslim religious establishment. Thus, Al-Fanar asked the police and the attorney general to investigate in 1991 and 1995 statements of one of the most prominent Muslim personalities in Israel, a man who had vocally supported the murders of Arab women residing in Israel due to the suspicion of irresponsible sexual behavior. The attorney general promptly rejected the possibility of initiating a criminal investigation, despite the proximate and tangible danger that such verbal assertions by a senior Muslim personality might lead to murders of women. In his legal opinion advocating nonintervention in communal life, the attorney general did not refer to legal pluralism and cultural relativity. Nonintervention was justified under the liberal principle of freedom of expression.[35]

The rhetoric of individual rights, which has marginalized the plurality of cultural meanings that may be given to the same behavior in different communal settings, has been very problematic. The attorney general is supposed to initiate criminal investigations in instances in which "freedom of expression" may clearly lead to murder. This has been the attorney general's formal policy since the assassination of Prime Minister Yitzak Rabin on November 4, 1995.[36] State law, however, has been affected by coalitions of sociopolitical forces that have given the Muslim religious establishment supremacy over Palestinian women and their feminist organizations.

In chapter 3, I explained that the state's strategy has been to legalize the minority as religious groups and monitor its sociopolitical and legal practices through cooperation with the religious Muslim establishment. Hence, Al-Fanar has demanded the separation of all reli-

35. Correspondence between Al-Fanar and the Office of the Attorney General, July 15, July 25, August 11, August 20, and September 5, 1991. For obvious reasons, I prefer to keep the name of the senior Arab-Palestinian personality confidential.

36. Correspondence between Al-Fanar and the Office of the Attorney General, December 12, 1995.

gions from the state, the demolition of the Sharia monopoly over Muslim women's lives, and more specifically the formal establishment of civil marriages (Hassan 1995).

Al-Fanar has aspired to privatize nationality, as a Palestinian NGO, and to challenge the male-dominated communal setting as a feminist NGO (Hassan 1995). The liberal language of legislation in the 1990s did not offer solutions because it ignored the specific needs of Palestinian women. Palestinian feminism has yearned to narrow the religious autonomy given in state law to the Sharia. That autonomy has been challenged by national Palestinian secularism, which has deconstructed Jewish Zionist hegemony and its endorsed communal Muslim religious autonomy. Dissent from state (Zionist) ideology and the legal ideology of a "Jewish and democratic" state notwithstanding, state law has been mobilized to change Palestinian women's situation within their community. Feminism, secularism, and Palestinian nationality have been inseparable in this epistemology, which views male dominance, religion, and Zionism as one phenomenon.

Palestinian feminist legal consciousness has differentiated between the instrumentality of state law, on the one hand, and its immoral legal ideology on the other. Accordingly, mobilization of state law has been localized and textualized. It has not been cast in terms of international law and the universal language of human rights. Rather, due to women's subservience, mobilization of state law should be used locally for the benefit of Palestinian women residing in Israel without accepting the legal ideology of a Jewish and democratic state (Hassan 1995). Similar to—and sometimes in cooperation with—radical Jewish feminists, Palestinian radical feminists have largely engaged in grassroots activities; policy goals have been considered hard to achieve, due to the state ideology, and irrelevant for the resolution of the daily problems of Palestinian women. Grassroots feminist NGOs have been fairly prominent, primarily helping to halt violence against and assist battered Palestinian women.

Radical Palestinian feminism does not necessarily consider Jewish liberal mobilization of state law to be futile since it may generate secularization of the Israeli legal setting and hence may incite more state intervention in religious Muslim autonomy.[37] While elite male Muslim

37. Hassan, interview.

jurists have aspired to preserve the status quo, an unexpected communal coalition of feminist forces has been created. Liberal Jewish feminists, particularly members in the Israel Women's Network, and radical Palestinian feminists from Al-Fanar are cooperating against the Sharia courts.[38]

There is no one type of communal legal action, and there is no one unified communal purpose for the same type of legal action in the same feminist community. Communities provide spaces of autonomy. For Jewish liberal feminists, the struggle against the *kadies* has been part of the fight against religious dominance in the Zionist state. Palestinian feminists view it as serving the purpose of liberating women in the Palestinian community. For the Jewish liberal feminists, the encounter with the Sharia courts is aimed to mobilize Arab-Palestinian support for the Israel Women's Network. Yet for Palestinian feminists it was supposed to empower feminist secularism at the cross-national and intercommunal levels. For liberal Jewish feminists, state law should aim to promote individual liberalism; for Palestinian feminists, however, it should aim to generate state protection against male brutality and a method to subdue the religious Muslim establishment within the Arab-Palestinian community.

Therefore, cooperation between Israeli Arab-Palestinian and Jewish women has been problematic. Legal consciousness in the feminist community has been very sensitive to multicultural contingencies, and the feminist NGOs, while interacting with each other, have been divided according to national lines. *Noga,* the main journal of Israeli feminism, has reported several instances of vocal splits between feminists of the two nationalities who debated their agendas and aspired to unite their efforts yet failed to achieve permanent and established cooperation (see, e.g., Ashkar-Aploag 1997; Eliezer 1996).

Feminist scholars have condemned communitarianism due to the damage that a multiplicity of communities could inflict on women's efforts to collaborate in their struggles for gender equality (Okin 1989). Nonetheless, multiculturalism inside a feminist community, as in Israel, enables the establishment of joint efforts that may be imple-

38. Ibid; Rachel Benziman, interview with author, January 28, 1999. For an explanation of *kadies'* attitudes, see chapter 3. See also Ahmed Natur, interview with author, January 31, 1999.

mented while recognizing various and distinct needs. Such multiculturalism, however, has not easily been translated into joint practices. An Israeli Palestinian feminist, Mrs. Iman Kandalphat-Irani, explained her attitude toward feminist organizational collaboration with Jewish women as follows: "the cooperation in those 'joint' organizations is not real. The organizations usually reflect the general inequality between Israeli Jews and Arabs. The Jews expect us to be involved in joint activity without emphasizing our national identity or our social problems. They want us to become Israelis according to their own concepts. Therefore, our aim is to go back to separate frameworks, in which it is possible to preserve and develop our Arab-Palestinian identity, and maybe a cooperation will occur in the future" (Ashkar-Aploag 1997).

Among all the severe problems that Arab-Palestinian women suffer, such as coercive marriages and marriages of minors, "killing for honor" has been one of the most challenging. Patriarchy in the Arab-Palestinian community is based on male guardianship of the female's and the family's honor and purity. If honor and purity have been breached, killing the female, who has "betrayed" her family, is justified as a means of restoring values. Men are the judges and executioners, and, based on interpretations of the Koran and the Chadith, women have always been suspected of behaving "sexually irresponsibly."

Male paternalism has been a means of maintaining control and patriarchy (Al-Fanar 1992; Shalhoub-Kevorkian 1998; Rabinowitz 1995). Naila Awad, the director of Al-Badil, an Israeli Palestinian feminist organization, has protested against the use of the term *family honor* in such a context. She has attempted to deconstruct its social essence: "Everybody has his or her honor; it is a private matter, and nobody can decide about another person's honor. No murder can be legitimized. The term *family honor* enables men to control women, in this case Arab women" (Benvenisti 1998, 23–24). Like other Israeli Arab-Palestinian feminists, she has criticized the unwillingness of state officials to fight these murders. Being a Palestinian, Awad has criticized the ethnocentric attitudes of Jewish Israeli society and has argued that Palestinian women must conduct their own internal campaign against male violence. Yet she has been practical and has asked for the intervention of state law to prevent killings and punish murderers. Controversy among Arab-Palestinian feminists as to the degree to which cross-national feminist epistemology and unified action are plausible notwithstanding, they

have been united in calling for state intervention to hamper male violence against women.

Having a distinct voice in the feminist community has not been a characteristic solely of non-Jewish feminists located outside the national security, Jewish, and Zionist narratives. Mizrachi (Oriental) Jewish feminists have had a unique say in the overall feminist approaches toward state law. Like many neo-Marxist and ethnic feminist theorists who emphasize sociocultural contingencies (Crenshaw 1993; Polan 1982), Oriental Jewish feminists have underscored that gender differences are contingent upon ethnic status. Thus, Western (Ashkenazi) women have been identified as affiliated with the ruling and hegemonic social class. Oriental feminists have articulated their double marginalization as women and Mizrachis who suffer both gender discrimination and economic, ethnic-oriented control. Accordingly, Ashkenazi women could not have been their sociopolitical allies in generating grassroots feminist consciousness because Ashkenazi women constitute a significant component of the bourgeois social class that has controlled national power foci and Mizrachi women.

The importance of a feminist community to promote feminist struggles notwithstanding, the ontological meaning of being a woman is neither identical to that of other groups and individuals nor socially autonomous. Feminist consciousness should be differentiated in the context of ethnicity. State law is not only male dominated; it should not be trusted due to its ethnic hegemonic identity.[39] According to Oriental feminism, when an Ashkenazi female soliloquizes about a unidimensional and unified feminist consciousness she is not only perceiving gender as a holistic sphere. She is narrating a coalition of sociopolitical forces between the oppressors (Ashkenazi women) and the oppressed (Mizrachi women) that has never existed, and therefore she disguises and reduces her own ethnic hegemony to a conventional trivia that veils control. Like Arab-Palestinian feminists, Mizrachi feminists have underscored the irreducible dependence of Oriental women on ethnocentric hegemonic culture, which combines with their sexual subjugation to men. As Ella Shohat, a critical Mizrachi scholar, says of the feminist community, "acknowledging the existence of contradictions

39. Henriet Dahan-Kalev, interview with author, February 7, 1999.

and conflicts should not be perceived as the demolition of the feminist strategy" (1995).

In her response to Ester Eilam's leading role in attempting to frame a unified feminist consciousness, Dr. Henriet Dahan-Kalev, an expert on theories of feminism and a prominent Mizrachi feminist, has made the following accusation, knowingly using a postcolonial approach and referring vigorously to Frantz Fanon and his decisive support of resistance (Fanon 1970; see also Nader 1990).

> [W]omen who have not played according to the rules of the game that the Ashkenazi women have decided upon (not as Ashkenazis but as part of the ruling elite) are not entitled to recognition and legitimacy, and their right to engage in revolt and resistance has been taken from them. [It is] as if they [the Ashkenazi women] have already made this war and fought for them and all that is left for Mizrachi women to do is come and enjoy what has been made ready. The principle that they have failed to recognize is fundamental to any feminism; the essence of struggle and resistance, the essence of criticism and redefinition, are the crucial elements of empowerment and self-definition. (Dahan-Kalev 1995)

Litigation and legislation that are aimed at improving the condition of women in the military have not been conceived as promoting feminist interests because if the language of state law is adopted and the military is embraced as a major social institution feminists would be legitimating male concepts.[40] Salient rulings, such as *Alice Miller,* that grant remedies in specific legal cases to several women do not affect the whole community and do not result in a change in women's status.

Mizrachi feminists have underscored ethnicity as part of their oppression as women, and they have underscored the need to articulate ethnicity as part of feminist efforts to challenge patriarchy.[41] Radical Ashkenazi feminists consider this concept to be an interruption of their struggle to represent women as a unified gender community.

40. Ibid.

41. Neta Amar, phone interview with author, February 1, 1999.

Liberal feminists, who have attempted to invoke individual rights and liberties, look at such a Mizrachi argument as an impediment to their efforts to frame a cross-ethnic, harmonious action based on the legal language of individual rights.[42]

For the Ashkenazi radicals, feminist consciousness should transcend ethnicity, while for the liberal feminists state law should be used as an ethnically autonomous language for promoting public policy. For Mizrachi feminists, these approaches have reflected and generated preservation of Ashkenazi hegemony in the feminist community. As Dahan-Kalev so vigorously pointed out to me: "the Ashkenazi women are the oppressors, . . . they have economically and politically benefited from the oppression of Mizrachi women. White women are oppressing Mizrachi women."[43] While referring to Fanon 1970, she accused liberal feminist organizations like the Israel Women's Network of recruiting only activists who are Ashkenazi and Oriental feminists who aspire to be like Ashkenazi women. The latter have neglected their ethnic consciousness. Accordingly, she referred to Fanon's observation that "there is the rhetoric of Black women who become White women, or the Mizrachi women who become Askenazi women."[44]

While liberal feminists have been influenced by transnational liberalism and Ashkenazi radical feminists have been affected by American critical feminism, Mizrachi feminism has maintained a clear, local, and counterhegemonic voice of class protest within the feminist community, a voice that has contextualized radical feminists' consciousness. Following an attempt by Mizrachi feminists to establish a separate organization, one of the founders, Mrs. Mira Eliezer, declared: "my enemy is not the Arab; my enemy is the Ashkenazi" (Eliezer 1996). State law, from this perspective, is an epiphenomenon of basic tensions grounded in ethnic and gender-structured discrimination against Mizrachi women. Accordingly, Mizrachi feminists have advocated grassroots activities that can construct a distinct type of feminism.

The relationships between Arab-Palestinian feminists and their Oriental counterparts have been tense, and the two collectivities have

42. Sarah Meler-Ulshiztki, interview with author, December 20, 1998; Eilam, interview; Benziman, interview.

43. Dahan-Kalev, interview.

44. Dahan-Kalev, interview.

faced some different types of challenges. Arab-Palestinian and Oriental feminists underscore that they have been part of a more general feminist consciousness embedded in a common morality of gender equality. In practice, they have combined feminism with different political tactics. Each collectivity has aspired to practice its own distinct identities despite common expectations of more state intervention in preventing male violence against women. Mizrachi feminists have often been co-opted into hegemonic narratives. Accordingly, their social status as a distinct collectivity has been less cohesive and more subject to the general proclivities of the Jewish and Zionist dominant culture. In this context, both types of feminism have emphasized the gap between formal state law, which asserts egalitarianism, and daily practices, which do not reflect these assertions.

Radical feminism, with all its multidimensionality, opposes militarism. It views the armed forces, wars, military actions, and military symbols as products and sources of male hegemony and as means of preserving patriarchal relations in preindustrial and industrial societies (Brown 1995; Elshtain 1987; regarding Israel, see Deutch 1994). Militarism is based on brute coercive force, and on muscularity, and it rejects debates about lofty issues of social justice, including gender equality. It is conceived in association with men's "superiority" as fighters and the subordination of females, whose purpose is to give birth and raise children (Peach 1997; Ruddick 1989). Militarism, as Israeli radical feminists have emphasized, has distorted the feminist consciousness, which should be independent of male domination. Furthermore, it has hampered feminist action, all in the name of public order and discipline.

Women's participation in peace activities in Israel and elsewhere has not necessarily been a feminist dictum. Demands to withdraw from the territories occupied in 1967 have been endorsed by Israeli feminists, both Jewish and Arab-Palestinian. Peace activities, however, have been contingent on specific interpretations of governmental actions. Hence, these activities have not necessarily been derivatives of an antimilitaristic stance or reflections of radical feminism.

Evon Deutch, a prominent feminist reporter, has pointed out that the organizational efforts of Arab-Palestinian and Jewish Israeli women to protest against the 1967 occupation were not necessarily a result of feminism. She wrote that "the fact that the women's peace movement

has not adopted a feminist political concept has hampered the possibility of public expression of their internal world. Women, especially mothers of soldiers, have remained in their loneliness. . . . For the purpose of raising the political feminist consciousness regarding questions of militarism, women's status, and peace, we have to refer to those subjects not only from local viewpoints but from a global perspective while cooperating with women who act for international peace and the creation of an international feminist movement." (Deutch 1994, 23; Shalev 1991).

What has been intrinsic and unique in radical feminism has not been mere peace activity—and not even globalized peace activity—but the unconditional opposition to militarism as a male product. In that respect, more than issues of peace, war, and withdrawal from the Occupied Territories, the issue of women's legal status in the Israeli military has been highly controversial and significant among feminists. This issue is further explored in the following section.

Liberal Feminism and Law: The Utilities and Costs of Political Compromise

Liberal feminism differs in epistemology and practice from radical feminism. It does not assert the need to frame an autonomous feminist consciousness. Rather, it claims that women should act toward state law and within the establishment in order to attain individual equality with men while acting and striving to be like men. Sexual differences are given, and gender can be equalized if liberals can enlarge constitutional frameworks to embrace women's voices.[45] State law should be utilized within the prevalent structure of power relations and national narratives of Zionism, Judaism, and democracy. Involvement in the formation and implementation of public policy through legislation and litigation is considered to be a more relevant mode of collective action than grassroots activities.

"We are working with the system and within the system," attorney Rachel Benziman, the chief legal consultant of the Israel Women's Network, informed me. Then, consciously looking from a utilitarian vantage point, she elaborated: "legislation necessitates more interaction

45. On feminist literature regarding "voice," see Bilsky 1998.

with the establishment. We are working inside the establishment."[46] In order to promote legislation that deals with gender equality, the network has established extraparliamentary and parliamentary coalitions of feminist-led sociopolitical forces. In a highly fragmented and polarized parliament, these coalitions should have been multiparty and bisexual. State law has neither been comprehended as a cohesive state organ nor perceived as a fixed set of regulations. Rather, it has been recognized as a fragmented fabric with contradictory endemic tensions and opportunities to attain fairness.

This concept of cultivating cultural pluralism and facilitating different voices that originates from Carol Gilligan's cultural feminism (1982) has been influential among Israeli feminists through American academic educations and transnational American-led liberal effects on Israeli society. In all the personal interviews that I conducted with Israeli feminists, references were made to American feminists. Feminists in the United States, other Western countries, and Israel conceive of liberal pluralism as a convenient framework for generating gender equality (Gilligan 1982; Taylor, Gilligan, and Sullivan 1995). In Israel, as in Canada, West and North European countries, and the United States, liberal pluralism is associated with feminist political action within state institutions.

It has been characterized by the Network's (the main liberal feminist NGO in Israel) activities in the Parliamentary Committee for the Advancement of Women's Status. A careful analysis of all the unpublished protocols of the committee since its formal establishment as a permanent parliamentary body in 1996 produces several insights.[47] The committee could have functioned as a supraparty parliamentary committee due to liberal feminist consciousness significantly generated through the Network. This consciousness has to some extent depoliticized female MKs and made their party affiliations much looser than during parliamentary deliberations on other matters.

46. Benziman, interview, January 28, 1999.

47. Thanks to MK Naomi Hazan, the committee's chairperson, and her assistant, Ms. Hila Bikovitzki, for permitting me to read the original protocols in the committee's offices at the Knesset, and in the Knesset Archives. Thanks to Mrs. Dana Gordon, the committee's manager, who assisted me in finding the material. I have respected a request to keep secret several sensitive issues and confidential data concerning the armed forces.

It has not resulted only from the decline in the power of political parties, particularly since the 1980s and more ostensibly in the 1990s (Arian 1989; Goldberg 1992; Koren 1998). The importance of this exogenous variable notwithstanding, a deeper dimension appears to have affected feminist liberal actions. Transnational American-led liberalism has shifted public attention from displaced communities to individual rights (Glendon 1991). On that account, different MKs, often women, could have cooperated as somewhat depoliticized individuals who are interested in molding legislative processes in defiance of conflicting party loyalties. Thus, as Benziman informed me and as the committee's protocols have shown, feminist activists who appeared before the committee along with MKs attempted to avoid debate over controversial issues of war and peace and focus only on topics constructed as gender issues.[48] Therefore, judges, parliamentarians, bureaucrats, and feminist activists consider the committee to be the least political committee in the Knesset.[49] This attitude, however inaccurate, shows that liberal feminism has been partially effective due to its power of legal and sociopolitical mobilization.

This collective action has persuaded the Network, however, not to address human issues concerning Palestinian women inside and outside the Green Line. Liberalism worldwide has not only legitimized basic fundamentals of state law by presuming its interchangeable values and equalizing potential, but it has reduced the ability to evolve an independent feminist epistemology. In essence, liberal feminism worldwide has been utilitarian in its tendency to compromise and pragmatic in its adaptability to organizational and cultural constraints (Gans 2000; Sandel 1996). Let us look at the efforts of liberal feminists in Israel in the field of legislation and litigation.

Legislation

Liberal feminists perceive two severe and changeable hurdles: structural impediments and the lack of opportunity for advancement. Ab-

48. Benziman, interview.

49. See, for example, a meeting between the committee members and the justices of the Supreme Court in which most participants, including most of the justices, emphasized the "professional" and "nonpolitical" virtues of the committee, while comparing it to other political committees of the Knesset (Protocols of the Committee, March 16, 1998, 1–25).

sence of a sufficient feminist consciousness is perceived as secondary. Emphasis has been given to bounded legal reforms in state law that are aimed to generate state-endorsed equality in the public sphere. As MK Naomi Hazan has phrased it: "There is no doubt that the central aim of current legislation on the subject of woman's status is the achievement of equality. It has two central components. The first is removing barriers to the exercise of voting rights by women, including in public forums. For example, if a woman cannot be *dayaan* [Rabbinical judge] . . . or a woman cannot be the chief of the armed forces, it is a structural barrier that prevents the materialization of equality. The second element is stimuli. . . . This is the issue of equalizing differences, affirmative action. . . . But if the purpose is materializing the principle of equality we see it in practice as removing barriers to [attaining] stimulus."[50]

Legal reforms are perceived as conditioned by women's abilities to infiltrate male-dominated power foci and alter them. A feminist effect on state law is considered to be not an epistemological matter but a behavioral issue. Primarily under conditions of an emerging liberal constitutionalism, as in Israel, women have had to cooperate within the establishment in order to alter state law. Feminization of state law can be accomplished because it is not structurally fixed.

Analysis of more than twelve hundred pages of unpublished original protocols has shown that most of the committee's debates have been devoted to policy issues. They include debates over laws that frame gender equality, budgets that aim to endorse policy implementation, coordination of administrative efforts to enforce policies, and promotion of women's representation in public bodies. In that sociopolitical and legal fabric, extraparliamentary feminist organizations and a few academic feminist activists were functional in legislation processes. During parliamentary debates over the SHL, for example, these organizations and activists were articulating professional knowledge.

Knowledge of state law has been the most salient virtue to be articulated during the committee's discussions. It is an important source of mobilization, and it gives lawyers some ability to alter conditions in political spheres (Sarat and Scheingold 1998). Feminist lawyers and legal scholars appeared before the committee not only in the name of femininity but as experts who had contributed know-how in their

50. Ibid., 11.

cronyistic legal domain. As in legal mobilization in Canada, England, France, and the United States, knowledge of the law has contributed to limited reforms in state power foci (Epp 1998; McCann 1994).

One of the most heated parliamentary debates was about the SHL. It was intensively promoted by the Network and phrased with the advice of such leading feminist jurists as Prof. Ruth Ben-Israel, and Dr. Orit Kamir. The Network was very effective in mobilizing feminist MKs, and even male MKs, as well as the Ministry of Justice, including the Office of the General Prosecutor and Attorney General, to support its proposal.[51] It is hardly conceivable to think of this law, which imposed criminal and civil sanctions on sexual harassment, without noting the overall effects of an emerging liberalism within state law. Inter alia, the notion of equality in its liberal, individualistic sense was often mentioned during parliamentary debates; liberal court rulings, which I will analyze later, were cited; and the American legal attempt to limit the widespread phenomenon of sexual harassment was mentioned as reference point.

Appearing as an extraparliamentary feminist organization representing thousands of women had enabled the Network to generate power. During parliamentary debates, the Network articulated the most vigorous demands to phrase in law an absolute legal responsibility of employers regarding the sexual harassment of employees. Representatives of the Network such as attorney Rachel Benziman were determined to make the SHL an educational legal document that could be used in the course of mobilizing public support for promoting further gender equality.[52]

Any analysis of legal mobilization should conceptualize it as an interactive process. The female MKs on the committee mobilized the Network to depoliticize the legislative process. Legal professionalism, which was conveyed in the discussions by the Network, generated consent among rival MKs, including religious men. The legal professional dialogue, quite technical in its verbal terms, enabled the formation of a solidarity of language among various MKs affiliated with rival political parties.

51. For the debates inside the committee, see ibid., June 25, 1997; July 8, 1997; July 15, 1997; February 10, 1998; February 17, 1998; and March 3, 1998.

52. Ibid., February 17, 1998, 20–21.

Professionalism and extraparliamentarianism were also conducive to attempting to enforce the SHL. Liberal feminism has underscored the need to enforce state laws as part of liberal efforts to attain gender equality (Raday, Shalev, Liben-Kubi 1995). Feminists have been concerned that proper laws may be enacted and yet their enforcement would be deficient or, worse, absent. Referring to the SHL, MK Yael Dayan, the committee's chairperson, expressed this worry: "I have repeatedly mentioned that women's organizations that were our partners in [passing] the legislation should take it upon themselves to work with employers and assist in implementing this law."[53]

The SHL is not the only example of how extraparliamentary feminist organizations and other liberal feminist groups have used liberal legality in order to mobilize state law and effect legal changes. The processes during the enactment of laws that are seen as promoting gender equality are similar—attempting to narrow the spaces between asserted egalitarianism and the grimmer realities of discrimination by using legislation, policy formation, and policy implementation. Such processes are grounded in a deep belief in the written word and a faith in scrupulously phrased written constitutional documents. The committee's debates only rarely employed an abstract rhetoric. The deliberations were very technical, about very formal and detailed issues concerning specific legal clauses. Based on that devotion to the formalities of constitutional documents attorneys of feminist organizations, governmental attorneys, and MKs could have cooperated, since identities were reduced to the banality of rhetorical sympathy with women's predicament.

Thus, feminist organizations cooperated in their endeavors to pass the Law of the Authority for the Advancement of Women's Status, 1998 (AAWS). Their general purpose was to institutionalize conditions that were regarded as conducive to the formation of a governmental policy of gender equality. Additionally, the AAWS aimed to foster coordination among governmental ministries and to enforce legislation that sanctions gender equality and confronts discrimination against women.

The Orthodox religious political parties opposed the law, which symbolized for them an endorsement of the advancement of women in

53. Ibid., March 3, 1998, 7.

public life.[54] They mitigated their opposition after the committee consented not to draft the bill as a basic law. Furthermore, the State Comptroller's Office ardently opposed the establishment of a separate institution to receive women's complaints about gender discrimination.

Despite these constraints, close cooperation between feminist organizations, which was embedded in professional liberal legal discourse, enabled passage of the AAWS. This coalition included Emuna, a religious Zionist women's organization that became part of the legal action despite the opposition of the male-dominated religious political parties. Such an intersectional coalition would have been unfeasible without the reduction of identities to a language of legal formalities and feminine sympathy. This communal practice, initiated mainly by liberal feminists, formed a behavioral consensus despite the diversity of conflicting identities.[55] As we shall see, reduced identities and professional mobilization of law had its own significant deficiencies despite the attainment of liberal legislation in a polarized and fragmented parliament.

The AAWS has underscored prevention of male violence against women as its central emblem. More generally, and worldwide, an instrumental approach to violence has been central in liberal feminism in its efforts to promote equality as an institutionalized idea in state law. This approach, which aims to eliminate violence through state regulations, is flawed since it ignores the possibility that violence is a state phenomenon and should be challenged not through the political establishment but by raising a critical feminist consciousness.

Austin Sarat in his studies of capital punishment has depicted violence as an inherent characteristic of modern state law (Sarat 1999a). Anthony Giddens and Charles Tilly in their respective studies of modern states have explored the ways in which states have used violence as part of their legitimization processes (Giddens 1986; Tilly 1995). Violence is integral to political control and state hegemony. Louis Althusser has correctly pointed out that violence is associated with other means of state ideological control and coercion (1971). Michel

54. In chapter 5, I refer to the dichotomy between the private and public spheres that is prevalent in Orthodoxy, particularly among the ultra-Orthodox.

55. For debates regarding the relevant issues, see Protocols of the Committee, December 8, 1997; December 16, 1997; December 23, 1997; January 14, 1998; and February 16, 1998.

Foucault, the noted poststructuralist and post-Marxist thinker, has depicted violence through the Marxist perception of a bourgeoisie that uses state power against the proletariat and has added his own concept of violence as a discursive phenomenon (1980). Generally, according to critical observations of states and societies, facets of violence may be culturally contingent, but violence has significantly and invariably been a state phenomenon.

Catharine MacKinnon in her endeavor to develop a self-contained critical feminist theory, conceives male violence against women, for example, rape, as a major component of men's institutionalized and legalized control over women by means of the state. Thus, state law recognizes "rape" only in very particular and isolated events and as a very rare phenomenon. State law is often reluctant to admit that the phenomenon of rape is more widespread since women are sexually subdued by men even in the context of established legal relationships such as heterosexual marriage (MacKinnon 1993).

On the contrary, liberal feminism perceives male violence against women as a cultural, autonomous phenomenon that is not essentially inherent in the state. Violence is perceived as an erroneous cultural derivative of a given physical advantage of (most) men over (most) women. In that context, women have presented weakness and men have presented physical superiority. The self-asserted physical vulnerability of women has been challenged by liberalism through deterring men from committing violence against women. Women are assumed to be victims in a given sociopolitical setting. Rather than concentrating on developing an independent critical feminist consciousness and the economic resources required for independent maintenance, women have been externalized as weak (for a further exploration of this, see Chancer 1998). Instead of liberating women, the state and its laws have been expected to remove manifestations of violence such as rape, battery, and sexual harassment, and hence the problematic fascination of liberal feminism with regulations, budgets, and enforcement of public policy.

Aspirations to mobilize sociopolitical forces for political reform have led liberal feminism to see the term *violence* as an antagonistic term that inspires legal mobilization. Liberal feminist campaigns against "violence" have been effective around the globe in mastering collective efforts to mobilize state law since everybody sympathizes

with the terrible experiences of raped females, beaten wives, harassed (women) employees, and so on (Carredo, George, Loxam, Jones, and Templar 1996; Eisikovits 1996; Marshall 1996; Riggs and Oleary 1996; Taylor, Gilligan, and Sullivan 1995).

The pressures on politicians to assist in implementing fast and efficient solutions to male violence against women are enormous. Liberal feminists have used these public pressures to spur legislation that formally promotes gender equality and protects women under state law. Prevention of violence has been reduced to regulative efforts while the deep epistemological and sociopolitical sources of violence have not thoroughly been addressed. Accordingly, and erroneously, the brutalized, humiliated, traumatically invaded woman and the rapist brute man have been taken as given, as individual irregular instances, while the legal "solutions" have been regarded as obvious.

Thus, during passage of the AAWS the issue of male violence against women was stripped of its social roots and perceived as a policy issue that was solvable through political coordination and enforcement. The opening clause of the AAWS asserts the following.

> The purposes of this law are to promote equality between the sexes in Israel; to bring about coordination between the bodies that deal with woman's status in Israel; to promote education, legislation, and enforcement in those areas; to promote activity to prevent violence against women; to offer the government the tools and information required to achieve those aims; and to establish a central [state] authority that will act for the implementation of these fundamentals.

The reference to violence against women in clause 1 of the law was under contention during the committee's debates. The critics presumed that it might reduce the emphasis on equality and the need to form an overall governmental policy concerning gender equality. Yael Dayan, the chairperson, confidently defied such criticism, stating that "the majority here [on the committee] are women, but one of the motivations, and we know it, for the . . . passage of this bill was truly the consensual feeling in this house [the Knesset] and outside it that society cannot tolerate this malady of violence against women. . . . the general society is not so interested in the resolution of discrimina-

tion, but it is interested and identifies with us regarding the problem of violence. Therefore, I would leave it [the reference to violence] in this clause, and it will affect budgets and all the rest."[56] Rachel Benziman, the Network's attorney, was admittedly convinced by this instrumental argument: "I think that there is a place to separately refer to violence against women because of the meaning of it and because of its educational effect."[57]

The perception of violence as a nonstate phenomenon and the instrumentality concerning violence aimed to promote opportunities for the advancement of women have significantly constituted the liberal feminist approach to military service. To explore this, I will move to a discussion of liberal feminism and litigation. As we shall see, the boundaries between litigation and legislation have been multifaceted and blurred.

Litigation

Litigation in court challenges, among other things, the unwillingness of state organs to alter situations. It is an institutionalized method that uses judicial discussions and rulings, including when appeals are dismissed, as sources of sociopolitical mobilization and changes. Whether it may produce more than a legal change, which is a somewhat probable outcome, but also a sociopolitical change, has been a controversial issue (Feeley and Rubin 1998; McCann 1994; Rosenberg 1991). Particularly, litigation in courts aimed to promote women's status in the military was helpful in a handful of cases in which, for example, a few American women aspired to be admitted to male-dominated military colleges. Yet it is doubtful whether and to what degree women's entry into the armed forces and combat units has led to gender equality in the overall society.

Military service in Israel, as in states such as England, France, Germany, and the United States, has differentiated between service of men and that of women as inferior (Golan 1997). The terms of military service, including its duration, have been different. Inter alia, since the late 1950s women in Israel have been prohibited from participating in

56. Ibid., December 8, 1997, 21.
57. Ibid., 22.

military combat missions. Formally, the military claimed that physical differences justify such exclusion. In the 1940s, women were required for battle functions due to high levels of security threats and the siege mentality of the Jewish Yishuv (the Yishuv was the Jewish collectivity in Palestine prior to the establishment of Israel in 1948). However, even in these periods women were conceived as mothers and men as fighters (Berkovitch 1999; Lahav 1993a).

With the establishment of the state and increasing confidence in its strength, gender discrimination in military service became more salient and patronizing. Male discrimination against women was exhibited as physically protecting vulnerable women and (future) mothers (Berkovitch 1999). Within the armed forces, women were briefly trained and mobilized within the separate and underprivileged framework of the Women's Corps. Most women served in marginal clerical positions and were taken for granted as auxiliaries to men. Since the end of the 1980s, under the liberal rhetoric of gender equality, formal legal conditions have become more conducive to claims advocating gender equality in the military service.

Legal prohibitions enacted in 1952 that prevented women's military service in selective courses and functions, were abolished in 1987.[58] Furthermore, in 1992 Basic Law: Human Dignity and Freedom was enacted and could have been interpreted in ways that generated more gender equality, including in the military. Despite such a formal progression, women in the military have largely been discriminated against and dominated by men. Surveys in the 1980s and 1990s have detected a high percentage of sexual harassment committed by male officers against subordinate female soldiers. Additionally, selective combat units have been closed to women despite a bounded inclination since the end of the 1980s to allow women to take part in more functions in field units, for example, as instructors.[59]

These conditions of ingrained discrimination amid limited progression have led to frustration among female activists. The very few female MKs have not been able to establish effective coalitions to

58. See Security Service Regulations (Women's Functions in Obligatory Military Service), 1952.

59. For these surveys, see reports of the committee's discussions in Protocols of the Committee, April 4, 1995, 15, 19, 23–24.

oppose gender discrimination in the military. Physical combat is considered a male privilege and the military a male domain. Undeterred by military violence, feminists aspired to grant women the same right as men to become licensed killers, but they were defeated. The military, as a major organization of male dominance, still opposes reform.

In turn, during the committee's debates, feminist activists expected female MKs to initiate an appeal to the Supreme Court against the armed forces in order to spur reform. From a liberal perspective, the presumption was that if the Network could win one salient legal case in the Supreme Court, it might alter women's status in the military with positive ramifications on gender equality in the overall society. Alice Miller was the proper appellant at the right time. Salient judicial cases do not just happen. They are part of a social and political process of legal mobilization.

Miller's appeal to the HCJ, asking to be examined for admission to the Air Force's School of Aviation, was upheld and has become a legal landmark, widely cited since its publication in 1995. A sense of legal victory in the feminist community has since been prevalent. Fervent letters of congratulations to the Network's lawyers, Neta Ziv and Rachel Benziman, were sent from feminists all over the country.[60] The community of feminists celebrated its spectacular legal victory, which has since become part of its legal consciousness and is widely referred to in feminist struggles. Even radical feminists have admitted that while the ruling did not significantly improve the feminine predicament, it was a symbolic defeat for the male-led military. They have since described the ruling as a reference point to underscore the limited advantages and numerous disadvantages of liberal feminism. Debating Miller's case has become a mode of communication among feminists who as community members have generated common denominators through the ruling.

Scholars of mobilization have underscored the relevance of legal texts to the generation of public support (Epp 1998; McCann 1994) while students of courts and sociopolitical changes have emphasized the relevance of legal texts to the attainment of a desirable ruling (Epstein and Kobylka 1992; Rosenberg 1991; Segal 1997). Both noncommunitarian approaches have diminished the importance of legal texts as

60. See files concerning the case in the Network offices in Jerusalem.

communal resources of internal mutual support and solidarity among community members. Communities, not only pressure groups, use the construction of legal texts in the process of mobilization.

Miller's appeal was well chosen. Being a pilot does not demand as much physical strength as is required in the army's field units. Miller was physically and mentally healthy. Additionally, she was an aviation engineer with a civil pilot's license.

Miller's appeal was well constructed as far as both the current environment and legal terminology were concerned. In the midst of Israel's liberal Americanized period, the public would have seen it as preposterous to dismiss her appeal. Miller did not ask the Court to make her a pilot. Rather, she asked the Court to recognize her right to an opportunity to become a pilot if she could overcome one of the roughest and most highly demanding courses in the Israeli military. She aspired to be like a man in a man's world. The timing of the appeal was favorable to her—during the peace process, when the probability of war was not seriously looming. The appeal was thoughtfully prepared and competently utilized state law. It included detailed citations from previous rulings in which the Court had ordered gender equality in the public service.[61] The appeal referred to comparative literature, mainly regarding the North American and Western European experiences, and mentioned the service of women as combat pilots in Western militaries. Its language was carefully drafted—it used only formal legal terminology regarding gender equality in state law.

Miller's request was accordingly constructed as a derivative of the current legal liberal trend in state law. The Court was not asked to make a constitutional revolution. Rather, the legal arguments underscored the absurdity of discriminating against women when physical strength is not significantly required and the appellant is a healthy and competent candidate. Serving in a combat field unit, the legal argument stated, might be a different legal matter.[62]

Expectations among liberal feminists of further mobilization of state law notwithstanding, the Miller case resulted in social change

61. Ibid.

62. Outline of legal arguments by Alice Miller before the Court, Israel Women's Network Archive.

only in a narrow sense. Following the Court ruling, the military altered its internal policy. Specific formal instructions were given to the Air Force's School of Aviation to admit any female who met the requirements for training. These instructions clearly stated that women must not be prohibited from crossing international borders and participating in combat functions.[63] Although dozens of women were admitted to training for seven years following the ruling, few made it past the preliminary stages. Three became pilots in 1999–2002. Base commanders were instructed to build separate showers and adapt housing and other services to the presence of women as pilots.[64]

Subsequent to *Miller,* increasing feminist pressures have been imposed to enable women to serve in combat units. The image of women in the military may have slightly changed. Thus, more evidence of limited social change has been the participation of the Women's Corps' commander in military planning of the High Command concerning human resources. Prior to *Miller,* she could not participate in these sessions. Liberals may claim that an observable improvement has been attained—a step toward gender equality in a society in which the military is a prominent sociopolitical institution.

There have been other aspects of the liberal solemnization concerning the *Miller* case. First, the ruling could have been utilized as a rhetorical base for empowering future litigation in courts and it might have invigorated more judicial rulings favoring gender equality. This expectation was primarily evident among liberal feminist attorneys, who aspired to construct the *Miller* ruling as a guiding precedent.[65] Indeed, since 1995 *Miller* has been widely cited in court decisions regarding equality and particularly gender equality. Yet, no proof exists that the ruling has resulted in more legal change, let alone any dramatic social change in women's status. This is another paradox of the liberal utilization of state law. Its few successes notwithstanding, it is doubtful whether the feminist community has largely benefited from it (for a similar criticism in a comparative context, see Brown 1995; and MacKinnon 1993).

63. Because of secrecy limitations I do not refer to the specific internal command given in writing in July 1996.

64. Ibid.

65. Benziman, interview.

Second, *Miller* could have been used to deter governmental authorities, including the military, from evading and forestalling parliamentary initiatives to promote gender equality. Empirical evidence suggests that female MKs have used it during negotiations with governmental officials and in their proposals for legislation.[66] Rhetorical and symbolic mobilization that imported the Court's ruling into parliamentary debates enabled female MKs to urge governmental authorities to positively respond to liberal feminist queries.

Third, the importance of judicial victories should not be completely discounted. They can be used as communal sources of organizational mobilization. Michael McCann (1994) has made this argument concerning pressure groups. Following McCann, and yet from a critical communitarian perspective, I find that state law and communal organizational interests may intertwine. The win in court has increased the number of members in the Network, has further empowered the legal department of the Network as a crucial branch, and has assisted in strengthening relations between the Network and female MKs. Thus, when the Knesset investigated whether the Court's order in *Miller* had been implemented, the female MKs and Network lawyers informed military officials that further appeals to the Supreme Court would be considered if its order were not completely implemented.[67]

Moreover, *Miller* has strengthened the communal tendency to battle in court for gender equality in the military. In practice, after *Miller* other instances of potential litigation were discussed in the Network. One woman wanted to be trained in the most prestigious and physically demanding commando unit, the Sayeret Matkal. But, unlike *Miller,* no "strong legal cause" was detected. The Network's attorneys presumed that due to the physical demands of the commando unit such an appeal would most probably be dismissed and the Court could justly differentiate between men and women.[68] Due to its focus on the political establishment and state law, liberal feminism has been eager to celebrate victories but not necessarily struggles.

My criticism, however, underscores an additional aspect. The em-

66. See, for example, debates in the committee about promoting laws that would impose equality in the military in Protocols of the Committee, December 29, 1998, 19, 37.

67. Ibid., June 23, 1998.

68. Meler-Ulshiztki, interview; Benziman, interview.

pirical evidence as to the success of liberal feminism in generating a social change in women's status is slim. It is reasonable to assume that a few women may succeed in the future and become combat pilots. But this has marginal social utility compared to the social price paid for proving that women are capable of being as violent (militaristic) as men. Even if women become as violent as men, it is doubtful whether it may reform the structure of sociopolitical power. As explored earlier, militarism, in most societies is men's social asset due to the construct of militarism as male prowess. Hence, gender discrimination in the Israeli military has prevailed since *Miller* and in some respects has even been aggravated.

The Air Force has only partially complied with the ruling. While it has initiated programs for men to join the force and become pilots, women have been selected for the course only when they have asked for it. The military has presumed that men may be better pilots both because of their natural physical advantages and because of the possibility of pregnancy and motherhood among young women. Based on utilitarian calculations of expected investments in candidates, compared to the probable length of their military service as pilots, the Air Force still grants men a clear preference in the recruitment process.[69] Women, however physically and mentally competent, are perceived as mothers. From a militaristic, that is, male, perspective, women should provide fighters with support; they can nurse and breed the next generation of fighters, but combat is a man's art (Peach 1997).

Following *Miller,* the Air Force command presumed that it was required to recruit a few good women at the expense of a few better men, nothing more.[70] Reports in the committee, however disputed by Air Force officials, also pointed to degradation of women during training.[71] There is no ample empirical evidence to claim that the *Miller* case has

69. This material is based on confidential military sources in the Air Force. The main argument was that most women, a significantly greater percentage than men, would be physically incapable of air combat due to the heavy pressures of fighting on the body. Accordingly, equal efforts to recruit men and women would be irrational. The same argument was made during the committee debate in 1998. Due to censorship restrictions, I am unable to refer to names and concrete protocols.

70. Protocols of the Committee, December 28, 1998, 15. I refrain from direct citations due to censorship limitations on discussions regarding pilot training.

71. Ibid.

rectified women's status in the military and the overall society. More women will become pilots, even combat pilots; more women will serve in field units, even combat field units, and the chief commander of the Women's Corps has gained more say in military decision-making processes. Moreover, in November 1999 the military considered equalizing the duration of compulsory military service for Jewish men and women (2.5 years).[72] But what is the social meaning of these self-celebrated gains for the feminist community?

The vigorous attempts of liberal feminists to use legalistic rhetoric and gain a few victories in a male-dominated sphere may change the military slightly. Yet these attempts may legitimize the overall male structure of the military. Efforts made by liberal feminists to adapt, and be adapted to, constitutional structures through litigation and legislation entail the costs of not challenging the male-dominated logic of the constitutional setting. Liberal feminism prefers a legalistic case like *Miller* to initiating social reforms that will liberate women from economic dependence on men. It prefers selective achievements in state law to cultivating, through grassroots activities, a communal feminist consciousness.

Critical communitarianism evaluates liberal efforts while looking at a feminist collective good. Feminist strivings to enact "affirmative action" in the public job market have demonstrated liberal achievements and failures. Endeavors to ensure female representation in public bodies have been typical of liberal feminism in several meaningful ways. First, the efforts to enact affirmative action have not been a conflict over improvement of women's sociopolitical predicament but a struggle to enlarge women's say in elitist bodies. Second, affirmative action has been an effort to promote the ability of women to compete with men within the bureaucracy and political establishment. In these spheres, liberal feminism could have achieved high rates of success since the basic sociopolitical structure of gender relations has not been at risk of being drastically altered.

Third, affirmative action has articulated a liberal presumption as if women should be like men and not constitute a separate feminist consciousness. Fourth, affirmative action is not grounded in critical ideology and critical theory, but it is based on pragmatic views of

72. *Yediot Hacharonot,* November 11, 1999, 20.

gender relations that prefer adaptation to hegemonic structures to reforms of those structures. Fifth, affirmative action can be instrumental for women in the middle and upper classes who have the professional capabilities to compete with men for elitist jobs. However, it cannot socially empower underprivileged women.

Let us return to the Israeli scene. Liberal feminism yearns to use litigation, arguing for affirmative action as a means of narrowing the space between the Governmental Companies Law and reality. In reality, boards of governmental companies are not inclined to nominate women as directors. Academic education among Israeli women has increased dramatically, and women are as educated as men. Yet in many governmental companies all the board members are men. Hence, the Network appealed to the Supreme Court. In the first legal case, in 1994, the Network appealed against the Ministry of Transportation and a governmental company under its authority.[73] The appeal attempted to narrow the gap between self-declared state egalitarianism and the absence of women in elitist bodies.

The file's protocol exposes how the Network mobilized liberal law and used its language to promote the inclusion of women in elitist bodies. Fifteen men were members of the company's board. The minister decided to appoint an additional member, a man, while none of the twenty-five women in the upper ranks of the ministry, all of them with proper academic training, was even considered for this position. The appeal was grounded in the GCL, and the Court was not asked to rule dramatically, but it was asked to apply the principle of affirmative action "as a special and temporary arrangement" in accordance with state law.[74] Referring to previous Court rulings, it was asked to give the GCL a broad interpretation to encourage gender equality.[75]

The value of gender equality and the Court's rhetoric about its commitment to apply it were used as the main narratives in the appeal.[76] Women are a deprived group, the Network claimed in its legal arguments before the Court, so the minister was compelled by the

73. HCJ 453/94 *Israel Women's Network v. Israeli Government* P.D. 48 (5) 501.

74. Ibid., clause 12.

75. Ibid., clause 18.

76. References were made to several rulings, inter alia, HCJ 104/87 *Nevo v. Labor Court* P.D. 44 (4) 749; HCJ 153/87 *Shakdiel v. Minister of Religion* P.D. 42 (2) 221; and HCJ 1/88, 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa,* P.D. 42 (2) 309.

GCL to act in ways that would enable women to become directors. It was a liberal argument that presumed the plausibility of equality of opportunity within the state bureaucracy. Justifications for a capacious hermeneutics that imposes the burden of proof on the minister were provided by referring to Western liberal experiences, primarily in North America. Accordingly, references were made to Canada, Norway, and the United States.[77] This way the attorneys could frame their arguments in a broader transnational liberal context, which has often been embraced by Israeli justices and has enhanced their sense of justice in public policy.

The Court upheld the appeal and enforced the GCL in one of its most celebrated decisions in years. The fact that the judiciary can force governmental companies to enable women to be appointed as directors had not been recognized before. What has this ruling meant for the community of feminists? Rosenberg (1991) has analyzed the conditions under which courts yield dramatic rulings that may induce social change. These are the legal precedents that empower courts to effect a change: lack of a strong opposition to an appeal; significant public support for an appeal, namely, a majoritarian mood; and bureaucratic willingness to utilize the court ruling. All of these elements appeared to be present in the Network appeal. As noted earlier, the appeal was phrased within a larger legal framework of preceding court rulings and legislation; the Network submitted it during Israel's liberal phase, which was characterized by a majoritarian mood, and no organized opposition to the appeal existed. Furthermore, no bureaucratic opposition was evident.

Has any social change followed this Court ruling? The effect of the 1994 ruling in the public market might have been significant (see fig. 8). The statistics demonstrate a drastic rise in the number of women who were appointed as directors in governmental companies. However, there are some basic problems with these figures. The comparison is between 1993 and 1997, while the Court ruled in 1994. The rise may have been occurred, in any case, due to the increasing organizational tendency to use the rhetoric of gender equality. These methodological problems notwithstanding, there is little doubt that most of

77. Outline of Arguments, clauses 11, 17.

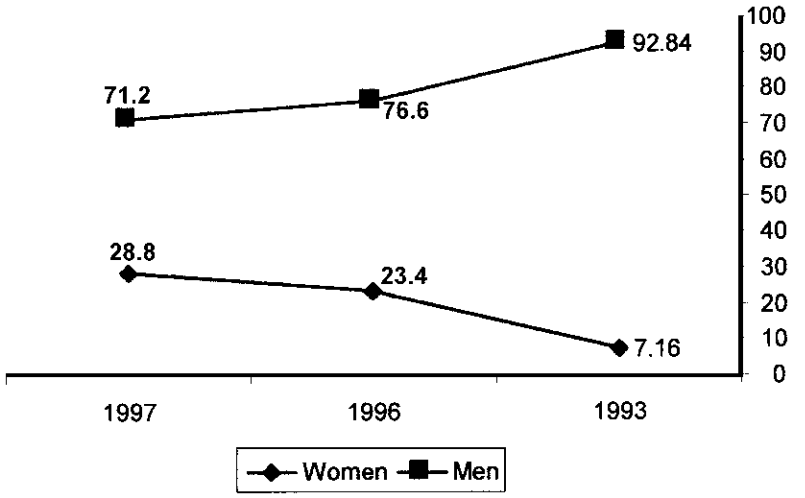

Fig. 8. Women in governmental companies before and after the Supreme Court ruling (in %)

the social change occurred following the ruling in 1994 and that the ruling has left ministers with a little formal choice but to comply with state law.

Hence, as far as the numbers can tell, the 1994 ruling has had a significant effect on women's entrance into elitist positions in governmental companies. The theoretical and empirical questions should be about the communal meaning of such limited change. Rosenberg's argument should be more carefully constructed. Even under conditions that are conducive to salient judicial rulings with the potential to generate social change, these changes are not necessarily occurring in the larger communal dimension. Rosenberg's conditions are necessary for communal social change, but they are not sufficient. Furthermore, his definition of *social change* seems to be debatable. This is where liberalism fails short. Courts may render salient rulings, but they do not necessarily result in communal social reforms.

Before further analysis, let us look at the 1998 ruling in which the Court upheld a similar appeal of the Network. Following the 1994 ruling, the Knesset, with the intensive involvement of the Network, altered the State Service Law (Nominations) so as to broadly apply the

principle of affirmative action to the state's civil administration.[78] The 1998 appeal was based on the SSL, and the HCJ was asked to further apply its 1994 ruling and enable women to be selected and appointed to high positions in the state's civil service.[79] By incrementally using success in previous court rulings, liberal feminists have attempted to structure the legal text and terminological environment for promotion of equality of opportunity for women.[80]

A community will rely on written legal texts in ways that allow its interpretations to construct the desired linguistic environment. Consequently, state law may become a major component in communal attitudes and efforts to advance its interests.

While in 1994 the Network's legal arguments referred to European and North American legal settings, in 1998 the references were solely to Israeli legal sources. Liberal feminists acknowledged that state law was more favorable to their purposes than ever before. In thirteen pages of the Network's arguments before the Court, there was no single reference to any legal source other than Israeli state law. Transnational, American-led, liberal rhetoric of gender equality was localized in the communal legal culture. As part of this textual construction of a favorable legal terminology, the concept of affirmative action was more prominent than ever, relying on the legal precedent of 1994 and its legislative results.

In 1998, the Network argued that "due to the alteration in the Governmental Companies Law and the ruling of the distinguished Court that this law matters [the 1994 ruling] the proportional representation of women in directorates of governmental companies was sharply increased from 2 to 28.8 percent."[81] The Network effectively initiated a process of a legal change based on its previous success in Court using legal texts, and empirical evidence concerning the effect of the 1994 ruling on entrance of women into governmental companies. The endeavor of liberal feminist attorneys to construct a linear line of legal progression from egalitarian assertions to affirmative action framed the Court as part of that incremental process.

78. Bill Proposal 2381 (1995), 368.
79. Outline of Arguments, clause 5.
80. Ibid., clause 11.
81. Ibid., clause 15.

This process moved the Court to uphold the appeal and to impose upon the minister of industry serious consideration of the appointment of a woman to a senior position. The justices constructed a linear line of *stare decisis* and legislation that constitutes affirmative action as a neoliberal right that renders a woman a legal claim, under specific conditions, due to her affiliation with a deprived collectivity of women.[82]

The social scope of this legal change is very narrow from a critical communitarian perspective that looks at the common feminist good. While a few women were appointed to positions in the upper echelons of the Israeli economy, most did not enjoy the fruits of affirmative action in governmental companies and the civil service. The egalitarian repercussions of women's progression in the state bureaucracy on the daily lives of women, particularly in the underprivileged strata of Israeli society, are far from being proved. While mobilization of state law by policy-oriented NGOs such as the Network has been proven to be somewhat effective at the formal level of statutory and adjudicative assertions, the social costs of such a mobilization have been just as prominent.[83]

Grassroots activities and the establishment of a separate feminist consciousness have been neglected. The empirical findings show that except for improvement in the representation of women in governmental companies no progress has been evident at either the political public or the grassroots level. Women are still subordinate to men despite a few salient court rulings and laws. This communal predicament notwithstanding, mobilization of state law and liberal feminist cooperation with the political establishment have legitimized the hegemonic patriarchal epistemology that generates the structure of male domination as "given." Liberal feminism has pragmatically hampered only a few of the negative repercussions of patriarchy.

The approach of achieving limited legalistic reforms through legitimatization of the power structure is typical of liberal feminism across the world (Young 1990). In the United States and Europe alike, some

82. Ibid.

83. Other feminist organizations that participated in the mobilization of state law are inter alia, Naamat, the women's organization of the Histadrut; and Emuna, an Orthodox Jewish organization.

progress in the status of some women has occurred in the business realm, and this has followed post–World War I women's participation in national elections and later liberal acknowledgment of gender equality between individuals. Yet studies that are more sensitive to the communitarian aspect have shown that despite women's progress in the business sphere many women—relative to men—have been significantly displaced from the public sphere (Reyes, Shaffer, and Reyes 1997). What modern political regimes have been missing is a legal consciousness that views women as a deprived community and grants them collective rights equal to those of men.

Conclusions

This chapter has explored legal culture from the communal perspective of feminists by delving into their voices, identities, consciousness, and practices. Since this chapter refers to feminists as a nonruling community, it could have described them as embedded activists who share common virtues and goals and yet with autonomy for various collective practices of identity toward law. Due to the emphasis on legal culture, I could have looked at a range of practices, compared them, and tried to understand how they relate to state domination, communal good, social existence, legal consciousness, and identities.

The diverse epistemological literature about feminism in modernity notwithstanding, the inadequacy of theoretical and empirical analysis of feminist legal consciousness and practices is obvious. Investigation of a non-American case, like that of Israeli feminists, may contribute to strengthening our relatively frail grasp of communal legal culture as a dimension of gender and as a potential source of challenges and counterhegemonic force. The diversity of Israeli feminist experiences and identities, and yet a relative resemblance to feminist practices and identities in the Western sphere, may suggest additional value in this chapter's findings.

Let us accentuate a few lessons and leave more conceptual conclusions to the following chapters. From a communal perspective that underscores interactions between various feminist concepts, identities, and practices, and their contribution to the common feminist goal of gender equality, there have been two distinct and comparable feminist approaches to Israeli state law: radical and liberal.

Neither of these trends is homogeneous and exclusive. On the contrary, each of these empirically and theoretically based trends is sufficiently heterogeneous to show how various groups of women in the feminist community that share a common goal and other collective characteristics have tended to locate themselves and interact with state law through their communal affiliations. Crucial discrepancies in approaches and legal practices notwithstanding, radical and liberal feminists share some common elements of gender identity, social existence (relative deprivation), legal consciousness (state law is male dominated, and women have been discriminated against in law), and practices (efforts to attain equality through organizational activities). Feminists constitute a community in the communitarian sense of shared public good and crucial collective legal and sociopolitical characteristics, as a feminist consciousness, which enables women to be individually constructed through communicating with other women in their feminist community.

Although discrimination against women has been severe and entrenched, Israeli state law has become more liberal since the 1980s and has supplied an opportunity to look at the insufficiency of liberalism as a potential liberating transnational and national force. State law and legal ideology have asserted more gender equality and democratic progression as part of the transnational trend of liberalism, mainly propelled by American domination. However, a careful analysis at the community level has offered more diverse and counterhegemonic lessons about the meaning of communal legal culture, state law, liberalism, and feminism. Transnational forces, scrutinized and generated in state law and legal ideology, have been localized in the communal legal culture, which has contributed its own hermeneutics and its distinct practices to norms that erroneously might be conceived as "given" within the language of globalization.

Communal legal culture is not a homogeneous set of practices. Rather, this notion reflects and focuses on ambiguities, paradoxes, inherent contradictions, multifaceted identities, and a diversity of reactions to state law such as its mobilization and demobilization. Radical feminism has underscored community consciousness and grassroots activities, alienation from and apathy toward state law, and disengagement from legal mobilization of state law. Radical feminists have demobilized state law because it is considered to be an irreversible male

product. Somewhat affected by neo-Marxist and critical feminist concepts of state ideology, legal ideology, and male structural control over state law, they have conceived liberalism as a menace to the feminist collective consciousness and the collective struggle for gender equality. Such equality cannot be attained through legalism and individual rights but rather through bottom-up challenges to power structures. Equality does not exist in radical minds as a value of state law but as a value to be attained while demobilizing state law and utilizing communal efforts through grassroots activities within populations untouched by state law (such as battered women) and criminalized by state law (such as prostitutes).

With regard to the Friedman versus Cotterrell controversy about legal cultures (Nelken 1997), I conclude that legal cultures are indeed important phenomena in human life. This term encapsulates a world of practices toward and inside legal and sociopolitical settings, which cannot be traced through a formal analysis of state law or through a macroanalysis of political cultures. As Cotterrell has put it, legal culture is not autonomous from state hegemony (and ideology). The critical communitarian approach shows that the study of power and state hegemony should and can be integrated into comprehension of nonruling communities and their cultures, as Cotterrell has generally suggested.

Thus, Jewish radical feminists have not disobeyed state law due to their Zionist proclivity. Paradoxically, state law has been ubiquitous in the rhetoric of Israeli Palestinian feminists, who are presumed to be the most extreme opponents of the state. The empirical evidence presented here suggests that Palestinian feminists are inclined to demand some intervention of state law through state apparatuses in Palestinian women's life in order to protect them against communal patriarchy. The dichotomy offered in the theoretical literature, as if legal culture is a different phenomenon from state law and legal ideology, is hence binary and erroneous. From a communal perspective, legal culture is not independent of state ideology, legal ideology, and state law. What makes communal legal culture so fascinating and intriguing to observe is its paradoxical and simultaneous existence within and outside state law and its ideology.

Liberal feminists believe that individual civil rights in state law foster gender equality as part of state legality. In this instance of liberal femi-

nism, the intimacy of interactions between state ideology, legal ideology, state law, and communal practices is more evident. They deal with legislation, adjudication, budget allocations, and policy enforcement. Radicals conceive state law as a male-produced coercive fabric with a low probability of significant structural and cultural reforms. Liberals perceive state law as interchangeable due to its separation from other state power foci. Therefore, they perceive state law as a significant means of establishing grounds for gender equality.

Violence is a major source of both agreement and contention. On the one hand, fighting against male violence is part of the common morality of feminists. On the other hand, while liberals mobilize violence in their legalistic reforms, radicals demobilize it. Since critical communitarianism looks at state domination in communal life, it explicates how various feminist identities react to state violence in the context of communal legal culture. Liberal feminists wage campaigns against male violence and the military in ways that serve to maintain their hegemony in the feminist community.

Referring to feminists as a community has enabled us to see identities and practices at the collective level, from alienation and apathy to grassroots activities, extraparliamentary action, legislation, adjudication, and legal mobilization against violence. It has also illuminated organizational interests during processes of legal practice. Alternative outlooks, whether formal analysis of law in books, state perspectives, individual attitudes and practices, or group-affiliated actions, would have exposed only one dimension of legal cultures.

Law from the communal perspective is a multidimensional sphere in which the language of law, its linguistic environment, can be both a field of cooperation and a battlefield. What may seem from a state law perspective to be progress may be seen from a communal perspective to be regression. Moreover, while state law has had some presumptions about women as individuals and as a group, the realities in the community have been quite different.

State law and its ideology have not only been limited in willingness and ability to accommodate diverse feminist expectations; they also imagine women in a very concrete form. Israeli state law perceived a woman as a middle-class, heterosexual, Jewish woman who has the power (e.g., time and money) to resolve problems by utilizing litigation. It has ignored, however, other identities and practices articulated

and generated at the feminist communal level. Thus, terms such as *affirmative action, sexual harassment, violence,* and *equality,* which have apparently been comprehended and agreed upon in the liberal canon, are the subject of fierce communal controversies that articulate and constitute, as communities often do, multifaceted identities.

Chapter 5

Religious Fundamentalism and Law: The Jewish Ultra-Orthodox (Haredi) Community and Legal Culture

Chapter 3 examined critical communitarianism concerning the legal culture of a national minority. Chapter 4 explored the legal culture of feminists who protest against male dominance. I have explored these cases while referring to state domination, transnational American-led liberalism, and state-community relations. This chapter demystifies several liberal and secular presumptions about religious fundamentalists by delving into their communal legal culture.

Religion, particularly religious fundamentalism, articulates dangerous conflicts between modernity and traditionalism and liberalism and communalism. Since Orthodox Judaism does not differentiate between religious life and politics, it is of particular interest, especially ultra-Orthodoxy, which for generations has denounced Zionism and any other potential form of Jewish nationality.

Yet a critical communitarian analysis calls for modern states to embrace the challenges of fundamentalist religious communities, which often refuse to be integrated into the overall fabric of state mobilization and tend to deny the relevance of liberalism and globalization to their collective identities. Inter alia, prominent examples of religious fundamentalism are radical Christian extremists and Amish fundamentalists in the United States, Christian Orthodox communities in the Netherlands and Germany, Sikhs and Muslims in India, Muslims in Western European countries such as England and France (and in Turkey), and Catholic fundamentalists in Latin America. These diverse groups, which highlight the conflicts between religion and the state and religion and liberalism, exist in many democracies in various forms. Formally, liberalism does not constitute religion as a public

force endorsed by the state. In practice, however, the issue of liberalism, constitutional democracy, and religion is profoundly complex and cannot be comprehended in a binary language.

England, Germany, and Ireland are constitutional democracies. Many claim that these states, particularly England, are liberal democracies despite the fact that in all three states Christianity (Anglican, Lutheran, and Catholic) is a state-endorsed religion. The problem I raise, that is, the strain between liberal egalitarianism and the state's religious commitment, may be comprehensible in various normative, theoretical, and empirical ways.

Even in the most liberal cultures, religion may offer a diversity of intriguing legal hermeneutics that may be generated in and through state law. In contrast to Cover (1992a, 1992c), I do not see how state judges are "killing" those religious interpretations; rather, judges are using religious symbols and metaphors to advance their judicial opinions. Nevertheless, modernity and particularly its own secular fundamentalism has imagined and proclaimed its ability to be divorced from religion as a genuine source of routine legal hermeneutics (Santos 1995). In many Western countries the ethos of separation between state and religion has been celebrated, yet Christianity is a major source of culture in political life and state law (Bruce 1999).

The liberal illusion of separation between state and religion is a constitutive self-propelled myth with instrumental ramifications for the artificial liberal boundary between religious faith as a "primordial" attachment, on the one hand, and "rationality" as the fundamental concept of modernity, on the other hand. This binary distinction, which is particularly relevant to the dichotomy between religious fundamentalism and the modern state, will be deconstructed through investigation of a communal legal culture of religious fundamentalists touched by state domination and transnational liberalism.

Islam and Judaism are prominent in their approaches to politics, society, nationality, and policy matters as parts of religion. Thus, Islam's challenge to democratic fundamentals in Turkey is similar to the challenge of some religious Jewish fundamentalists to the state of Israel. Israel differs from Turkey, however, because there has been no separation of religion from the state in Israel.[1] While Turkish nationalism is

1. During a workshop about religions and human rights at Hebrew University, Jerusalem (February 2000), Marc Galanter and Jay Krishana argued a similar point

grounded in an antireligious disposition, Zionism relies on Judaism and embraces Orthodox Judaism as part of its ethos. Jewish Orthodoxy is a cornerstone of the Zionist state's ideology, and it has been activated through state law.[2] What is comparable and still unique in the case of Jewish religious fundamentalists is that their legal culture, that is, their legal consciousness, identities, and practices toward state law and their own legal texts, is generated within a nonsecular space. Jewish religious fundamentalists generate their legal culture within a rather traditional space, partially within, partially outside, and even against state law, which endorses Orthodox Judaism as the state religion.[3]

Before proceeding to my main argument in this chapter, I owe my readers an etymological clarification. Israelis refer to ultra-Orthodox Jews as Haredim. The English translation is "fearful." It accurately reflects one facet of their collective identity, loyalty to Jewish Halachic texts and a firm opposition to compromises with secularism. However, to reduce the tension between the state and the Haredim to a conflict between modernity and religion is a grave mistake. The tensions originate from various identities and are activated through various, often contradictory, legal cultures.

I suggest not stigmatizing fundamentalist religious communities as contrary to modernity, nationality, democracy, and state law. Paradoxically, in my study I conclude that there is not necessarily conflict between religious fundamentalism and liberalism. This study shows that even religious fundamentalism, when it is comprehended from its own communal perspective, has had equivocal and pragmatic relations with state law, and even with liberalism, despite its repudiation of some elements of modernity in the age of globalization.

More specifically, Israeli state law has not been inclined to eliminate alternative legal cultures that occupy the same space as Judaism and Jewish religious fundamentalists have not completely rejected state law. Contrary to liberal expectations that presume such a binary conflict, a critical communitarian analysis shows otherwise. Hermeneutics and other practices simultaneously effect interactions between and separation of state law and communal law.

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regarding the challenges of Muslim communities in India. My thanks go to Francis Raday, David Kretzmer, and the Minerva Center for organizing this workshop.

2. See chapter 2.

3. See also chapters 2 and 3.

The next section of this chapter dwells on the Haredim's approaches to the Jewish and Zionist metanarratives of the state and its legal ideology. Then it examines the communal social being of the ultra-Orthodox. Subsequently, it suggests an outline of the religious fundamentalist legal culture; practices of identities toward state law and community law are analyzed. The third section explores sources of conflict and cooperation among liberalism, religious fundamentalism, and religious pragmatism as intersections of different legal cultures. A discussion is devoted to legal mobilization by non-Orthodox religious movements (the Conservative and the Progressive movements), which uses transnational, American-led liberalism.

The fourth section addresses the issue of state interference in communal internal life while focusing on two major aspects: first, crimes in nonruling communities and state punishment; and, second, the boundaries between liberalism and nonliberal, nonruling communities. The fifth section aims to understand how religious fundamentalism deals with the cultural hegemonic constructions of modernity, rationality, and democratic elections. It investigates the ways in which Shas, the main political party within Mizrachi ultra-Orthodoxy, has mobilized and countermobilized state law, offering alternative legal hermeneutics and political action. The last part is devoted to conclusions concerning state ideology, legal ideology, state law, and legal cultures of religious fundamentalist communities in the age of globalization.

On Cultural Narratives, Religion, and State Law

Legal Intersections: Dissent, Not Illegitimacy

I follow Santos (1995) and Twining (2000), who have impressively discussed legal pluralism, and I share their emphasis on the importance of normative versatility. Yet, while Santos has conceived cultural relativism as generating legal pluralism and Twining has considered legal liberal structures as conducive to legal conjunctions, I refer to the issue of legal pluralism quite differently.

As noted earlier, legal pluralism is primarily a horizontal phenomenon constituted when a person is subjected to different sets of legal norms simultaneously. In the context of religious fundamentalists, this simultaneous cultural phenomenon is secondary and even mar-

ginal. Persons in the Haredi community, as in most other religious fundamentalist communities, conceive of themselves as being embedded in one ultimate set of religious, ultra-Orthodox dicta. In this instance of religious fundamentalism in democracies, legal pluralism fails to prevail from a communitarian perspective. Yet, there is no dichotomy of state and nonruling community; community members imagine themselves as relevant to several sets of legal norms. Hence, I prefer to speak about legal intersections, which neither result from complete relativity of norms nor are structurally imposed through liberal jurisprudence. As this study shows, cultural legal intersections are created by ambivalent legal practices utilized by members of the religious fundamentalist community toward the state.

Israeli Jewish society is largely united over the Jewish essence of the state. The controversy over the proper degree of Jewish religiosity has been severe, however. Representative examples of this can be found in the declaration of independence of 1948, the Law of Return of 1950, and in the basic laws of Freedom of Vocation and Human Dignity and Freedom of 1992. As we have seen in chapter 2, Judaism in the widespread understanding of symbols, morals, liturgy, and traditions has served as a central factor in the creation of state law. The shared religious heritage and the empathy with the Jewish fate across generations, and across borders, have allowed the evolution of a broad-based national spirit embodied in constitutional arrangements among the Jewish majority.

The political elite constructed a state without a separation of the Jewish religion from state. Thus, the liberal value of separation of church and state—formally founded in the United States and expressed in the limitations on state involvement (e.g., financial) in religion and in the rejection of state sponsorship of one specific religion—has not been adopted in Israel. The approach of the ultra-Orthodox community to state law should be comprehended within that space.

However, Israel has never embraced the antidemocratic theocratic model, according to which the state and religion are one and religious leaders control the state. Iran after the Khomeini-led revolution of 1979 is an example of a theocracy, where the *ulama* controls the political regime. The constitutional model of nonseparation between state and Orthodox religion as practiced in Israel has reflected and generated the definition of Israeli nationality as Jewish. In that political

cultural context, state law has legitimized the legalized religion as politics.

The Orthodox Jewish essence rendered to the state has been constructed as "civil religion." Civil religion is a system of religious symbols, values, and norms with significant political and national meaning (Dowty 1998; Liebman and Don-Yehiya 1983, 1991). The Jewish Israeli political discourse is based on religious symbols. Thus, festivals, such as Rosh Ha'Shana, Yom Kippur, and Pesach are sanctioned by state law as national festivals and have widely been accepted not only by the Orthodox/ultra-Orthodox religious public but by traditional and secular Jewish Israelis as well (Levy, Levinson, and Katz 1993; Liebman and Katz 1997). Civil religion should not be portrayed as a culturally autonomous phenomenon; rather, state institutions have played a central role in the construction of the public Jewish consciousness (Liebman and Don-Yehiya 1983; Ram 1995). Thus, education in state schools stresses the Israeli national identity as a Jewish identity, Jewish religious festivals have become national holidays, and compulsory military service is geared toward constructions of Jewish nationalism.

Deep social rifts surround the issue of state religiosity and its meaning for democracy. The majority of secular Jewish Israelis tend to support the reduction of Jewish Orthodoxy's effects in state law. Thus, according to a comprehensive survey of 1991, 78 percent of those who did not adhere to Orthodox dicta and 45 percent of those who practiced some of the Orthodox dicta supported "civil marriages" in Israel (Levy, Levinson, and Katz 1993). Seculars favored significant reductions in the importance of religion in Israeli public life. For example, 70 percent of seculars and 35 percent of non-Orthodox Jews shared the opinion that Israel should be "less religious than it is" (Levy, Levinson, and Katz 1993). Yochanan Peres and Efraim Yuchtman-Yaar detected in 1998 a similar trend—78 percent of seculars and 40 percent of non-Orthodox Jews advocated less religious legislation (1998, 165). On the contrary, 93 percent of ultra-Orthodox Jews and 52 percent of Orthodox Jews demanded more religious legislation (165).

Accordingly, obedience to state law has been a controversial issue for both religious and secular Jews. Obedience has long been debated

in political science and law as a criterion for legal cultures (Caldeira and Gibson 1995; Rozen-Zvi 1993; Tyler 1990). Orthodox and primarily ultra-Orthodox religious Jews conceive of Halachah as a major normative source of obedience; it requires daily compliance with rabbinical rulings even when they are contradicted or trivialized by state law (Peres and Yuchtman-Yaar 1998). From an Orthodox perspective, state legitimacy requires that secular law does not contradict Jewish religious dicta. Many secular Israeli Jews, on the other hand, tend to view state law as requiring obedience even when it contradicts rabbinical law (Peres and Yuchtman-Yaar 1998).

An expression of this rift over legal obedience to state law was the response of "Yesha Rabbis" (Orthodox Halachic leaders of Jewish settlers in the West Bank) to the possibility of a military withdrawal, as specified in the Oslo Accords (1993). In winter 1995, these rabbis, viewed by many of the settlers as authoritative figures, ruled that withdrawal from the Occupied Territories ran counter to Halachah and therefore military commands ordering the evacuation of settlers should be disobeyed. The impact of the Rabin assassination (November 4, 1995) and public criticism of ultranationalist tendencies weakened the effects of that ruling. Accordingly, an expeditious rejection of this Halachic ruling was issued by Israel's chief rabbinate and dominant Jewish religious leaders. However, the issue of religious disobedience remains relevant to this day. More generally, contradictions and conflicts between state law and Orthodox religious law have been a principal subject in the relations between the Orthodoxy and other political elites.

Several distinct outlooks and practices regarding the state are to be found within the religious camp. Religious Zionists, represented especially by the National Religious Party (NRP) have envisioned and practiced a combination of Zionism as territorial nationalism and extraterritorial and extranational monotheistic religion. One of the fundamentals of Judaism is the longing for messianic redemption, which is a divine act. Religious Zionism calls for the fusion of Zionist political activism and messianic longings. It argues for formalizing Jewish sovereignty over a Jewish land as speeding eschatological redemption. Accordingly, Zionism was deemed religiously legitimate, even desirable, as a means of accelerating the coming redemption provided that

Orthodox Judaism would be recognized as Israel's official religion (Don-Yehiya 1977; Don-Yehiya and Liebman 1984; Liebman 1990; Liebman and Don-Yehiya 1983).

This was also the rhetorical justification for long-lasting cooperation between religious Zionists and Mapai/Labor Party during which the former complied with secular laws and state judicial review of rabbinical rulings in exchange for political payoffs. This political cooperation between Orthodox and non-Orthodox Jewish elites had been formalized in the 1940s with the first political agreement anchoring the secular-religious status quo. It continued until the NRP abandoned Rabin's first government in 1976–77.

Prior to 1967, Jewish Orthodoxy tended to focus on building religious institutions, and specifically on maintaining religious control over private and public life in Israel, while obtaining state funds for state-recognized, partially autonomous education. Orthodox Zionism experienced a radical transformation following the 1967 war. Religious Jews have always been subject to legal intersections, like religious minorities all over the world, such as in Denmark, Germany, India, and the United States. But political reality has stimulated a change in the level of their commitment to state law. Orthodox Zionism has since 1967 become Israel's most hawkish ultranationalist sector, calling for massive Jewish settlement in the Occupied Territories, especially in the West Bank, and their annexation by Israel. Accordingly, Zionist Jewish Orthodoxy has challenged state law directly and vigorously due to the ambivalent approach of state law as to the future of the territories occupied in 1967. The fact that the Land of Eretz-Yisrael was conquered and redeemed in the NRP's mindset spurred an unprecedented surge of feelings of religious salvation.

Religious Zionism found itself with its religious aspirations fulfilled when the Jews returned to their "chosen land." This post-1967 ideological and emotional emphasis generated the relativity of state law as a source of guidance and obedience within a multicultural space of laws applied to religious Jews. Its relevance has become contingent upon its instrumentality to Jewish control over the territories (Sprinzak 1986, 1991). The new strongholds in the "Holy Land" have exacerbated the sense of messianic eschatology as the ultimate part of ultranationalistic Zionism, and in turn religious loyalty to the Halachic text has intensified. Hence, the occupation has produced a national fundamentalism.

Democracy and its laws are perceived as fragile and a means of realizing the renewed Halachic principle of settling the Jewish frontiers.[4]

The Haredim, who in the early 1990s were about 6 percent of the Israeli population, are different from religious Zionists.[5] They insist on stricter obedience to Halachah and its religious dicta, and they have more decisively rejected any compromise with modern lifestyles. An example is the effort by Haredi authorities to prohibit personal computers and TV sets in private and public housing. These elementary technological facilities are still identified as inciting, among other evils, blasphemy and pornography. In Haredi municipalities and neighborhoods, Halachic authorities, acting in informal communal courts, issued rulings, which included sanctions of excommunication against those who disobeyed. The Supreme Court recognized the validity of these writs in cases of "private" courts, namely, informal communal rabbinical courts, but prohibited these writs if rabbinical state courts had issued them.[6] Thus, the communal leadership of ultra-Orthodoxy has disciplined its members, preserved the internal structure of the community, and retained its identity in a bounded space from which "others" are excluded.

Most fundamentalists reject Zionism as a political ideology. Most ultra-Orthodox Jews view Israel as a very problematic entity with which it has been necessary to come to terms, although a few groups

4. New political leaders who were far more extreme replaced the veteran, pragmatist leadership of the NRP (such as Zerach Varaftig and Yitzhak Rafael). The political participation of the radical right-wing Tehiya Party's members in the NRP completed the shift toward extremism in which young leaders like Zevulun Hammer and Hanan Porat took over the party. This change was unavoidable. The NRP became a political ally of the Likud and one of the most ultranationalist parties, calling for the acceleration of Jewish settlements in the Occupied Territories. The NRP and its members are closely connected to Gush Emunim, the ultranationalist and Orthodox mass movement that calls for settlements in the territories regardless of their legality (Sprinzak 1991).

5. See, for different criteria for population estimation, Dahan 1998–99.

6. In one case, three appellants were excommunicated by a state rabbinical court. The HCJ intervened and ruled that these writs of excommunication were unconstitutional because state courts, including rabbinical courts, do not have the authority to excommunicate (*Ha'aretz,* November 18, 1996). However, the Supreme Court legalized writs of excommunication issued by nonstate rabbinical courts in religious fundamentalist localities. For the ruling, see HCJ 3269/95 *Katz v. Rabbinical Court, Jerusalem,* P.D. 50 (4) 590.

(such as the Satmers) hold Israel to be an evil entity against which active opposition is necessary. In general, ultra-Orthodox Jews differ from religious Zionists. Like religious Zionists, Haredim recognize the contradiction between religion and nationalism and between the notion of messianic redemption and the creation of the state by secular means.

On the contrary, however, and grounded more strictly in Halachic hermeneutics, ultra-Orthodoxy (with a few exceptions) views nationalism and statehood as profane, destructive, degenerate, and deserving of communal opposition. Principally, Haredim perceive nationalism as contradicting eschatological messianic redemption. Since nationalism has moved Jews away from religion, it has hampered redemption (Fund 1999). From the ultra-Orthodox vantage point, there is no greater peril to Jewish longings for messianic redemption than Jewish nationalism (Deshen 1993; Menachem Friedman 1989, 1990, 1991; Naor 1996; Shveid 1988). As we shall see, increasing liberal (and to a lesser degree libertarian) facets in state law have strengthened the tension between ultra-Orthodoxy and state law. The dissent of ultra-Orthodoxy has not been only from Zionism but from a state controlled by Jews. Later I will show that, this dissent notwithstanding, Jewish ultra-Orthodoxy has been ambivalent toward state law, even in its Zionist configuration, and that its opposition to a Jewish and Zionist state has not been extreme.

This dissent has been expressed and constituted in a number of social ways. For example, ultra-Orthodox Jews have chosen to live in areas apart from other Israelis, such as the Haredi city of Bnei Brak, and in Haredi neighborhoods in Jerusalem (Keren and Barzilai 1998; Shelav 1997). The fundamentalists have constructed not only geographical isolation but autonomous educational systems based on ultra-Orthodox instruction. Their autonomous educational system has been accepted and is financially endorsed by the state.[7]

State law has adopted Orthodox Judaism as its official religion. This has allowed the Haredim to play a role in state power foci. In addition, state law has practically permitted Haredim to control their communi-

7. See, for example, The Regulations of Obligatory Education (Free Education in an Unofficial Institution), 1978, which were derived from the Law of Obligatory Education, 1949.

ties with their own legal system concerning issues such as Jewish dietary laws (Kashrut), regulations concerning modesty of dress and lifestyle, housing, exemption from military service,[8] and private judging by communal rabbis. Rulings of communal courts (Batei Din) have been publicized through communal leaflets and executed as part of the communal habitude. In extreme cases, communal, informal, and unrecognized, police (disciplinary) forces have executed their rulings.

Less than other Israeli Jews, ultra-Orthodox Jews have perceived the Supreme Court as legitimate (Barzilai, Yuchtman-Yaar, and Segal 1994b; Rattner, Yagil, and Pedhazur 2000). In contradiction to conventional wisdom, it would appear that most Haredim do not disregard the Court in daily life. Most Haredim regard it as a legitimate institution in a limited way, however (Barzilai, Yuchtman-Yaar, and Segal 1994b; Barzilai 1999a). Despite its liberal appearance, the Court tends to be mindful and does not rule against Haredi interests because anti-Haredi rulings may result in legislation and government sanctions that could limit judicial powers.[9] Later I will show that even in its most liberal rulings the Court has been rather careful not to hinder Haredi interests in preserving their autonomous legal jurisdiction. Two examples are its rulings not to engage itself in the secular and ultra-Orthodox conflict over free transportation during Shabbat in Jerusalem's Bar Ilan Street and its unwillingness to vigorously reject the collective exemption from military service granted to Yeshiva students.[10] Hence, binary distinctions between the community and the state are redundant. The relations between the community and the organs of state law have not been integrative, however.

The religious fundamentalists' derogatory proclamations against the Supreme Court have been aggravated over the years, especially as the Court's rhetoric has become more liberal.[11] Subsequent to the

8. This arrangement has no clear statutory anchor. However, prior to 1997 it was fully legalized by the Supreme Court in HCJ 910/86 *Ressler v. Defense Minister,* P.D. 42 (2) 441.

9. See, for example, the Court's decision not to nullify a law that prohibited importation of nonkosher meat, despite the fact that the law contradicted a previous ruling, in HCJ 4676/94 *Miteral v. the Knesset* P.D. 50 (5) 15.

10. HCJ 5016, 5025, 5090, 5434/96 *Chorev v. Minister of Transportation,* P.D. 51 (4) 1; HCJ 3267/97, 715/98 *Ressler v. Minister of Defense,* Dinim, 18, 58.

11. See the detailed study of this judicial tendency in state law in chapter 2.

Court's acknowledgment, since the mid-1980s, of gender equality and some rights of homosexuals, the community and its parliamentary representatives augmented their criticism of the Court (Keren and Barzilai 1998). The dichotomous perspective on the Court (viewing the Court, on the one hand, and its rulings, on the other hand, separately) clearly explains its public position within ultra-Orthodoxy. Its political tactic within the framework of state law has been to simultaneously segregate itself from and include itself in the political setting. Later I will explore this type of legal action.

Following the outline of the communal Haredi location in the general culture, let us move farther into the community. It has not been a unified and homogeneous entity. Habad (a mystical ultra-Orthodox movement known for its enthusiastic faith in the importance of God to all that exists), for example, has been very much involved in Israeli society and has held extreme hawkish opinions on the future of the Arab-Palestinian-Israeli conflict, rejecting outright any possibility of territorial compromise. These positions have stemmed from the viewpoint of the Lubavitch Rabbi, who conceived that only the devotion of the people to their land, Eretz-Yisrael, would bring the age of messianic redemption. Hence, that Haredi group legitimizes the "rule of law" as long as it strengthens fundamentalist Jewish facets of the state. In contrast to Habad, Haredi groups such as Satmer, and less fundamentalist groups such as Viznitch and Belz, entirely or significantly reject nationalism and tend to separate themselves from the overall society and its legal setting (Keren and Barzilai 1998). This latter approach is the most popular among the ultra-Orthodox, promoted by authoritative Halachic leaders such as Rabbi Menachem Zalman Shach.

Similarly, a clear distinction is made between the most extreme fundamentalists, such as the followers of Rabbi Bloi (students of "Toldot Aaron" Yeshiva, the main group within Neturei Karta), on the one hand, and members of the Agudat Yisrael and Degel Ha' Torah factions on the other. The former reject any possibility of coalition and cooperation with the political establishment and publicly resist state law, legal ideology, and state ideology. Symbolically, they refuse to pay taxes and be included in the national census. In comparison, the latter groups have agreed to cooperate with the Israeli political leadership, going so far as to join governmental coalitions (1949–51 and

from 1977 to 2003) and obey state law. Within the Haredi community, the dominant approach has been the one articulated and created by the Agudat Yisrael and Degel Ha' Torah political parties.

Social Existence

The religious fundamentalist population at the grassroots level has experienced poverty. Several things have led to this. A very high birthrate, with an average of about four children per family, is one reason (Dehan 1998–99). Exemptions from compulsory military service, which have been granted to Yeshiva students, have drawn most men to Talmudic studies and therefore have greatly exacerbated the community's problems of poverty. The formal job market is based on women working in clerical and teaching jobs, and they are forbidden to attend universities. The Haredi educational system is overcrowded (Keren and Barzilai 1998; Levy 1990). Hence, theological concerns notwithstanding, various groups within the community have demanded from their political elite participation in Israeli public life, a more significant role in the building and demolishing of governmental coalitions, and active pursuit of the Haredi agenda. From a political perspective, the religious fundamentalist's complete autonomy is impossible.

Polarization in Israeli politics, especially regarding issues of national security and the future of the Occupied Territories, has invigorated the political status of the Haredi political parties. They have become a political key to formation of ruling coalitions and therefore were sought after by both the Likud and Labor Parties. This has contributed immensely to Haredi communal efforts to expand their share of the budgetary pie and to spur religious legislation (Nachmias and Sened 1999).

Ultra-Orthodox Jews have interacted with others, outside their community, through governmental services (primarily, health and municipal services) and commercial relations (Keren and Barzilai 1998). Utilitarian cooperation in these fields notwithstanding, the Haredim tend to segregate their neighborhoods and cities from the surrounding society and be hostile toward non-Orthodox culture and its modernist, primarily secular elements. Most ultra-Orthodox Jews are anti-Zionist in their religious outlook but loyalist to the Jewish state (Menachem Friedman 1989; Keren and Barzilai 1998). Their legal culture, as we

shall see, is a reflection and a constitutive element of that compound social construction.

Conventional secular thinking has perceived religious fundamentalists, including those in Israel, as homogeneous groups with a unified leadership. This view is incorrect. Since I would like to clarify that issue before we delve into communal legal culture, let us look at the tensions between religious fundamentalists and their leadership and the ethnic (Ashkenazi-Mizrachi) differences among ultra-Orthodox Jews.

The Haredi leadership has largely been pragmatic with regard to issues of national security and the permanent territorial borders of Israel (Inbar, Barzilai, and Goldberg 1997).[12] Ultra-Orthodox leaders are fundamentalists but not extremists. With a few exceptions, they are well aware of daily events and they attempt to use these events for their communal benefit within the rules of the political game. While secular political elites have been entrenched in their own positions on the future of the territories, and in issues of military force, Haredi leaders have held to their religious communal interests and have therefore been able to maneuver between extremes in the Zionist political setting.

Unlike their leaders, most Haredim are hawkish (Goldberg, Barzilai, and Inbar 1991; Inbar, Barzilai, and Goldberg 1997). Incrementally, since 1967, most ultra-Orthodox constituencies have supported hawkish opinions on the future of the territories (Peres and Yuchtman-Yaar 1998, 167). This tendency sprang from several sources: their emotional religious ties to Jewish holy sites, their view that Israel's victory in 1967 was a sign of messianic redemption, their animosity toward Arabs and Palestinians ("sons of Ishmael"), and their Halachic longings for the biblical land of Eretz-Yisrael. Haredi fundamentalism also includes, according to some interpretations, a religious requirement to settle in Eretz-Yisrael (Naor 1996).

This problematic connection between ultranationalism and religious fundamentalism may result in violent resistance to state law and its legal ideology. The Haredi militant underground uncovered in 1951 was closely tied to the "Tzrifin Underground" and extremist ex-

12. This finding is based on personal interviews conducted with religious fundamentalist MKs as detailed in the article.

members of Lechi and Etzel, two nationalistic underground organizations that were established during the Jewish resistance to British rule in Palestine. The 1967 war gradually strengthened nationalistic elements among the Haredi public and aggravated the probability of illegality, namely, violent repudiation of democratic fundamentals (Peres and Yuchtman-Yaar 1998; Rattner, Yagil, and Pedhazur 2000). Thus, the Haredi public was inclined to oppose the Oslo agreement (September 1993). In their eyes, the withdrawal from the territories was symptomatic of the helplessness of the corrupt, bloated, superficial, heretic, hedonistic, and weak secular majority (Keren and Barzilai 1998). The interim agreements with the Palestinians further tarnished the image of the state and its laws in the eyes of the Haredim. The secular elite and their "rule of law" were seen as devoid of strength and willing to give up primary national resources (Keren and Barzilai 1998; Naor 1996).

Now let me point to the other rift. Legal practices have been diversified among the Haredi community, based on ethnic rift associated with social class (Peled 2001). The division has been between Ashkenazi groups (Central and Eastern European in origin and represented mainly by Agudat Yisrael) and Mizrachi groups (of Middle Eastern origin and mainly represented since 1983 by Shas). Mizrachi Haredim have tended to be less separate from, and more involved in, Israeli society. Thus, Shas's highest Halachic authority, Rav Ovadia Yossef, even served as Israel's chief rabbi during a time when Ashkenazi Haredim opposed the chief rabbinate as a Zionist entity. Shas practices of involvement in the general society have attracted the support of Israelis of Middle Eastern origin, who maintain a traditional outlook but in no way can be classified as religious fundamentalists. They were the major segment that voted for Shas in its unprecedented electoral success, winning seventeen parliamentary seats, in the national elections of 1999 (Peled 2001).

Shas split from Agudat Yisrael in 1983, when the former ran in municipal elections, and became a national political party during the 1984 national elections. Difficult personal clashes between the leaders of the ultra-Orthodoxy and feelings of discrimination and inequality among Mizrachi students in Ashkenazi Yeshivot, led to the split within ultra-Orthodoxy. As we shall see, Ashkenazi Jews have been more inclined to demobilize state law and in turn to enjoy the legality

of religious autonomy. The Mizrachi Jews, on the other hand, have tended to challenge state law by attempting to mobilize it from within, especially using democratic procedures.

State Law and Legal Ideology from a Community's Perspective

Critical legal thinkers who have articulated different schools of thought, such as Robert Cover and Roberto Unger (Minow, Ryan, and Sarat 1992; Unger 1976) have depicted Halachah as a source of constant inspiration in modern jurisprudence and politics. These studies have somewhat overshadowed the conceptual and practical relations of Halachah with modern Jewish statehood. Most Halachic interpretations of state law were formed after the Roman period, when there was no Jewish national sovereignty. Hence, the existence of a modern Jewish state has been challenging if not frustrating to the Halachic world.

From a purely Halachic viewpoint, Israel's state law has been a gentile entity (Ariel 1980). The terms *secular* and *progressive,* which imply differentiation between several types of Judiasm, are not recognized in the Orthodox/ultra-Orthodox Halachic linguistic environment. Fundamentalist rabbinical authorities around the world agree that a state that has not formally adopted Halachah as its sole constitutional basis is a gentile state (Ariel 1980; Bleadstein 1986; Shuchtman 1992). Only Zionist religious Orthodox authorities have used Halachic interpretations to legitimize Israel. It is legitimate because it is controlled by Jews and includes Orthodox Jews in its parliament, government, and judiciary (Soloveitchik 1994; compare Ariel 1980; Bleadstein 1986; Fund 1999; and Shuchtman 1992).

The discrepancies between fundamentalist religious legal culture and state legal culture are significant. Supreme Court justices have argued for the proper relationships between democratic and religious Jewish values.[13] These judicial contentions at the state level, however, have failed to address the concerns of the Halachic fundamentalist advocates. From their perspective, the issue has not been whether Israel should be more democratic than Jewish, or vice versa, but whether a state controlled and managed by Jews without a Jewish (Halachic) legal culture should be legitimized.

13. See chapter 2.

Ultra-Orthodox rabbinical authorities have conceived the issue of legitimacy as a critical matter because Israel's founding was conceived as an interruption to eschatology. The general view has held that due to its being a gentile entity state law cannot be legitimized based on a presumed public consent (Ariel 1980; Bleadstein 1986; Shuchtman 1992). Such a consent would have been inconceivable because a Jew should not voluntarily agree to be subject to non-Halachic law, even if the judges and the legislators are Jewish. A delegitimizing Halachic hermeneutics has primarily been common among ultra-Orthodox authorities, whether Ashkenazi or Mizrachi. This aspect of legal culture has primarily reflected the deep uneasiness of ultra-Orthodox Jews who have faced nationality instead of messianic redemption. It has also articulated the potential for a serious conflict between state and community over legitimacy and obedience. This fundamentalist approach notwithstanding, a closer look at Halachic interpretations to state law reveals an additional legal cultural facet.

The Halachic authorities have legitimized state law based on the argument of political necessity. In the original words, "state law is the law" (dina de'malchuta dina). It means that in practice state law should be obeyed even if its content is wrong. The argument is utilitarian; the existence of a state controlled by Jews is considered to be a sufficient justification for obedience. That obedience is contingent on the assumption that state law does not contradict Halachic law (Bleadstein 1986; Fund 1999). Consequently, at the conceptual level, ultra-Orthodox interpretations have critically challenged state law, regardless of its democratic values, as non-Halachic, iniquitous, and wrong. Yet, due to the actuality of statehood, ultra-Orthodox hermeneutics has been rather pragmatic. Nonruling communities, even a fundamentalist religious community, cannot sustain an autonomous legal culture that is free of the state. Critical communitarianism underscores that communal legal cultures should be studied not merely as traditions but in the political context of state domination.

The Halachic restriction on litigation in nonrabbinical courts is contingent on the relevant legal issue. The sovereign power, the state of Israel, has the interest in and ability to enforce and punish. Therefore, it should deal with criminal law and taxation. Rabbinical courts have neither the interest nor the power of state coercion. Consequently, they should not be responsible for the resolution of disputes in these

fields. The chief rabbi, Meir Hai Uziel, ruled: "If we do not accept that rule in our time, how will the state of Israel exist without every man and woman being compelled by dina de'malchuta dina [state law is the law] to obey state laws that enforce taxes and criminal law? It is inconceivable that [obedience to] the state of Israel will be discretionary and not obligatory and that every person will do whatever he or she sees as right." Uziel was a Zionist, religious, Orthodox Jew, yet his ruling has been accepted by most Haredi groups with few exceptions (Shuchtman 1992, 355).

Communal legal culture, at the elite level of the Halachic authorities who have legitimized state law on utilitarian grounds, asserts the necessity of rabbinical adjudication only on family and private financial issues that both sides can agree to litigate before a rabbinical court. These matters are considered to be remote from state interests and integral parts of community life (Ariel 1980; Bleadstein 1986; Shuchtman 1992, 356). A religious fundamentalist legal culture based on written texts and their strict interpretations has been in practice, and from a deeper perspective, more pragmatic, however conservative, than it seems. It has used its rules of hermeneutics and its written texts to adapt itself to the reality of Jewish sovereignty in which the majority does not view rabbinical authorities as a major source of litigation and legal resolution of conflicts.

The pragmatic facet of communal legal culture has not characterized all factions of fundamentalist Judaism. A prominent rabbi is Ovadia Yossef, who has led the struggle to preserve Jewish Orthodox fundamentalism while accepting state supremacy in many aspects of law (Shuchtman 1992). Others, leaders of small, more radical Haredi congregations like the Satmar, have vigorously rejected any pragmatic Halachic tendency.

If one analyzes only the declarations of Haredi leaders in the media and in public forums, one gets a skewed portrait of the Haredi leadership's dispositions toward state law. Their allegations have often included brutal attacks on justices following rulings by the Supreme Court when the rulings have been liberal in content and have led to a perceived change in the religious-secular status quo.[14] In one in-

14. *Ha'modia,* December 2, 1994; *Yated Neeman,* December 10, 1998; *Ha'modia,* December 10, 1998.

stance, Ovadia Yossef referred to the HCJ, in reaction to its ruling in favor of importing nonkosher meat into Israel, and declared that

> HCJ's justices do not have honor and politeness toward the rabbis, they do not have any interest in our holy Torah. They are worse than the gentile authorities. The Israeli public thinks that we are allowed to appeal to them because they are Jews, but they are not our justices. They are not the justices of Yisrael.[15]

His assertion reflects the tensions between the legal cultures but not to the degree that it seems. Ovadia Yossef delivered his speech at a conference organized by the chief rabbinate that was intended to encourage the public to litigate in rabbinical courts more often. His assertion mirrored the long-lasting concerns of Orthodoxy and ultra-Orthodoxy with state law and its relevance to their communities. Yossef, one of the most prominent Haredi leaders of the twentieth century, expressed tension as to the division of authority between rabbis and judges/justices, but he did not articulate a complete negation of state law.

The same tension and the same ambivalence of Jewish religious fundamentalism toward the Jewish state were expressed in numerous other places. In one Haredi editorial, the newspaper claimed that "the judicial dictatorship . . . is a grave menace, relevant to all spheres of life. The appeal to the HCJ may cause a lot of trouble for the Haredim. . . . We need a unified campaign of all factions of the religious public."[16] Yet a deeper critical communitarian view shows that the general mood among the fundamentalists has not been wholly belligerent. It has been somewhat tempered by utilitarian considerations.

Rav Aharon Yishayia Roter, the main rabbinical authority on interpretations of Rav Schach's Halachic rulings, reflected the general spirit within the Haredi camp. In a major Haredi newspaper, he stated that, despite the gentile nature of contemporary Israeli law, the Haredi community is a minority that does not have the power to change the law. Hence, he warned against any attempt to harm the justices.[17] Rav

15. *Ha'aretz*, August 10, 1996, 3.
16. Ibid., August 30, 1996, 5.
17. Ibid., October 20, 1996, 6.

Schach is considered to be the most vigorous and outspoken fundamentalist critic of Zionism and a leading Ashkenazi Halachic figure who has often criticized Zionist nationality as a severe impediment to Judaism and its fundamental principle of eschatological messianic redemption. Yet he was facing the probability of Haredi physical violence directed against state officials and attempted to derail it.

Communal violence is probable, as Haredi confidence in the Court is very low; in our survey, about 78 percent expressed a lack of faith in the Supreme Court,[18] while the Haredi political leadership and the Haredi press voiced brutal threats against the justices. The probable reaction of the state could have been more extensive adjudication and enforcement of state law against the religious-secular status quo. Hence, Schach expressed the need to legitimize the state for utilitarian calculations while he aspired to preserve the autonomy of the community in the face of state interference. As communitarianism emphasizes, communal autonomy does not necessarily damage national sovereignty but may acknowledge it.

The community's needs have been a subject of great concern among the ultra-Orthodox. Haredi MKs have been held responsible for effecting the allocation of funds and other benefits to the Haredi community. Therefore, they have participated in processes of national legislation and legitimized a state that is controlled by Jews but enforces gentile law (Shuchtman 1992). The participation of ultra-Orthodox politicians in government decisions is another issue that highlights the discrepancy between fundamentalist principles and practices in legal cultures.

We could have hypothesized that ultra-Orthodox Jews would refuse to take an active part in national power foci, including in those that have been responsible for the utilization of state law. Indeed, between 1951 and 1977 the Jewish fundamentalist political parties, Agudat and Poali Agudat Yisrael, refused to participate in governmental coalitions. Yet, although the Haredi opposition to the HCJ has increased over the years in association with the Court's outspoken

18. According to the Tami Steinmetz Center for Peace Research, at Tel Aviv University, in a survey conducted in August 1996, 78.2 percent of Haredi respondents expressed lack of faith in the Supreme Court. Only 19.6 percent of the religious, 8.5 percent of the traditional, and 6.2 percent of the secular expressed lack of faith in the Court (*Ha'aretz,* September 5, 1996, 9.)

liberal and anti-Orthodox rulings, the Haredi practical approach toward participation in government has changed from negation to consent. The participation of religious fundamentalists in the first Begin government (1977–81) was not based only on sympathy with the rather traditional standpoint of Prime Minister Menachem Begin. The community's social existence was significant.

The Haredi community was expanding its ranks due to its high birthrate. Its population was rather poor. Bnei-Brak and Jerusalem, the two most populous centers of the Haredim, have been for years the most impoverished cities in Israel (Dahan 1998–99; Levy, Levinson, and Katz 1993). Communal restrictions on participation in the general labor market have severely limited the ability of the fundamentalist community to sustain itself economically without special state subsidies (Dahan 1998–99; Keren and Barzilai 1998).

The collective exemption of Yeshiva students from compulsory military service since 1948 has induced the community to encourage male youngsters to enroll as Yeshiva students instead of joining the formal labor market. Hence, and paradoxically, the Haredi community that conceives of women as inferior to men in public life relies on the limited ability of ultra-Orthodox women to work, mainly as teachers and clerks.

There are different empirical estimations as to the number of Haredi men who did not enter the job market during the 1990s. The numbers are between 60 and 67 percent (Adva 1998, 29; Dahan 1998–99). However, the percentage of women who were employed in the 1990s was also relatively low in comparison with non-Haredi women. Estimations vary between 30 and 41 percent. Most Haredi women, and a higher percentage than women in the general population, worked only a part-time job. Around 80 percent of Haredi women in the labor market did not hold full-time jobs (Adva 1998, 29; Dahan 1998–99). The patriarchal regime, within the community, and the burden of raising on average four children in a family, in addition to severe restrictions on women's nonreligious education, have prevented ultra-Orthodox women from entering the general labor market (El-Or 1994; Panim 1999).

That self-induced poverty of the Haredi community has resulted in pressures on its political leadership to participate in national power foci, especially in the government and parliament, despite the Halachic

principle of portraying these institutions as gentile in their very essence. The need to establish and maintain more religious services to serve the increasing ultra-Orthodox population and meet its demands has been another source of augmenting the necessity to cooperate with the political establishment.

The siege mentality of religious fundamentalists has led to the perception that the non-Orthodox world is hostile (Bren 1999). The strained communal structure has forced Haredi groups to seek out autonomous environments where they can live detached from other communities in separate cities, townships, or neighborhoods. This mentality has necessitated a demand for more state release of lands and permission for land use and building permits. Due to state ownership of about 95 percent of the land (Kedar 1998), obtaining special land use and building permits could not have been possible without intimate relations between the religious fundamentalist community and the political establishment.

To preserve a tight, hierarchical, community structure through and for socialization, from kindergarten to Yeshiva studies, the founding and maintenance of educational institutions have been prime objectives. One of the main achievements of the religious fundamentalist parties has been state recognition of the Haredi educational system as national, despite its autonomy (in the language of state law, these institutions are "recognized but not formal"). Maintenance of this diverse communal educational system could not be accomplished without coalition pressures from ultra-Orthodox political parties that should have been struggling for national budgets and other benefits. The political rise of Shas in 1983, and its several thousands of educational institutions within a separate ethnic (Mizrachi) organization, has sharpened the rivalry between the religious political parties over national budget allocations for their respective educational systems—the Zionist religious, Ashkenazi ultra-Orthodox, and Mizrachi ultra-Orthodox.

The communal facets mentioned earlier have been crucial for the construction of the ultra-Orthodox legal culture. Not only have religious authoritative interpretations of the Halachah been ambivalent toward a "gentile" state law controlled by Jews, but the communal practices that originated in the community's needs have strengthened

that proclivity, despite the ultra-Orthodox inclination to articulate its fundamental opposition to cooperation with the state.

There has always been some interaction between religious fundamentalism and extremism. The conservative commitment to Halachah has sometimes produced extreme attitudes vis-à-vis the state and a demand for active violence to alter its basic characteristics. Before the 1967 war, in a few instances Haredi students would participate in the attempts of small extremist groups to violently transform the political regime and found a "Jewish kingdom." Following the 1967 war, the excitement of eschatological redemption drove youngsters to justify the control of the Occupied Territories as the embodiment of that theological redemption (Naor 1996).

The Haredi leadership, however, has mostly been pragmatic regarding territorial and national security issues (Inbar, Barzilai, and Goldberg 1997). This was not only the result of Halachic suspicion of a Jewish state established by force but a tactical position. In the midst of polarization and fragmentation in the non-Orthodox system, it could serve the Haredi community's needs and interests. Since the 1980s, the support of Haredi political parties has become necessary for any governmental coalition to be formed. Thus, during 1990–98 the allocation of funds by the Ministry of Education to Haredi institutions increased by 111 percent in the case of Agudat Yisrael and 305 percent in the case of Shas (Adva 1998, 9; Nachmias and Sened 1999).

The formation of Ehud Barak's government in July 1999 is a good demonstration of that aspect in which communal legal culture is evidently associated with the more general political culture and internal communal needs. Prior to the elections (May 17, 1999), and with only a few exceptions, religious fundamentalist groups were clearly identified as advocates of Benjamin Netanyahu. Increasing nationalism among younger Haredi voters was not the main reason. Barak had professed his desire to apply the 1998 Supreme Court ruling that declared the collective exemption of Yeshiva students to be void. He had also taken a vigorous stand against the massive allocations of government funds to the Haredi community and called for a national restructuring of preferences concerning budget allocations. This challenge to what was considered to be Haredi extortion caused the fundamentalist religious community to oppose Barak.

The picture drastically changed following Barak's electoral victory. Its communal needs left the Haredi parties with a narrow freedom of choice to join the government coalition. All the ultra-Orthodox parties needed government funds for their community services. The dramatic electoral success of Shas, which won seventeen Knesset seats, made the Ashkenazi religious parties more prone to join the coalition, fearful of losing more power to their rivals. Furthermore, the system of direct elections for prime minister strengthened the bargaining power of Barak and reduced the bargaining ability of the ultra-Orthodox parties. Hence, contrary to their interpretations of Halachic texts, these parties signed coalition agreements that established the Barak-led government. In these agreements, the government was committed to strengthening not only rabbinical courts but the state's nonrabbinical courts as well. That government, moreover, committed itself to discussing in a special public committee the status of the exemption of Yeshiva students from military service.[19]

Indeed, ultra-Orthodox political parties have in practice legitimized gentile state law. Additionally, they have cooperated with the secular political establishment and accepted its rules of the political game in return for state financial support. This financial support notwithstanding, the autonomy of the ultra-Orthodox community has remained very significant. Thus, despite massive budgetary allocations to their educational institutions and religious services, the state has not censored the fundamentalist content of texts that are taught and endorsed in ultra-Orthodox educational institutions.

It can be concluded that liberal fears of traditionalist communities as dangerous to democracy are largely erroneous. Fundamentalist communities may interact with democracies through various practices that articulate dissent and loyalty based on utilitarian arrangements. The critical communitarian perspective has enabled us to see this while focusing on the community and its practices under state domination. Now we should turn from the vertical to the horizontal dimension.

Religious fundamentalists operate in a challenging political setting in which non-Orthodox collectivities generate antifundamentalist coalitions. These coalitions articulate the effects of transnational liberal-

19. Coalition agreements of July 1999. I acknowledge the assistance of Mr. Barak Mendelsohn, who assisted me in locating these agreements.

ism and international immigration. This will be discussed in the next section.

Political Religion, Liberalism, and Legal Battles: The Horizontal Dimension

Communal legal cultures should not be studied only vertically but also horizontally. Despite the importance of state law and legal ideology as the main pillars of state ideology (Scheingold 1974), and their effects on communal legal cultures, nonruling communities shape their views and practices regarding legal texts and through them by struggling with other nonruling collectivities. This section examines horizontal conflicts in the context of interactions between religion and liberalism.

The activities of the Jewish conservative and progressive movements around the world, chiefly in the United States, are not a recent phenomenon. These movements go back to the beginning of the nineteenth century, while their formal actions in Israel began in the late 1950s. Their intensive acts and expansion reflected the global transformation of modern Judaism from Orthodoxy and ultra-Orthodoxy to more liberal interpretations of the Halachah that were better adapted to transnational liberalism, particularly among the largest Jewish population in the world, that residing in the United States. Therefore, ultra-Orthodox Jews, who lived like they did in the eighteenth century, became a minority in global Judaism.

The founding of Israel as a Jewish state was grounded in the legitimacy acquired from those Jews who aspired to take an active part in the Zionist enterprise, including Zionist Orthodox Jews. The legitimacy conferred by Jews who matched the prototype of the "original" Jew, the contemporary Haredi, was considered to be vital to the Zionist cause. The Mapai leadership considered the support of the Orthodox and ultra-Orthodox, who were still influential as symbols of historic Judaism, necessary for transforming Zionism into a Jewish nation (Barzilai 1997a). Hence, the Jewish state and its law have been framed in the context of Orthodoxy and exclude state support of the non-Orthodox hermeneutics of Judaism (Shamir 2000; Sheleff 1996).

Struggles over interpretations of Halachah as a legal text have always been part of the Israeli political setting. More liberal rhetoric in

state law has revitalized the efforts of the two non-Orthodox religious movements to alter the political regime through alterations in state law. Due to the veto power that the religious fundamentalist parties have enjoyed since the 1980s, legislation has been considered as less efficient for promoting non-Orthodox religious concepts and interests. Adjudication has largely been preferred, due to the inclination of the judicial elite to encourage incremental alterations in the constitutional monopolistic status of Orthodox Judaism.[20] The platform of the progressive movement has been described as follows.

> The judiciary and especially the HCJ are the main base of the Center's action [the Center for Jewish Pluralism of the progressive movement] for recognition of the right of the progressive movement (and other movements) to equality based on law. The presumption is that the legal system is loyal to law and morality and it acts in accordance with criteria of equality and justice, innocent of political influence.[21]

Indeed, in the last ten years the movements have participated in efforts to adjudicate issues of state religion. On the one hand, the movements have been reluctant to establish political parties of their own. Facing an Israeli agenda preoccupied with issues of national security, peace, and war, and compared to the tight and highly efficient community structure of the religious fundamentalists, such attempts could have resulted in a complete electoral failure. Political mobilization is considered to pose a grave electoral risk due to the costs of organization, money, human resources, and time. The expected utility of being represented by only a few MKs is presumed to be low.

On the other hand, political settings are often conducive to only one type of legal mobilization (Epstein and Kobylka 1992; Santos 1995; Twining 2000). Legal mobilization is contingent on the political culture and accessibility to political power foci (Epp 1998). Appeals to the

20. On this process from the judicial elite's point of view, see chapter 2.

21. Outlines for the Activities of the Center for Jewish Pluralism, the movement archive; Hila Keren, interview, March 1999; Dan Evron, interview, March 1999. I acknowledge the assistance of Mr. Barak Mendelsohn, who conducted these two interviews according to my guidelines and questions.

Supreme Court in order to win legal cases, or at least to attract public attention, are considered to be a better tactic than legislation due to the veto power of the religious fundamentalists. Winning in court has not been the only objective and not even the main intent of litigation in that context. Frequently, legal mobilization has many other purposes (Feeley 1992; McCann 1994; Silverstein 1996). It has been aimed to accumulate more organizational power, to frame a non-Orthodox collective consciousness, and to lessen (ultra-)Orthodoxy's effects on state law. Yet the legal culture of non-Orthodox religious movements is not outside the main narratives of the Jewish state. Practically, their legal mobilization has embraced nonseparation of Judaism and Zionism from the state.

But liberalism has its own uniqueness. It has multiplied the variety of religious practices that may argue for legitimate coexistence and some effect on state law.[22] Within this cultural and organizational setting, legal mobilization has advocated inclusion of progressive and conservative interpretations in the constitutional setting of Israel as "Jewish and democratic."[23]

The Supreme Court has been the arena for that inclusive purpose. Michael McCann has referred to supreme courts as institutions that induce and alternatively displace interactions between political players.[24] Indeed, the HCJ has effected a limited process of liberalism and has been a tool to generate the concepts and interests propelled by the movements despite the opposition of governmental coalitions and ultra-Orthodox political parties. Its broad adjudication has generated countermajoritarian moves articulated by the counterlegal mobilization of the ultra-Orthodox political parties, which aimed to enact laws

22. For a process in which liberalism even in the very narrowest sense reduces the effect of religious fundamentalism, see Eickelman 1999.

23. See *Newsletter of Hemdat, The Council for Freedom of Science, Religion, and Culture in Israel,* no. 3, 32–33. I refer to clauses 2, 5, 6, 7a, and 8 in the proposal for Basic Law: Freedom of Religion, which was supported by the two non-Orthodox movements. At the time, Hemdat was a framework organization that included representatives from nine smaller organizations that were active in public struggles against the Orthodox and ultra-Orthodox establishments. The progressive and conservative movements participated in Hemdat.

24. M. McCann, lecture and paper presented in the Center for the Study of Law and Society, University of California, Berkeley, April 1999.

that would overrule the Court's decisions. In addition, countermajoritarian moves included evading obedience to court rulings. While the theoretical literature has mainly addressed institutional reactions to extensive adjudication (Barzilai and Sened 1997; Epstein and Knight 1998), this subject deserves cultural attention as well.

Let us examine adjudication and communal legal action in the spheres of religion, fundamentalism, and liberalism. It is a necessary dimension of the critical communitarian perspective on culture and law.

Membership in religious councils has been a major issue of contention between Orthodoxy, primarily ultra-Orthodoxy, and non-Orthodoxy. Religious councils have been the main bodies for the allocation of religious services in municipalities. Their power originates in large budgets intended for religious services and personnel. They also supervise all Jewish religious practices in Israel, including marriage and divorce. Membership in these councils means political power through the control of money, public positions, benefits, and the authority to legitimize or delegitimize religious practices. Practically, they narrate and monitor the "permissible" religious (Orthodox) modes of belief and behavior. According to state law, members of religious councils are subject to the orders of the chief rabbinate. Hence, the religious councils have been a major source of Orthodox and ultra-Orthodox power in high politics and daily life alike. They have been important components in (ultra-)Orthodoxy's efforts to maintain hegemony in the religious field and to meet any challenges.

Religious councils have been the local constitutive elements of communal legal culture among religious fundamentalists since they can serve the interests of ultra-Orthodoxy by preserving its veto power in state law, and they have prevented ultra-Orthodoxy from being marginalized as non-Zionist. Non-Orthodox movements, which do not have equal representation on these councils, have demanded reform.

The secular composition of the Supreme Court and its role in generating liberal rhetoric were articulated in a series of rulings. In 1987, it ruled that the law regarding municipal religious services should be interpreted according to "modern" (i.e., state) law and not be based on Halachic law. Therefore, it ordered that women are entitled to be members of religious councils, even though the councils are subordinate to

the chief rabbinate.[25] The Court's judicial policy, which has empowered horizontal interactions between fundamentalists and other religious non-Orthodox collectivities, notwithstanding, ultra-Orthodoxy has since attempted to exclude women from participation in religious councils as active members. While the Court was articulating its main constituency's secular rhetoric of increasing commitment to individual egalitarianism, the ultra-Orthodox community evaded obedience to its rulings.

Courts in democracies may effect legal changes (Feeley and Rubin 1998; Spaeth and Segal 1999). This phenomenon should not be analyzed in isolation from its possible sociopolitical, and less expected, ramifications. Critical communitarianism emphasizes that the willingness and ability of state courts to effect dramatic sociopolitical change are limited.[26] Yet courts may incrementally change the legal linguistic environment because they may signal to nonruling communities the possibilities and limitations of their actions.

Within the context of expanding liberalism in the linguistic environment, the conservative and progressive movements appealed to the Supreme Court. They mobilized several sources of support—previous court rulings, antifundamentalist majoritarian opposition, Court assertions about its commitment to equality, and expanding public respect for liberal rhetoric. Thus, a survey conducted in August 1997 found that 62 percent of the Jewish-Israeli public supported the appointment of conservatives and progressives to religious councils.[27] In a series of rulings at the end of the 1980s, the Court upheld appeals and ordered the Orthodox and ultra-Orthodox to include progressives and conservatives in religious councils.[28] The movements, in turn, have largely publicized these rulings. Their publications have underscored to what degree the non-Orthodox movements are operating in the name of "rule of law."[29] The alteration in the legal linguistic environment has occurred, and the movements have used the liberal principles of

25. HCJ 153/87 *Shakdiel v. Minister of Religion,* P.D. 42 (2) 221.

26. See chapter 1.

27. The survey was conducted for Channel 1, Israel Radio, in August 1997.

28. HCJ 4247/97 *Meretz v. Minister of Religion,* Dinim, 55, 151; HCJ 3551/97 *Brener v. Ministerial Committee* P.D. 51 (5) 754.

29. See, for example, a summary of the subject in a leaflet of the progressive movement dated October 26, 1997.

equality to obtain appointments to religious councils and have employed a multiplicity of religious interpretations in their efforts to attract public support.[30]

Changes in the legal linguistic environment have their own limitations. Adjudication led to a series of legal mobilization countermoves by the ultra-Orthodox community. Enjoying the parliamentary veto power of their political parties, they refused to obey the Court. Thus, in correspondence in 1999 between the chairman of the religious council in Haifa and the minister of religion, Shas activist Eli Swissa, the latter ordered the religious council in Haifa not to convene with its progressive and conservative representatives.[31] The same policy was adopted all over the country. The Ministry of Religion, under Shas control, prohibited the religious councils from gathering if progressives and conservatives were among their members. In 1999, the Supreme Court had to rule on the conflict, this time concerning the refusal of the religious council in Jerusalem to convene with representatives of these movements.[32] The HCJ ordered the council to convene.

Facing the significant power that Haredi political parties wielded in the city council of Jerusalem, their reaction was more vigorous than ever. Opinions and rulings of the chief rabbinate and authoritative figures within the Halachic ultra-Orthodox world were presented in Court to support the dismissal of that appeal and to countermobilize the movements. The Ashkenazi chief rabbi, Yisrael Meir Lau, submitted to the Court a letter stating that "only the chief rabbinate and its delegates—the local rabbis—will be authorized members of the religious council according to their adaptability, personality, and style of learning."[33] His approach was adopted in 1997 as the formal policy of all the Israeli Orthodox and ultra-Orthodox rabbis.[34] Lau was publicly

30. Keren, interview; Evron, interview.

31. These are letters between the minister, his assistant, the chair of the religious council in Haifa, its attorney, and the progressive movement. The letters are from December 1998 and January 1999. The letters were presented before the justices during the legal proceedings in HCJ 4247/97, 921/98 *Meretz v. Minister of Religions,* Dinim, 55, 66.

32. HCJ 415/99 *Meretz v. Religious Council of Jerusalem* (unpublished).

33. Letter of January 16, 1996, submitted to the Court in 1999 (unpublished).

34. Decisions of Israeli rabbis in a conference held by the chief rabbinate of Israel, August 7, 1997 (unpublished).

depicted as a moderate, but in fact he was subject to the guidance of Rabbi Elyashiv, one of the greatest spiritual authorities in all the Haredi world. Accordingly, he declared that state law in that respect should be subject to the Halachah and no conservative and progressive representative should participate in religious councils.

The vigorous opposition of Rabbi Shlomo Zalman Oyerbach, one of the most influential ultra-Orthodox rabbis, was also presented before the Court.[35] Oyerbach voiced a clear opposition to those who aimed to "destroy the religion."[36] Rabbi Ovadia Yossef asked the chief rabbis, as formal state authorities, to oppose the "progressives, who deny our Torah."[37] The major conflict was neither about democracy nor about the essence of the "Jewish and democratic" state. It was about authority and power within a very problematic sphere of political religion in state law.

These expressions, along with other assaults on the Supreme Court, have framed the Court within the ultra-Orthodox community as an antireligious institution. Hence, communal actions of countermobilization targeted against the Supreme Court were legitimized within the community.[38] Furthermore, legal countermobilization has reflected basic communal suspicions of state institutions, which have invoked nonrabbinical law. The emerging liberal sphere in state law and the general society, with its limited scope, has been a convenient battlefield for the ultra-Orthodox. Let us deepen our examination of the communal legal culture through its own voices.

Ultra-Orthodoxy has aspired to construct these movements as liberal in order to contrast them with the Halachah and fundamentalist Judaism. Often the progressives and conservatives have been referred by religious fundamentalists as one body—reformists—while the distinction between the moderate progressives and the more traditional conservatives was avoided. That way they were all stigmatized within ultra-Orthodoxy and in courts as one rival opponent of "authentic" Judaism. In order to support dismissal of the appeal by

35. HCJ 4247/97, 921/98 *Meretz v. Minister of Religions,* Dinim, 55, 66.

36. Letter of 1994, in ibid.

37. Letter of 1995, in ibid.

38. See, for example, assertions of religious fundamentalist political activists in *Ha'aretz,* April 21, 1994; *Ha'aretz,* April 24, 1997; *Yated Neeman,* December 10, 1998; and *Ha'modia,* December 10, 1998.

the progressives and conservatives alike Rabbi Shalom Messas, the chief rabbi and head of rabbinical courts in Jerusalem, wrote an opinion, which was presented in Court. Comparing Judaism and contrasting it to "reformist" hermeneutics, he wrote: "I know their Torah, its name is 'progressive Torah' according to the spirit of times, and it is a blasphemy . . . One of our religious fundamentals is that it [the Halachah] will never be changed or transformed."[39]

The existence of liberal and antiliberal rhetoric in the same legal field of state law was convenient for both sides, which used it to mobilize forces for their respective communal aims. For the non-Orthodox religious movements, the Court has become a symbol of the modern and progressive rule of law. For the religious fundamentalists, it has become a symbol of secular evil that justifies communal mobilization of ultra-Orthodoxy against the "external" menace of "gentile" law.

Religious conversion has been another issue of contention between various nonruling communities that face liberal principles in state law. Again, I will look at it not vertically but horizontally, so as to reveal further aspects of communal legal culture. Which religious procedures are valid and proper in converting a gentile from another religion to Judaism? That controversy has been a major field of conflict among progressives, conservatives, and Orthodox (including ultra-Orthodox) Jews. Its roots can be traced to the historical struggle between Orthodox Jews and those who aspired to make Judaism more adaptable to liberal modernity. The abyss between these religious trends and the ingrained struggle between them in Israel has led to a conflict over the state's hegemony.

Due to the crucial political weight of the religious Orthodox and ultra-Orthodox political parties in the formation and maintenance of governmental coalitions, no administrative remedies were offered to Jews who were not born to a Jewish mother and to Jews who were converted through non-Orthodox procedures. Attorneys of the non-Orthodox religious movements have emphasized in personal interviews, for this study, that judicial remedies and pressures on the legislature to resolve these problems represent the only prospect of altering state law and its practical ramifications for religious conversions.[40]

39. Letter of opinion, January 24, 1999 (unpublished).

40. Keren, interview; Evron, interview.

Hence, that issue (coded as "who is a Jew?") has been litigated in the courts since the 1960s. In 1969, following a series of public affairs, the HCJ constituted a controversial legalistic doctrine. It ruled that an immigrant to Israel has the right to choose his or her religion and that for purposes of administrative registration the Ministry of the Interior must comply with the immigrant's disclosure, provided that no suspicion arises as to his or her truthfulness.[41] Subsequently, the Orthodox and ultra-Orthodox political parties have demanded the right to make any religious conversion, unless it is Orthodox or ultra-Orthodox, unlawful. Attempting in 1970 to break their historical political alliance with the ruling Labor Party, the religious political parties succeeded in altering the Law of Return, 1950, and the Law of Population Registration, 1965 (see also Gavison 1995).

Since 1970, state law has constructed a formal criterion for "being a Jew." He or she must have been born to a Jewish mother and must not have an affiliation with another religion. The religious parties, however, could not mobilize enough political support to embody in law a statutory assertion about the exclusivity of Orthodox/ultra-Orthodox conversions. Yet political arrangements have guaranteed the prevalence of Orthodox/ultra-Orthodox interpretations, and in practice they have hampered any alternative religious procedure of conversion. These procedures have been held under the tight supervision and monitoring of the chief rabbinate and Badatz, the communal high court of ultra-Orthodoxy. The latter is not an official institution in state law. Practically, however, it is the ultimate source of legality and legitimacy in the religious fundamentalist community. Only religious conversions supervised and approved by that body can be legalized within the religious fundamentalist community.

The communities of Zionist Orthodoxy and ultra-Orthodoxy consider state law to be a proper framework for religious conversion. The former conceives state law as a major pillar in the state ideology, Zionism, which has justified, according to prevalent interpretations, the dominance of Orthodoxy in religious conversions. In accordance with official interpretations rendered to The Order of Conversion, 1927, the chief rabbinate has been the authorized state organ that decides on the validity of conversion procedures conducted in Israel

41. HCJ 58/68 *Shalit v. Minister of the Interior,* P.D. 23 (2) 477.

and other countries. For the religious fundamentalists, state law has provided the power to prevent non-ultra-Orthodox converted Jews from joining their community. The community has enjoyed the power to decide who is entitled to the rights rendered to community members in the areas of housing, labor, education, religious services, and social assistance.

Correspondingly, Badatz has been a significant institution in setting the boundaries between community members and outsiders. The theoretical literature has underscored the tendency of communities to establish boundaries between their members and outsiders (Greenhouse, Yngvesson, and Engel 1994). This tendency has additional functions in nonliberal communities. Badatz has constructed legality in the community. Hence, it has been a major means of controlling the tight hierarchical structure of the community, preserving its internal social stratification and sociopolitical discipline while reducing threats to the community's survival as a relatively (to liberal communities) cohesive unit under the rule of its elderly Halachic authorities. From the perspective of critical communitarianism, the religious fundamentalist legal culture, however in opposition to state law, has been framed within the sphere of religious Orthodoxy in state law.

Political cultural developments have exerted pressure on the ultra-Orthodox legal culture. Let me emphasize, again, that I claim that legal cultures are part of political cultures.[42] The massive influx of hundreds of thousands of immigrants (about 700,000) from the Soviet republics, most of whom immigrated to Israel between 1989 and 1993, has made the political environment more subject to the mobilization of state law by the progressive and conservative movements. While the Jewish population that immigrated to Israel during the 1950s and 1960s and Israeli-born Jews were largely socialized to legitimatize the Orthodox monopoly, the Soviet immigrants in the 1980s and 1990s have become a constituency for countermobilization.[43]

Until the end of the 1980s the number of members in the progressive and conservative movements was rather marginal in national

42. See chapter 1.

43. In the 1970s, Israel experienced much less immigration from the Soviet Union, with relatively few sociopolitical effects, in comparison with the immigration of the late 1980s and 1990s.

electoral terms and did not exceed several thousand. The reality of hundreds of thousands of immigrants, out of which between 40,000 and 100,000 were not Jews according to Orthodox criteria, has framed a new sphere for organizational mobilization.[44] Sociopolitical exclusion of these immigrants, who were not converted by state law into Judaism, would have subjected them to severe discrimination, beginning with their inability to get Israeli citizenship, through severe restrictions in the labor market and their exclusion from state services and supports. The movements have seen it as a necessity to use collective legal action to empower them under state law.

As we saw in chapter two, Israeli society has been more liberal since the 1980s. Thus, the practice of civil marriage—meaning marriage not condoned by the Orthodox/ultra-Orthodox rabbinical authorities—has become more acceptable to the Jewish public since the 1980s. According to an extensive survey conducted in 1991 among the Jewish Israeli population, about 50 percent supported state legalization of civil marriage (Levy, Levinson, and Katz 1993). In practice, the use in civil marriage was much smaller, however, and did not exceed several hundred couples over a few years (Etnar-Levkowich 1997). In general, about 50 percent of Israeli Jews asserted their advocacy of the separation of state and religion (Levy, Levinson, and Katz 1993). The Supreme Court has reflected these attitudes in the series of rulings discussed earlier.

The Court has framed and propelled the precept that state law dictates the imposition of several liberal norms on the ultra-Orthodox. This precept has justified the incremental legalization of the admittance of non-Orthodox Jewish movements to the corridors of state power. Hence, the legal linguistic environment has been altered to include more judicial references to Israeli rulings and legislation, which has allowed attorneys of the movements to construct solid legal arguments for changing the procedures of religious conversions.

The comparative and theoretical literature, mainly about the United States, points out that under majoritarian conditions changes in judicial rulings and even some social changes are likely to occur (Epstein and Kobylka 1992; Rosenberg 1991), provided that no major

44. These figures are based on the Ministry of Immigration data and were published in *Hemdat: Council for Freedom of Science, Religion, and Culture in Israel* 3 (August 1998): 8.

established counterelite exists (Rosenberg 1991). Feeley and Rubin have shown that decentered approaches to understanding judicial policy, judicial reforms, and social changes may broaden our perspective on law, politics, and society (Feeley and Rubin 1998). I advance this line of research from the perspective of critical communitarianism. Looking at law, culture, and politics from a communal and horizontal angle results in further insights into the plausibility of social changes and mobilization.

The Supreme Court, the chief protagonist of liberal rhetoric since the 1980s, was used by the ultra-Orthodox as well. In 1987, Shas appealed to the HCJ and asked the justices to legalize a policy that the party-led Ministry of the Interior had framed. Religious conversions overseas should be recognized only for purposes of population registration and only if conducted by an Orthodox/ultra-Orthodox rabbi.[45] It was Shas's counteraction of a previous HCJ ruling in which non-Orthodox conversion procedures conducted overseas were recognized for purposes of registration.[46] The Court dismissed the Shas appeal, rejected the unlawful policy of the ministry, and affirmed that religious conversions abroad, whether progressive, conservative, or Orthodox, were valid for purposes of registration.

Through communal struggles, state law has become more diverse and has formally supplied opportunities for a multiplicity of religious procedures of conversion abroad to be legalized domestically. As I will show, such adjudication has had not only vertical ramifications of slightly broadening the ability to express religious practices. The adjudication of religious conversions has also had consequences on the horizontal, intercommunal dimension.

The rulings restricted the state's engagement in registration of nationality and religion for administrative purposes, while the immigrant's disclosure has formally been given crucial administrative weight. This relatively liberal legal text has paved the way for collective legal action aimed to destroy Orthodoxy's monopoly over religious conversions. In 1993, the progressive movement appealed to the HCJ, demanding legal recognition of non-Orthodox religious conversions in Israel. Its argument called for eliminating the discrimina-

45. HCJ 264/87 *Shas v. Director of Population Registration,* P.D. 43 (2) 723.

46. HCJ 230/86 *Miller v. Minister of the Interior,* P.D. 40 (4) 436.

tion imposed on non-Orthodox movements in Israel by recognizing the legality of non-Orthodox religious conversions overseas. In 1995, after delays of two years and during Israel's most salient liberal phase since the 1980s, the Court published its ruling. It legalized non-Orthodox conversions conducted in Israel but solely for purposes of population registration.[47] As the theoretical literature suggests, the Court was influenced by liberal rhetoric and yet was careful not to antagonize the ultra-Orthodox community (Barzilai and Sened 1997). Therefore, it upheld the appeal only as far as registration was concerned and avoided the more substantive issue of "who is a Jew." Limited liberal adjudication notwithstanding, it undercuts the religious fundamentalist policy of rejecting any alteration of the status quo.

The ultra-Orthodox community responded with attempts to evade the rulings. Yet the HCJ was consistent in its decisions and robustly affirmed the right of each person to subjectively assert his or her religiosity and nationality for purposes of population registration. The main ultra-Orthodox reaction was to use its veto power in parliament (and in government coalitions) to counter legislation. In 1997, the Haredi political parties introduced the Law of Conversion, which altered existing state law (the Law of Rabbinical Courts' Jurisdiction, 1953). The Law of Conversion aimed to give exclusive jurisdiction in matters of religious conversions to the Orthodox and ultra-Orthodox rabbinical courts. Appointments to these courts were dependent on the discretionary power of the chief rabbinate and ultra-Orthodox rabbinical authorities.

As critical communitarianism underscores, communal legal culture should be comprehended in its political context of state domination. Countermobilization by religious fundamentalists that utilized legislation against the nonrabbinical judiciary has advanced a communal hermeneutics that contradicts the rulings of the Supreme Court.

Fearing further derogation of the Court's legitimacy, and shying away from direct conflict with the ultra-Orthodox, the justices constructed a legal interpretation that differentiated between status issues in the context of family law and registration of the population.

47. HCJ 1031/93 *Passaro and the Movement for Progressive Judaism v. Minister of the Interior* P.D. 49 (4) 661.

TABLE 7. Public Attitudes toward Religious Conversions (in %)

	Religiosity			
	Ultra-Orthodox	Religious	Traditional	Secular
Halachah according to Orthodox interpretation	96.6	76.7	42.0	21.3
Halachah according to progressive or conservative interpretation	1.7	2.3	11.8	10.8
Civil and secular law		2.3	8.3	14.9
According to free choice		11.6	26.6	43.0
Halachah according to any interpretation		2.3	3.0	2.8
Do not know	1.7	4.8	8.3	7.2
Total	100	100	100	100

Note: Sample size, $N = 577$. While conducting this survey, I calculated the possibility that ultra-Orthodox Jews would refuse to reply. Hence, their proportion in the overall sample was expanded and they are presented in the sample in a similar proportion to their share of the overall population.

The latter was considered a secular matter under state supervision. The former was conceived as being under the jurisdiction of the rabbinical courts, as was politically agreed upon and constitutionally embodied in the Law of Rabbinical Courts' Jurisdiction, 1953. Facing the horizontal challenges of the non-Orthodox movements, the Haredim moved to forestall any further alterations in state law regarding religious conversions, and they demanded to embed in law their exclusive authority over all issues of religious conversions to Judaism.

Let us look at the broader grassroots issues. In a survey that I conducted in July 1998,[48] the respondents were asked whether they supported a public policy that legalized only conversions that were conducted by the Orthodox and ultra-Orthodox establishments according to their respective interpretations of the Halachah. Table 7 shows how a significant percentage supported non-Orthodox religious conversions (47.2 percent), as opposed to support for exclusive Orthodox and ultra-Orthodox hegemony in this matter (46.6 percent).

48. This survey included a representative sample of the Jewish Israeli population. The sample size was 577. A private, nonaffiliated, and nonpolitical research institute, Modein Ezrachi, disseminated the questionnaires. The sample included a representative group of ultra-Orthodox Jews. I would like to thank the Institute for Social and Economic Research, a private and nonaffiliated institute, and its director, Dr. Rubi Natanzon, for financing this survey.

No clear majoritarian trend existed. The figures in the table illustrate why the Court's limited judicial intervention led to countermobilization by the religious fundamentalists.

The Court was largely supported by those who defined themselves as secular (71.5 percent) and resented Orthodox/ultra-Orthodox hegemony regarding religious conversions. The trend among traditional Jews was more complex. Yet a significant portion (49.7 percent) supported non-Orthodox conversions. These two groups constituted the cultural spheres where the non-Orthodox have operated. While the ultra-Orthodox community was almost united in its support of the enforcement of Halachic procedures of conversion (96.6 percent), Orthodox Jews were more heterogeneous. About one-fifth (18.5 percent) also supported non-Orthodox conversions. In general, the association between type of religiosity and support of religious conversions was significant (lambda = .175; chi-square = 206.332, < .000).

A similar trend is detected when we examine attitudes regarding the most preferable institution for supervision of the procedures of religious conversion. Table 8 presents the findings. Generally, the statistical association between type of religiosity and support of the institution that should supervise religious conversions is significant (lambda = .112; chi-square = 188.330, < .000).

A majority (68.6 percent) of those who defined themselves as secular supported alternative institutions to the chief rabbinate and the rabbinical courts. Only 24.5 percent advocated retaining the status

TABLE 8. Public Attitudes toward Institutions of Religious Conversion

	Religiosity			
	Ultra-Orthodox	Religious	Traditional	Secular
Chief rabbinate	52.6	55.8	35.5	18.9
Religious court	33.6	18.6	11.8	5.6
Any other religious institution	8.6	14.0	11.2	3.6
Ministry of the Interior	1.7	4.7	21.9	36.1
According to free choice		2.3	14.8	28.9
Do not know	3.5	4.6	4.8	6.9
Total	100	100	100	100

Note: Sample size, $N = 577$. While conducting this survey, I calculated the possibility that ultra-Orthodox Jews would refuse to reply. Hence, their proportion in the overall sample was expanded and they were presented in the sample in a similar proportion to their share of the overall population.

quo, the submission of all religious conversions, and related matters, to rabbinical courts. The traditional population, as it defined itself, was more heterogeneous and yet revealed strong opposition to ultra-Orthodox and Orthodox hegemony (47.9 percent compared to 47.3 percent who supported that alternative). Orthodoxy was more heterogeneous than ultra-Orthodoxy, with a minority of 21 percent who supported other institutions for purposes of supervising conversions.

The religious fundamentalist community was very homogeneous while only 10.3 percent advocated an alternative to the status quo. However, the Haredim preferred a less antistate approach than might have been expected. The chief rabbinate is an Orthodox institution that legitimizes the Zionist state. Since the 1990s, the effect of ultra-Orthodoxy on the chief rabbinate has become more evident. The fact that most Haredim (52.6 percent) consider the chief rabbinate to be the best institution for supervising religious conversions attests the ambivalent approach of that fundamentalist community toward state law.

The horizontal aspect of legal cultures teaches us that boundaries between various communities divided by religiosity are blurred. The more Orthodox a group is the more its communal structure will be based on religion. The less Orthodox a group is the less religiosity becomes a basis of communal life. That finding explains why the progressive and conservative movements have appealed to the judiciary. Litigation is their last resort for gaining power through transnational liberalism, facing the rather narrow communal basis of the two movements and comparing it to the basis of Orthodoxy and particularly ultra-Orthodoxy. Due to their construction in state law as hegemonic, public support of Orthodox and ultra-Orthodox interpretations as bases of conversions was significantly larger than support of progressive and conservative interpretations (see table 7). Litigation of non-Orthodox movements in courts, however, could have symbolically relied on the support of seculars and accordingly could have been empowered through adjudication. Moreover, the relatively cohesive structures of the Haredi community and its parliamentary strongholds have provided advantages that the non-Orthodox movements could not have enjoyed in legislative struggles.

I conclude my examination of the horizontal perspective with one further event and one additional theoretical lesson. The internal rifts concerning religious conversion and the anger in American Jewish

communities over the possibility of canceling the Court's recognition of progressive and conservative religious conversions abroad led to the establishment of the Neeman Committee in 1997. That governmental committee was supposed to achieve a compromise among the three Jewish streams that have been active in Israel. For the non-Orthodox movements, it was a moment of exultation, however ephemeral. The prospect of negotiating in a corporate body with representatives of Orthodoxy and ultra-Orthodoxy was the result of legal mobilization that lasted for years. The ultra-Orthodox political parties refused to take part in a collective negotiation that implicitly legitimized alternative legal hermeneutics to Halachah. They preferred to struggle against cultural challenges within the parliament, where their relative political strength might result in hampering non-Orthodox dynamics.

In 1998, the Neeman Committee recommended the establishment of a joint institute in which the three strands of Judaism could administer a program of studies in Judaism before conversions were conducted. This achievement of the non-Orthodox movements was neutralized by the recommendation that all procedures of religious conversions should be supervised by the rabbinical courts.[49] The Orthodox leadership was fragmented in its reaction. The ultra-Orthodox Halachic authorities opposed the committee's recommendations due to their legitimization of alternative Jewish movements. In a rare instance of collective protest by prominent Halachic figures in the Haredi community, Ashkenazi and Mizrachi alike, fervent opposition to the Neeman report was voiced. Under these pressures, the chief rabbinate opposed the recommendations as well.

Litigation through legal mobilization of some liberal aspects in state law has not resulted in altering the overall public policy regarding conversion. But it has led to an incremental process of improvement in the constitutional status of non-Orthodox religious procedures. From that perspective, the theoretical question of whether courts can and should bring about a social change seems significantly unanswerable in binary terms. Adjudication is part of a much larger and decentralized

49. In December 1999, the Ministry of Religions adopted this report but suggested that the non-Orthodox movements should stop conducting religious conversions and reject candidates who request their independent services. The movements rejected that proposal but agreed to the establishment of a joint institute for studies of Judaism where candidates for conversion could study.

process. Litigation in court has empowered the movements to continue the struggle against ultra-Orthodoxy without effecting significant social change.

Part of that process has been the interactions of fundamentalist political parties. They have successfully used their parliamentary positions to be part of state law and thus to maintain their relatively autonomous status. It has not been a matter of fundamentalism against the state, but fundamentalism in state spheres. Against conventional expectations affected by the modernity/religion distinction, ultra-Orthodoxy has prevented social change not by retreating from state law but by using it. Studies of legal mobilization are advised to use the horizontal (intercommunal) perspective and to explicate not merely vertical relations between litigation in state courts and social change but to look at counterpractices of nonruling communities, which utilize legislation and litigation by other means.

This chapter has examined the legal culture of a religious fundamentalist community, underscoring social being, legal consciousness, and practices of identity from a critical communitarian perspective, that is, by using communal voices. In that context, state domination and transnational liberalism have been examined as parts of the community and its struggles with other nonruling collectivities. My main argument has been that, contrary to liberal presumptions and by explication of communal legal culture, religious fundamentalists seem to be more pragmatic and more ambivalent in their practices and relations with their surroundings. I turn now to a critical communitarian analysis of the problematic boundaries among the state, liberalism, and religious fundamentalism, arguing that advocates of multicultural and intercommunal democracies should recognize the dangers inherent in the secular and liberal fundamentalist traditions.

State, Religion, and Communal Boundaries: Values, Autonomy, and Interference

A Matter of Relative Values: State Punishment and Communal Violence

State intervention in a community's internal life has been a salient disputable issue in liberal and communitarian debates (Kymlicka

1995; Sandel 1996). In instances of communal violence against a community member, it is his or her right to opt for state legal remedies. It is a state's duty to address such claims for a legal remedy. Nothing in a community's autonomy should justify internal violence by and toward community members. If an individual wishes to leave his or her community, including through challenging an acceptable violent deed used in his or her community, the state should provide such a right of exit. The ability of men and women to leave their communities should be available in democracies.

Since state law, under these conditions, is not expected to interfere in the communal normative order and process, its jurispathic essence is irrelevant and the community's culture is not jeopardized. Hence, there is nothing anticommunitarian in the premise that a community should grant a right of exit. Furthermore, if communitarianism emphasizes responsibilities and not solely rights (Etzioni 1995a, 1995b; Selznick 1987, 1992), a community has the responsibility to allow its members to leave if they so desire. What makes communities contributive to our meaningful life is not their dogmatism but their cultural intimacy grounded in particular collective histories, memories, and identities.

Communal justifications of deeds that seem to be violent acts from an outsider's vantage point should not infringe on the right of an individual member of the community to ask for state assistance. This is not a liberal principle but a matter of democratic precept. A democratic state should form a public policy of assistance only if members of the community are asking for it. Under this conjuncture, state assistance as a last resort for the prevention of endogenous violence seems to be an easy argument for communitarians to accept. No one who follows communitarian writings has grounds for the impression that communitarians would justify or be forced by their own logic to justify such communal violence (Etzioni 1998; Taylor 1989).

However, and this is the essence of the matter in this chapter, what if a community is undemocratic in its internal structure, practices, and values and members of that community do not enjoy the endogenous choice of addressing their grievances externally? Under what conditions—if at all—should a democratic state intervene in the internal life of a nondemocratic community?

Under conditions of a nondemocratic, nonruling community in a democratic state (Kymlicka 1995), it seems that communitarians do not

have a defensible argument with which to prevent state interference for the prevention of violence. There is one instance, however, in which such interference is undesirable—when the victim or his or her family members (if he or she is no longer alive) justify the "violence" based on an alternative set of values acceptable in their community. The absence of an intersubjective narrative for moral judgment necessitates the noninterference of the state. The debate here is relevant to my efforts to comprehend religious fundamentalists as a community. At the outset, let me illuminate my argument about undemocratic communities and state interference.

The custom of women's circumcision is accepted as a social ceremony in several African and Asian Muslim communities. It seems ethical to claim that state interference in these undemocratic communities is justified. Moreover, apparently it is a state's obligation to punish such a cruel act in order to prevent it. However, if the victim herself refuses to support an act of state prevention and punishment, her wish should be respected. No judgmental narrative is preferable to her narrative (see Griffiths 1997; Villmoore 1999). Her communal attachments and her interpretations of what violence is should be preferred to those of the democratic state. In Caribbean societies, a few tribes share a traditional ceremony in which following a wedding the man "plays" with "his" bride; he tries to physically force himself on her, she resists, he physically subdues her, and then the two engage in sexual intercourse (Sheleff 2000). As outsiders to that community, we define it as rape, a brutal act and a very serious criminal offence. It seems to "us" logical and ethical that we should try to prevent it and punish the men who are doing it. Again, the victim's preferences should be superior to state values because she is entitled to her own communal traditions and practices. If, however, she wants to be seen as a victim of rape and/or to leave her community, state law should assist her.

Among Muslim Palestinian communities, killing for family "honor" (Al-Sharaf) is a communal custom. If a married woman enters a liaison with another man, her family's male members are entitled to slay her since such a killing purifies the family. It is a male responsibility to pursue and maintain the family's honor. We, as outsiders to that community, conceive of it as a murder. The community members, however, see it as a required act for protection of the family honor.

According to that patriarchal tradition, men are responsible for preservation of their family honor and it is their ultimate duty to purify the family by killing the woman (Shalhoub-Kevorkian 1998). A man who gives up this duty is like a man who gives up his land (Al-Ard); in both instances, he gives up his principal communal duties.

Should a woman in this context be helpless? No, she should not. Based on the critical communitarian argument, the state should protect a woman who seeks to be defended against violence; otherwise, the state should respect communal cultural preferences and traditions.

Let me elucidate this moral from a communal perspective. Communities that generally obey democratic procedures should be respected by democracies even when the community itself is undemocratic in its internal structure. In instances in which there is an identified victim of violence, the state has the duty to protect the potential victim and the duty to prosecute the offenders if violence has occurred. Yet, due to the constitutive importance of nonruling communities and their normative order in our lives, if a victim prefers communal values and practices it is his or her right to preserve the communal culture and that culture should be favored over state desires to protect and punish. This argument derives from the postulates of critical communitarianism, as clarified in chapter 1.

Observe that my real life examples of exceptions to communal cultural autonomy deal with women. For reasons that deserve a separate analysis, women have been the main victims of violence in religious and very traditional societies (Boyarin 1997). Yet my argument about the need to make even criminal procedures contingent on communal cultures is also relevant concerning violence against men. With this in mind, we are ready to delve into the affairs of the Haredi community and state interference.

Ultra-Orthodoxy, Violence, and Coercive Liberalism

The Haredi community has had its internal violent and coercive facets. There have been several informal communal police forces, composed of Yeshiva students, which have operated among various Haredi groups and have been known as "guardians of modesty" (Mishmarot Ha 'Tszniut). They have been responsible for a series of physical attacks on women and men who were suspected of engaging

in extramarital relationships.[50] There have been other devices used to detect instances of "social perversion," for example, special answering machines on which one may leave a missive of suspicion against somebody else who should be questioned by community members. As was shown earlier, the Haredi community is tightly structured and its members are subordinate to a hierarchy guided by Jewish clergy and Halachic leaders.

Within this patriarchal structure, women have been particularly marginalized, and they have often been prevented from acquiring an academic education, especially a general (non-Orthodox) education. The formal communal argument has been that rational and analytic study of the Talmud may damage their feminine senses (Boyarin 1997; El-Or 1994). Only rarely has the state intervened in these affairs of the community. Its internal cohesive and disciplined structure, its siege mentality, its suspicion of the "secular" world, and its soaring importance to ruling political parties have halted state intervention in communal affairs when it might have been proper to do so in order to deal with concrete violence.

The state has limited and intervened in communal life in two ways. The first is rulings that reflect a tendency to lessen the monopoly of ultra-Orthodoxy in some public arenas. Yet these rulings have not resulted in state intervention in ultra-Orthodox communal autonomy.

A good example is the ongoing controversy about the way dates should be engraved on tombs. Funeral services of Jews in Israel have been nationalized and are managed by the ultra-Orthodox company He 'vera Kadisha. The ultra-Orthodox failed to prevent passage of the Law of a Right to Civil Alternative Burial, 1996. Yet, by controlling the Ministry of Religion and the Ministry of the Interior, ultra-Orthodoxy has refused to grant permission to release land for the establishment of alternative cemeteries. While de jure Israel has enjoyed since 1996 the existence of alternative burial services, de facto almost all of these services, with a few exceptions, have been managed by He 'vera Kadisha.

Ultra-Orthodox Jews inscribe on tombs only the dates of the Jewish calendar that start from the date of the creation of the world instead of

50. *Yediot Hachronot*, November 29, 1996; *Ha'aretz*, December 13, 1996; *Maariv,* February 29, 1996; *Davar,* June 9, 1996.

using the Gregorian calendar. After this issue was addressed in the Supreme Court several times, the Court intervened and narrowed the discretion of the ultra-Orthodox to dictate ways of memorializing relatives.[51] In July 1999, the HCJ articulated its liberal stance. Grounded in the argument of the "Jewish and democratic state" and with respect to human dignity, most justices ruled in favor of granting the appellant the choice of using the Gregorian calendar for inscriptions on tombs.[52] Thus, the Court has lessened the ultra-Orthodox monopoly, yet it has not directly intervened in communal life. The religious fundamentalists (in this instance, He 'vera Kadisha) have not been forced to replace their calendar, but they have been instructed to allow other persons to memorialize their relatives using any calendar they wish.

Intervening in communal autonomy is another approach that aims to impose liberal values on the religious fundamentalist community. In that context, I focus on Court rulings concerning military conscription. Conflicts over the scope of the military draft have reflected the scope of legitimacy rendered to the state. Religious Zionists have conceived of the military draft as being essential to national redemption. On the contrary, ultra-Orthodoxy rejects military conscription as a secular effort to replace divine redemption with secular nationalism. In essence, there are underlying fears of losing communal intimacy and its dogmatic structure of supervision, tight communal discipline, and obedience by allowing youngsters to become part of a non-Orthodox Zionist framework. The legal practice of evading military conscription by presenting oneself as a Yeshiva student who devotes all his time to learning the Halachah and then getting a de facto exemption has become ingrained in communal life.

The collective exemption, as agreed upon since 1948 between the ultra-Orthodoxy, the ruling parties, and the defense establishment, has had its own symbolic structure and meaning. It represents a demarcation line among religious communities and between the ultra-Orthodox and others. For the religious fundamentalists, it has marked the difference between believers in divine redemptive power and Zionist nonbelievers. The threat of military service has been a constitutive drive for cultural disengagement from the surrounding society. Not

51. See, for example, C.A. 294/91 *He'vera Kadisha v. Kestenbaum,* P.D. 46 (2) 464.

52. C.A. 6024/97 *Shavit v. He'vera Kadisha*, Dinim, 56, 358.

only has it constructed a communal solidarity, but it has facilitated more supervision by the Haredi leadership over the rank and file. Those men unwilling to obey the communal habitude of joining the Yeshiva, with its tight control over all facets of daily life, could have been forced by the community, through cooperation with state authorities, to join the armed forces for a duration of several months to several years. In this instance, communal legal culture has legitimized state law if it can provide apparatuses of communal coercion.

For those outside the Haredi community, the boundary of military conscription has led to intervention in ultra-Orthodox communal affairs. During the 1970s, the Court refused to hear a private appeal demanding the recruitment of Haredi Yeshiva students. The justices articulated a judicial doctrine that prefers nonintervention in the discretion of the security authorities. They preferred to conceive the issue as political and therefore unjusticiable.[53] In those days, the Court was secondary in the efforts of the ruling elite to control and maintain the political system (Barak-Erez 1999; Barzilai 1998).

In mid-1980s, the issue of sharing the military burden was again addressed in court. An appeal to impose military conscription on religious fundamentalists reflected the increasing intercommunal tensions and the centrality of the military burden in the midst of a sociopolitical conflict between secular and ultra-Orthodox Jews. This time the arguments in the appeal were different. In *Baker,* the main argument was utilitarian; national military service should be equally divided, for otherwise the burden on some would be heavier. The same argument occurred later in two private appeals of *Ressler* at the beginning of the 1980s. In all three legal cases, the Court conceived of the argument for intervening in the exemption agreement as being "political and ideological," and it dismissed the appeals.[54]

In mid-1980s in an additional appeal of *Ressler* the legal argument was more liberal; it reflected the effects of transnational American-led liberalism, and the Court was willing to adjudicate the issue for structural and cultural reasons.[55] That appeal was more liberal than the

53. HCJ 40/70 *Baker v. Defense Minister,* P.D. 24 (1) 238.

54. HCJ 448/81 *Ressler v. Defense Minister,* P.D. 36 (1) 81; FA 2/82 *Ressler v. Defense Minister,* P.D. 36 (1) 708.

55. HCJ 910/86 *Ressler v. Defense Minister,* P.D. 42 (2) 441.

previous three in two aspects. First, it aspired to impose individual equality in sharing the military burden, no matter what the communal characteristics and circumstances are. Second, it constructed religious fundamentalism as an outsider and called for abolishment of the exemption agreement. The HCJ did not embrace these arguments. It adjudicated the exemption agreement, however, claiming that "we are dealing with a constitutional problem, with a public characteristic that has a direct link to the rule of law. . . . everything is a legal matter in the sense that the law determines whether it is a legal or illegal matter."[56]

Most justices supported the public demand for sharing the military burden and advocated a soaring protest against the growing influence of ultra-Orthodoxy in public life (Mautner 1993). Yet the Court concluded that the defense minister had the statutory authority to consider religious aspects in his decisions concerning military service. Inter alia, the minister was authorized to exempt Haredi Yeshiva students from obligatory military conscription. This ministerial decision, the justices further ruled, was not damaging to national security.[57] Thus, the Court avoided a severe constitutional crisis that might have been inflamed by parliamentary and administrative ultra-Orthodox reactions.

The dismissal of the appeal notwithstanding, the Court's ruling anticipated its future judicial policy. Before we study how coercive liberalism has impinged on the religious fundamentalist community through adjudication, and prior to theoretical lessons, let us examine the story in more detail.

As was noted in chapter 2, the polarization and fragmentation of political parties' power foci were associated with expanded judicial engagement in political affairs (Barak-Erez 1999; Barzilai 1998). The demise of party hegemony in the mid-1970s had enabled the Court to incrementally move into a prominent public position. The same process of transition from party hegemony to judicial engagement also occurred in France and Italy (Barzilai 1999a).

In Israel, fragmentation and polarization were also associated with the growing strength of Jewish religious parties, which gained parliamentary veto power. Following the 1996 and 1999 national elections,

56. Ibid., 466.

57. Ibid., 491.

the ultra-Orthodox political parties received more budget allocations than ever before (Nachmias and Sened 1999). The increased cooperation between the state and the religious fundamentalist community, unpredicted by liberalism, has had some effects on Israeli liberalism.

The secular protest was characterized by unprecedented exasperation over increasing state financial support for the ultra-Orthodox community. Legal mobilization of the judiciary prevailed, and a new variation of judicial doctrine evolved by the end of the 1990s. A group of MKs from the Israeli left-wing Meretz Party, university students, high school students facing the military draft, and several lawyers, among them Ressler, appealed to the HCJ.[58] While the previous appeals concerning more widespread military conscription were private, this one was public and very salient, enjoying favorable mass media coverage because it was initiated and mobilized by secular-liberal political organizations in the midst of extensive public protest against the ultra-Orthodox community.

Ressler, as a repeated player (Galanter 1974), explained the repeated appeal as a response to "new circumstances." The appeal pointed to the soaring number of Yeshiva students who were exempt from military service, about thirty thousand in 1997, as a crucial ground for unprecedented judicial intervention in the communal habitude. The new circumstances argument was generally accepted in court as one cause of judicial intervention. The justices upheld the appeal but not in its entirety.

The arrangement of collective exemption was declared unlawful. Facing the increasing number of exemptions, the Court considered this arrangement as discriminating against those citizens who had been serving in the armed forces for several years. This judicial reasoning was a doubtful ground for intervention in communal affairs.

At the beginning of its ruling, the Court proclaimed that growth in the number of exemptions was increasing. Yet the figures presented by the justices were not evidence for such a dramatic change, since the rise was about 2.6 percent (5.4 percent of the draftee population in 1987 compared to 8 percent in 1997).[59] The second judicial reasoning was even less persuasive. The justices argued that a normative ar-

58. HCJ 3267/97, 715/98 *Ressler v. Minister of Defense* (original ruling).

59. Ibid, 2, 6, 11.

rangement such as a collective exemption from compulsory military service should be discussed, reviewed, and altered by the legislature.[60] Obviously enough, such constitutional reasoning had been relevant and valid in the 1980s as well. Hence, the formal legal text fails to explain the change in judicial doctrine, and it fails to illuminate the deep causes of judicial intervention in the communal legal practice of the ultra-Orthodox. Again, comprehension of the state's legal practices demands that we look at the broader political environment.

The Court aspired to generate a public and liberal outcry against the "other," against ultra-Orthodoxy. The rift between the ultra-Orthodoxy, a pillar in the Netanyahu-led government, on the one hand, and the secular public, on the other hand, was very prominent. Secular justices, who constituted most of the Court's members, wanted to reflect that spirit, which was perceived as majoritarian. The language of the ruling was completely secular, implying that the Haredi community was a separate other that suffered poverty and needed secular, judicial-led guidance.[61]

That is why the Court discussed the appeal in a rare composition by eleven justices. Unlike the American federal Supreme Court, the HCJ regularly rules in decisions written by three justices. Only in very rare constitutional cases, when the Court aspires to attain public visibility for its rulings, especially among its constituencies, is the judicial composition larger. This was an endeavor by the Court to generate judicial-led public opposition to state benefits for the ultra-Orthodox. Thus, for the first time in a series of rulings concerning shared military conscription it phrased its decision in liberal constitutional language, measuring and balancing between various claims constructed as individual, not communal, rights and duties.

> The rift is not only ideological. It is related to conflict concerning human rights themselves. The current situation, in which various sectors [of the population] do not risk their lives for state security, is causing serious discrimination and a deep sense of deprivation. . . . on the other hand, there is the right of freedom of religion. That freedom includes, inter alia, the freedom to preserve

60. Ibid, 18–32.

61. Ibid, 35–36.

> religious demands and commands. There is an argument that compulsory service of a Yeshiva student . . . could violate his freedom of religion. It may also violate his religious feelings, which should be considered.[62]

The ultra-Orthodox political parties were major components of the Netanyahu government. The Court ruling was carefully tailored to evade a constitutional crisis. Emphasis was upon the doctrine of "separation of powers." Accordingly, the justices were reluctant to cancel the arrangement. Despite their view of its unlawfulness, they asked the Knesset to decide on the proper solution to the problem of exempting Yeshiva students, following their guidance as to its illegality.[63]

Communal autonomy was violated due to a social and judicial desire to impose on the religious fundamentalists values extraneous to their identities. Mobilizing the Supreme Court for their political and cultural purposes, the messengers of secular Jewish Israel aspired to alter practices inside the community. While the parliament and government were under ultra-Orthodoxy's veto pressure, the Supreme Court was more amenable to secular and liberal expectations. The Court saw an opportunity to ameliorate its public status as a constitutional and political institution. Hence, state law has become a means to individualize the ultra-Orthodox community and atomize its members in ways that may decay communal internal practices.

Karl Marx was correct in his observation that the rhetoric of liberal legality would prevent consolidation of a collective class consciousness ([1843] 1975, [1852] 1976). Later, Stuart Scheingold pointed to a similar theoretical argument regarding liberal state law, liberal legal ideology, and American society (1974). I have come to a similar conclusion concerning the state and nonruling communities. The intrusion of liberal state law into the religious fundamentalist community may have caused severe damage to its collective practices. A critical communitarian perspective of legal consciousness, identities, and legal practices orders us to look at communal voices in the shadow of state domination, liberalism, and liberal efforts to atomize members of nonruling and nonliberal communities.

62. Ibid, 35.
63. Ibid, 38.

Reactions to the ruling in the Haredi community were harsh. One of the major religious fundamentalist newspapers, *Yated Neeman,* asserted that "the ecstasy of those who hate the Torah is premature. . . . Many more and stronger enemies have attempted in Jewish history to destroy the fundamentals of our existence. . . . we must sacrifice our lives on the subject of damage to the Torah."[64] The Court's ruling was perceived as an attempt to delegate responsibility to the Knesset, and the justices expected the legislature to permanently abolish the exemption. The Haredi newspaper *Yated Ha'yom* wrote that "The meaning [of the ruling] is to grant the Knesset permission to legislate laws, but provided they are acceptable to the 'enlightened concept' of the HCJ."[65] Spiritual leaders of the community perceived the judicial intervention in communal legal practices as a menace. Following a gathering organized by one of the most prominent ultra-Orthodox leaders and a cherished Halachic authority, Rabbi Shmuel Oyerbach, they proclaimed that "the attempt to draft the Yeshiva students is a severe blow that touches on the very existence of the nation and inflicts damage on the existence of the Torah in Israel. There is no room for compromise."[66]

Yet, the communal reaction was somewhat fragmented. Even a fundamentalist legal culture is sometimes pragmatic, and its relations with the state and its laws may be, as pointed out earlier, ambivalent. The leaders of the ultra-Orthodox political parties criticized the Court, but they hoped to mobilize sufficient political forces in the legislative body to prevent a radical transformation of the status quo. They were prepared, accordingly, to compromise on the number of those who would take up Torah studies and receive exemptions. In several statements of Haredi MKs and political activists, they expressed their willingness not to exempt from military service those ultra-Orthodox youngsters who were not interested in Torah studies. Contrary to their spiritual leaders, who insisted on a collective exemption, they were less committed to fundamentalist symbolism and more attuned to needs to navigate within the complex web of governmental and parliamentary pressures.

Following the 1999 national elections, Haredi political parties had to

64. *Yated Neeman,* December 10, 1998.
65. *Yated Ha'yom,* December 11, 1998.
66. Ibid., December 13, 1998.

contemplate the ascent of Ehud Barak to political power. Barak had resolutely advocated the non-ultra-Orthodox public demands for equality in sharing the military burden. This reflected a popular conviction among his constituency of secular and liberal Jews and was supported by Zionist Orthodox Jews. The financial needs of the Haredi political parties and their dependence on state budgets were so urgent that they agreed to establish a public committee that would discuss the future of the exemption arrangement.[67] Legal practices, even those of religious fundamentalists, are shaped by the possibilities and constraints of the political environment. In that sense, too, legal cultures are part of political cultures.

This book's critical communitarian theoretical prism includes an emphasis on the politics of identity. Let us examine ethnic religiosity as one part of a religious fundamentalist community that challenges state law and suggests alternative hermeneutics and practices.

On Religion, Rationality, and Ethnicity: Legal Culture and Oriental Religiosity

Robert Cover has competently delineated the conflicts between a state's judicial interpretations of its law and the alternative legal hermeneutics of nonruling groups (1992a). His study led him to express one of his most frequently cited ideas as follows: "Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it" (155). The problems related to such a dichotomous intellectual approach, which ignores the multiplicity of exchanges between hegemonic and subdued cultures, notwithstanding, Cover has framed a powerful theoretical base. It may be used to explore latent conflicts between state and religious communities excluded from the public agenda under the veil of formal hermeneutics.

In contrast to Cover (see also chap. 1), I do not see the relations between state and communal law as binary and necessarily confrontational. I do share, however, Cover's view that under certain cultural structures state-community relations may become primarily confrontational. Furthermore, from Cover I have learned that we should con-

67. See outlines for the governmental policy, July 1999. Original document.

sider hermeneutics to be a bridge on which to cross over troubled relations of intercommunal societies that are reluctant to admit the merits of multiculturalism. Cover, as Austin Sarat has prudently observed (1992), is not a communitarian. Cover, however, seeks to listen to hidden voices, to the unheard music covered by the formal noises of state law.[68] I will follow his advice.

The case study that I would like to explore reveals one facet of that possible conflict and false harmony. The modern state of Israel prefers its own "rationality" to that of the Oriental religious community and hence defines its communal practices as illegal. This is one type of condition under which state judges are "killing" communal interpretations. The case study to be explored concerns issues of liberalism, rationality, and ethnic fundamentalist religiosity.

Democratic electoral procedures are integral components of democratic political cultures.[69] Liberalism underscores that voters in democracies decide how to vote in a "rational" fashion. *Rationality* ordinarily means, accordingly, the absorption of significant information, cognitive cost-utility consideration of the alternatives, and individual decisions on voting (Dahl 1982; Riker 1988). These individualistic, pluralistic models notwithstanding, empirical and theoretical studies have shown that voters in liberal democracies are manipulated by the political elite and have been affected by diverse identities (Russett and Barzilai 1992; Shamir and Arian 1999). Contrary to the portrayal of purely rational and individualistic voters, practices in liberal and nonliberal democracies affirm the importance of emotions, fears, images, and communal affiliations.

Critical and liberal intellectuals (Green and Shapiro 1994; Marcuse 1964) have argued about the significance of irrationality as a practice in liberal democratic life. Nonetheless, state law strives to portray voting as a rational and individualistic act that defines the essence of modern democracies. This purification of politics as a product of autonomous and informed individuals who individually calculate their political acts somewhat contradicts alternative communal legal hermeneutics that

68. The idea of viewing law in terms of noise and music was first addressed by attorney Raef Zreik at the conference celebrating the first issue of a joint Arab-Palestinian and Israeli law journal, *Adalah's Review: Politics, Identity, and Law* 1 (fall 1999).

69. See chapter 1.

consider ethnicity and other communal affiliations to be the essence of democratic elections.

Modern electoral laws in democracies embody a myth about rational individual voters (Rae 1971). This type of legality has primarily been at the expense of religious minorities that are not supported by hegemonic political cultures and cannot use their religious uniqueness for political purposes. The ability of nonruling religious communities to articulate themselves within state law for electoral purposes might be severely reduced, as the conventional legal interpretation of democratic elections excludes religious and other communal affiliations as "irrational." Often liberal state law that aspires to be seen as progressive and liberated from past constraints is antagonistic to the tolerant inclusion of the religious affiliations and practices of minorities. Expectedly, the more a community is religiously fundamentalist the more a conflict between the nonruling community and the state in law may be bitter. We may assume, based on the theoretical literature, that state law will encourage individual rationality while communal legal interpretations will emphasize religiosity and other collective attachments. As we shall see, these boundaries between legal cultures exist, but the binary distinction between "rational" state law and "irrational," religious, and "primordial" communal law is imaginary.

The Mizrachi ultra-Orthodox political party Shas has often used pictures, charms, and bottles of oil to emotionally attach its members, Mizrachi religious and traditional Jews, to their traditional histories. Jews who immigrated to Israel in the 1950s from Muslim Arab countries are particularly attracted to these material symbols, which have little financial value. These oriental symbols are frequently used at festivals and funeral ceremonies as part of long-standing traditions and habitudes. The Muslim population and its traditions in countries such as Morocco, Iraq, and Libya employ many of these symbols and practices. They underscore emotions, bursts of joy or sadness, loyalty to prominent religious figures known for their unique personal merits (*tszadikim*), fears of and hopes in the supernatural power of these figures, and belief in magic forces. On the contrary, state and legal ideologies have primarily been framed by Ashkenazi Jews unfamiliar with these oriental religious practices.

When Shas was established as a political party in 1983, it drew its

political constituencies from these foci of communal religious practices. Its religious fundamentalist leadership was efficient in its use of communal attachments. It has extensively used oriental religious symbols to persuade its constituencies that their communal affiliations drive them, even force them, to vote for Shas. The party has interpreted electoral procedures as allowing it to use oriental religious symbols for electoral support of Shas. Such oriental fundamentalism has not been counterhegemonic vis-à-vis state law in its procedural facet, but it has challenged its cultural preferences.

In 1998, Shas participated in municipal elections. These were an important yardstick with which to measure its ability to gain power in the national elections in 1999. Historically, Shas has consolidated its power at the grassroots level of municipalities, especially those with large concentrations of underprivileged Mizrachi Jews (Peled 2001).

As part of its propaganda during the municipal elections, Shas used special bottles of oil, with a picture of Rav Kaduri, the most popular Mizrachi *tszadik,* on them. These small bottles with a diminutive quantity of oil were given free to any person who asked for one. The financial value of one or two Israeli shekels (around twenty-five or fifty cents a bottle) was minor. They carried the title of "remedy oil," and the combination of the capital Hebrew letters constituted the word *Shas.* Hence, Shas symbolized the common practice among traditional and religious Mizrachi Jews of using oil for remedial purposes and utilized this symbolic meaning for electoral purposes. The bottles were meant to advise the voter that supporting Shas in the municipal elections would bring upon the voter the *tszadik*'s blessing and remedy.

The political practice of using oriental religious symbolism for electoral purposes was soon to become an issue in a major controversy, however latent, between two contradictory hermeneutics about democratic elections. Mainly secular, educated, middle- and upper-class Ashkenazi constituencies supported Shas's main rival, the political party Meretz. Meretz articulated and generated a legal text supported by many in the professional legal community. It asserted the precepts of liberal democracy and underscored the primacy of individual rights. Many justices advocated such rhetoric. Therefore, Meretz's members have transferred many of its political struggles, since the mid-1980s, to the Supreme Court. During the electoral campaign of 1998, Meretz's

representatives appealed to the Central Elections Committee (CEC) and demanded that Shas be prohibited from using the bottles of oil in the course of the electoral campaign.

At this junction of state domination, oriental fundamentalist religiosity, and American-led transnational liberalism a local legal battle was developing that demonstrates how slogans about the globalization of culture tell us little about human praxis. Critical communitarianism is committed to revealing the voices of the community through analysis of its legal culture. Before examining it, a few words of clarification are needed.

The CEC is a political body composed of representatives of all the political parties in the Knesset. A justice heads the committee, and he or she is responsible for legal guidance and management. Let us probe the deliberations of the CEC, where a legal battle between two legal cultures was taking place.[70] Let us look at how state law was exerted to displace communal law as a legitimate part of "modern" and "rational" elections. The tumultuous noises of the battle about hermeneutics and state-society relations show how those interpretations, carried by state and community, were not only contradictory but complementary.

Meretz referred in its motions for writs of injunction (against using the bottles of oil) to a state law that prohibits political parties from giving gifts during electoral campaigns.[71] It was claimed that dismissal of these motions would cause irreversible damage to the principles of equality and purity of elections.[72] The designation *unlawful gift,* which was given to the traditional practice of using bottles of oil, was meant to remove that practice from its communal religious context and to secularize it within the linguistic environment of state law.

The motions were supported by an affidavit by an expert in the sociology of Jewish religious practices, who explained the religious

70. My discussion is based on internal material that was presented during the deliberations of the CEC.

71. Knesset Elections Law (Means of Propaganda), 1959, clause 8.

72. File 94/98 *Jerusalem List v. Shas,* clause 8. Jerusalem List was an independent list of predominantly Meretz members who left the party due to personal and political conflicts with the national leadership. The appeal was submitted to the CEC, then headed by Justice Eliahu Matza.

meaning of these bottles of oil in a tradition hundreds of years old. Meretz contended, accordingly, that even if these bottles were valued at one shekel (about twenty-five cents), their cultural and symbolic value would be enormous.[73] Even if the bottles were not a gift in the secular sense, Meretz argued, they would have an "irrational" effect on voters.

Shas, on the other hand, referred to cultural relativism as justifying multiple legal practices, including appeals to emotion, faith, and deep feelings grounded in oriental fundamentalist religious attachments. In its replies to the motions, Shas asked the following question.

> Let us take a hypothetical situation in which a written recommendation to vote for Mapai with the signature of the late prime minister David Ben-Gurion is being dispersed. We have no doubts that for some voters a recommendation with Ben-Gurion's signature would be very much appreciated. Can we say that due to their subjective feelings Ben-Gurion's recommendation is a prohibited gift?. . . . Of course not! The same is true of the bottle of oil with Rav Kaduri's picture on it.[74]

Nonruling communities challenge the idea of one general discourse of individual rights exclusively imposed upon them. Communities may generate their collective rights due to their distinct identities, characteristics, and needs (Santos 1995; Selznick 1992). This claim of communitarian multiculturalism and legal pluralism, which has been partially accepted by liberals (Kymlicka 1995; Smith 1997), should not exclude religious fundamentalists from democracies.

Shas underscored the communal nature of its political activities. Its representatives emphasized that their means of political mobilization were adapted to communal oriental and religious culture with its specific needs and characteristics. It stated: "We have to understand that there is an electoral constituency that can be reached through postcards, there is an audience that prefers shirts and stickers, and Shas supporters are reached through bottles of oil and cassettes. This is a purely electoral decision, that according to Shas should not be

73. See clauses 5–9 of the affidavit.

74. Clause 7, Shas response to the motions.

intervened, otherwise the due and democratic process of elections would be damaged."[75] And another passage stated that

> Shas's spiritual leaders seek to communicate with their community of voters and to inspire among them a feeling of tradition originating from their fatherland, emotions, and a sense of family. The bottle of oil is like a language common to Shas leaders and their community of supporters, and presumably the one who does not share that language will have no interest in the bottles.[76]

Hence, Shas's interpretation of state law was different. While Meretz had introduced into state law its secular concept of liberal and individual rationality, Shas offered a contrary communitarian hermeneutics that excluded rationality as the sole legitimate epistemological configuration for electoral behavior. While the formal legal dispute was about the meaning of *unlawful gift* in state law, the actual conflict was about the centrality and displacement of liberal rationality in politics.

Meretz articulated a controversial Western—mainly American—precept of individual rationality as a sole basis of a "pluralistic" society and regarded political attachments to oriental emotions, which were articulated through popular religious practices, as primitive expressions of nonmodern oriental societies. It aspired to construct a legal culture that is independent of infrastructures of religion. Mizrachi (oriental) "irrational" folkloric practices that were articulated through the use of oil bottles for electoral purposes were incomprehensible to Meretz's leaders and activists, who were captives of utilitarian liberalism. Hence, in the midst of a political conflict between the two rival political parties Meretz yearned to impose its precepts on Shas's communal constituency and to constrain the soaring power of the Mizrachi ultra-Orthodox leadership of Shas.

State law is not an impartial entity, and it can never be such an entity. As Stuart Scheingold put it in his path-breaking book, law is an important pillar in state ideology (1974). There is always a certain ideology in law, and law by itself may be a constitutive, not only a

75. Ibid., clause 10.
76. Ibid., clause 12.

reflective, means of generating state ideology (Cain and Hunt 1979; Sarat 1999a; Sarat and Kearns 1992b). Yet this argument does not concern only construction of an ideology of rights. State law generates an ethnic ideology, however much it pretends to be innocent of ethnic identities and preferences. Imagined and class- and state-propelled impartiality is an ethnic preference objectified through state law as legality. It is contextually contingent and constructed for the privileged and hegemonic ethnic group(s) in a society (Spann 1993). Shas, a powerful representative of the Mizrachi, oriental, deprived social class (Peled 2001) was striving to fundamentally deconstruct that legally objectified and masked reality.

Justice Matza, chairperson of the CEC, accepted Meretz's allegation as if the bottles of oil that were disseminated in two municipalities (Jerusalem and Nathania) were "prohibited gifts." Injunction writs against Shas's local political lists were accordingly issued. The argument of rationality was fully upheld. Emotions and specifically oriental religious practices were displaced outside the realm of the justice's ruling. He had absorbed individual liberalism in a way that constructed communal usage of Mizrachi religion as irrational and therefore unlawful. The justice eliminated an alternative legal hermeneutics by excluding oriental religious practice from the state's self-proclaimed rationality of legality. Here is the main argument of that skewed and erroneous ruling.

> The purpose of an electoral campaign is to sway the electorate to support a certain candidate and prefer him to the other candidates. The only legitimate and permissible means of persuasion during an electoral campaign is the word: the spoken and the written word. With words, the candidate can appeal to the voter's intellect and logic in concrete messages and forceful arguments. He may also attempt to persuade him with slogans and advertising tricks . . . but the law prohibits the use of any other propaganda. . . . There is no ground for the attempt to compare a bottle of "remedy oil" and a written postcard or a paper hat. A written postcard or a paper hat are permissible propaganda items; they are reasonable means of transmitting a written message, and they cannot be useful to the recipient for any other purpose with the exclusion of the propaganda message upon them. The oil bottle—even if its financial

> value . . . is small in comparison with the value of the written postcard or the paper hat—is illegal because even if it is used as a way to transmit a verbal and propaganda message it can be used by the recipient for some other purpose.[77]

Shas appealed to the CEC as the final authority on matters of electoral campaigns. The arguments by the political parties were heard a few days before the elections, when the electoral benefits of using the bottles were diminutive. Still, a principal issue was at stake. Shas claimed that "exclusion [of the oil bottles] reflects a concrete political-ideological approach. . . . in actuality, it is censorship . . . which critically damages Shas and its voters' freedom of expression and damages the Israeli democracy."[78] State law and communal customs were in contention. In the appeal, Shas demanded an alternative narration of state law.

While ultra-Orthodoxy prefers dicta of spiritual Halachic leaders over dicta of state organs, Shas has not condemned state law as completely undesirable. Rather, it expects state law to disengage itself from civil society in ways that enable multiculturalism and communitarianism. The word *shas* means in Hebrew "guardians of tradition." As a religious fundamentalist political party, it has asked to be allowed to preserve its unique communal structure of ultra-Orthodox spiritual and political leaders supported mainly by a traditional Mizrachi electorate.

In that respect, Mizrachi ultra-Orthodoxy differs from Ashkenazi ultra-Orthodoxy. The former does not rely solely on Yeshiva networks and an ultra-Orthodox general constituency. Its main electoral support derives from the observant Mizrachi public. While Ashkenazi religious fundamentalists are a close textual community, albeit with various histories and cultural characteristics (Boyarin 1997), the Mizrachi religious and ultra-Orthodox community is in practice an ethnic religious community. Its legal text, the Halachah, is rooted in several hundred years of religious practices that constitute multifaceted com-

77. File 94/98 "*Jerusalem Now*" *v. Shas* (unpublished decision by Justice Matza, November 1, 1998, 6). Also see File 153/98 *Meretz List in Nathania v. Shas List in Nathania* (unpublished decision by Justice Matza, November 6, 1998, 2).

78. Appeal 2/98 *Shas in Nathania v. Meretz in Nathania,* clause 6.

munal practices. Contrary to some trends in Ashkenazi ultra-Orthodoxy, its practices and hermeneutics emphasize not only rational tools of textual analysis but emotions and popular beliefs.

That communal legal culture embodies the practice of using democratic procedures to procure more political support within Mizrachi constituencies. Therefore, Shas's religious fundamentalism has not been completely counterhegemonic.

Although Shas spokesmen have protested against secular individualism, they have also endeavored to use the liberal rhetoric of tolerance and openness to effect the inclusion of oriental religious and fundamentalist practices and hermeneutics in the multicultural fabric of democracy. Multicultural democracies should respect internal habitudes of nonruling communities as crucial conveyors of culture. Furthermore, the principle of individual dignity justifies an individual's right to be framed within his or her community.

The case of Mizrachi religious fundamentalism demonstrates this. Shas had no desire to appeal to nonmembers outside its community. It aspired to convey its messages to its communal members. This was clarified by its attorney, Dov Viesglas, during the CEC's deliberations: "It would be undesirable . . . in the context of such a decision [to allow or exclude the use of oil bottles] to prefer standards or qualities or considerations of one public over another public."[79] He proceeded to argue that "to one who receives that bottle . . . which means that he was appealed to by Rav Kaduri . . . it is a completely legitimate thing. . . . It is being done by most public figures in Israel, each one in his language and each one using the means of communication accepted by his constituency."[80]

Affected by the modern concept of rationality and individual liberalism the state has been interventionist and has aspired to expand its powers into the communal structure (the predominance of Halachic authorities) and communal practices. Religious fundamentalism is not necessarily against the state, however. In the case of Shas, it challenged the state not to intervene in cultural modes, suppressed by the hegemonic culture, that communal leaders wished to exercise in order to communicate with their constituencies. Shas's leadership was well

79. Protocols of the CEC Deliberations, November 8, 1998, 15.

80. Ibid., 17.

aware of its ability to symbolize long-lasting oriental traditions and use them for political mobilization.

> We disagree with the ruling, which claims that only a verbal message is legal. . . . I can imagine publics that are more excited by other things than verbal messages, and vice versa. . . . there are other publics in Israel that do not read and write, and there is no way to appeal to them. . . . The written word is one of many means of communication, of transmitting content and messages. It is a good, legitimate way, and it is true that it is the most common way, but it is certainly not the only way. Any message is permissible and legal.[81]

Therefore, Shas's attorney employed an argument for equality of access of individuals and communities to means of political communication. He added that "everything is allowed as a means of communication unless it is expressly prohibited. . . . I say that we—as a political party—are entitled and even should use any existing means unless it is expressly prohibited."[82] Accordingly, he argued for the need to interpret the notion of "unlawful gift" in its narrow sense: a gift is prohibited if it has significant monetary value.[83] Another interpretation of state law, which defines *unlawful gift* according to a distinct cultural precept, would have made state law more coercive toward the hermeneutics of minorities.

Liberal individualism has attempted, paradoxically, to impose its own interpretation of "freedom of choice." Accordingly, verbal messages are relevant to "rational" decisions made by informed voters based on cost-benefit analysis. Conversely, messages that are based on noninformative aspects of life, such as beliefs in metaphysical remedies and abilities, are prohibited because they have an irrational impact on the individual's freedom of choice.

That argument fails to address the freedom of an individual to preserve a communal tradition, and a communal habitude, however "primitive" they may be considered. Within such a communal con-

81. Ibid., 25.
82. Ibid., 13.
83. Ibid.

text, he or she may feel free to vote for the political party that is most closely linked to his or her religious practices. Arie Derhi, Shas's controversial political leader, explained such a perspective as follows: "I confess that if Rav Ovadia Yossef tells me to vote for Shimon Peres I will vote for Shimon Peres. If he tells me to vote for Bibi Netanyahu, I will vote for Bibi Netanyahu. If he tells me to vote for somebody, I will vote for him. I subordinate my discretion to his discretion. Now, you will tell me that this is illegitimate and that he should not cancel my freedom of choice? Gentlemen, I have willfully chosen it. I have willfully chosen to listen to Rav Ovadia Yossef."[84]

Using a broad and interventionist legal interpretation of the term *unlawful gift* would have enabled Meretz to mask coercive liberalism and in practice hamper Shas's efforts to become politically empowered within its community. State law was mobilized in the context of a larger conflict about political power. Thus, Meretz's representative in the CEC, attorney Holtz-Lechner, argued during the boisterous debates that "As for the law, should it be interpreted in a narrow or broad way? Based on the history of rulings . . . the law should be interpreted broadly. That law aims to protect the principle of equality, the principle of democracy, the principles of fair play."[85]

A coalition of forces between the left-wing Meretz and state law (under the right-wing rule of a Likud-led government) was not unexpected. The explicit and controversial Parliamentary Elections Law (Propaganda) was enacted in 1959, yet its use against Shas was a reflection of some facets of liberalism. The law was interpreted as allowing only a democratic electoral process in which individuals are stripped of their communal identities, primarily their oriental religiosity. A line of demarcation was drawn between legal, rational behavior that is based on verbal communication and illegal, irrational behavior that is based on oriental folkloric communal practices. This epistemological and interpretive boundary was instrumental for Meretz, and for other political parties, in their attempts to reduce Shas's popularity.

State law in modern societies embodies binary distinctions between law and politics as principal components of legality (Kairys 1990). This dichotomy has hampered cultural relativity in legality. For the same

84. Ibid., 45.
85. Ibid., 41.

reason, the debates in the CEC were significantly legalistic and formalistic, as if state law were exogenous to political struggles. A few days before the deliberations started, Meretz had announced to the CEC that two of its attorneys would replace its two political representatives (MKs) on the committee. This political move enabled Meretz to develop a debate that was wholly formal, not cultural. A formal legalistic debate served Meretz's political interest in objectifying state law despite its ethnic, cultural, and political preferences.[86] Antithetically, Shas appeared with its attorney, but Arie Derhi, Shas's political leader, took an active part in the deliberations and challenged cultural hegemony in state law. He delivered a long and emotional speech and referred to the deep cultural rift in Israeli society between Mizrachi and Ashkenazi Jews. Through oriental religious fundamentalist rhetoric, he opposed state legalistic interventions in communal avenues of political communication.

In the midst of Justice Matza's endeavor to halt his speech, Derhi demystified state law, and stated: "The question is this: whether we and the larger public will be given the opportunity to deliver the messages of rabbis to a public that believes in them. Alternatively, the public that does not believe in them but is afraid of the public that does believe in them will overcome. This is the cultural struggle: there are Jews in Israel who are ashamed that they live in a country that is affected by Rav Kaduri. Let us face it. . . . There is a public that is ashamed of this and says: 'I am unwilling to live in a secular democracy where Rav Kaduri and Rav Ovadia Yossef can influence one-quarter to one-half of the citizens.'"[87]

In a majority opinion, the CEC dismissed the Shas appeal. State law was interpreted broadly and formally and was utilized for intervention in avenues of political communication within the community. At that point, liberal individualism became coercive.

During the national elections of 1999, Shas expanded its electoral strongholds far beyond the imagination of any of its exponents. Unemployment, long-standing deprivation of the Mizrachi population, severe socioeconomic conditions in developing towns, and primarily the

86. Meretz letters to Justice Matza, November 4 and November 8, 1998, unpublished (ibid., 79).

87. Protocols of the CEC Deliberations, November 8, 1998, 49.

failure of the state to supply social services were the main causes of its electoral success, the winning of seventeen seats in the Knesset (Peled 2001). Attempts to use state law to disrupt Shas's political communications with its constituency proved futile. Following the CEC's decision in November 1998, Shas stopped producing the bottles of oil. But it has used successfully, and far beyond the reach of state authorities, several other modes of folkloric communication. Inter alia, blessings, religious ceremonies, and the endorsements of rabbis are legitimate methods and effective avenues to communal political mobilization.

Despite the rejection of alternative communal legal hermeneutics, communal practices won, and they were stronger than state law. These hermeneutics will continue to be used, legally in the view of the community's members, whether state officials and the law prohibit them or not. Shas revealed the deficiencies of liberal individualism and its failure to dictate one legal culture. Judges may kill communal interpretations, as Cover has asserted (1992a). Yet the effects of state law on the legal consciousness, identities, and practices of nonruling communities are more limited than legalistic declarations imply. Communal practices, and multifaceted aspects of communal legal cultures, may survive and be reproduced in unpredicted configurations outside the formalities of state law.

Conclusions

Fundamentalist religious communities have unique legal cultures, a distinct religious consciousness, legal hermeneutics, and legal practices that are based on sacred texts. These practices are structurally embodied in daily life, spiritually disciplined, politically supervised, socially stratified, collectively generated, and forcefully (even violently) restrained and imposed. Fundamentalist legal cultures coexist, cooperate, and collide with the modern state and its laws. No clear and stable boundary exists between fundamentalist religious communities and states in democracies. No imposition of a binary line of demarcation, insensitive to dynamic practices, between religion and the state and between epic sacred texts and modernity can sufficiently explain legal cultures and state-community interactions.

Religious fundamentalism has not necessarily discarded state law. My critical communitarian study of the ultra-Orthodox community

reveals rejection of the state ideology of Zionism, the legal ideology of a balance between Judaism and democracy, and state law as law that is managed by Jews but is significantly affected by secular values. That rejection is grounded in elitist textual interpretations. Yet, despite some manifestations of communal violence against the "outside world," the religious fundamentalist community has been ambivalent and rather pragmatic in its practices toward state law.

State law has been instrumental in gaining and maintaining a certain autonomy and a certain influential position of ultra-Orthodoxy in national decision-making processes, while democratic procedures have been utilized to promote political party interests. In the case of the Israeli Haredi community, we did not expect to find a complete divorce of religious fundamentalism from state law due to the statutory autonomy in specific realms rendered to the community as part of a constitutional arrangement. In practice, religious fundamentalists did mobilize state law, even appealing to the Supreme Court in horizontal conflicts between religious fundamentalists and other religious, non-Orthodox groups that have localized American-led transnational liberalism by transforming it into a source of struggle against ultra-Orthodoxy.

Hence, to presume that religious fundamentalists are necessarily against the state and democracy is erroneous. Even when they argue for the illegality of certain state acts, they may render the state and democracy with legitimacy. That legitimacy is antithetical to some fundamentalist interpretations of sacred texts, and yet it is conceivable due to utilitarian considerations. This incongruity is specifically embodied in social existence and in the consciousness, hermeneutics, and other identity practices toward law that are included in the phenomenon of legal culture.

Instrumental and partial legitimization of state law does not necessarily indicate the adoption of state and legal ideologies. A careful examination of communal legal culture suggests a plausible conceptual differentiation between state law and ideology despite interactions between these phenomena as major sources of political domination. State law is a somewhat tangible entity composed (inter alia) of expressive formal dicta and practices. Nonruling communities, due to their scarce resources and vulnerability, tend to accept state law as a framework of modus operandi without necessarily being socialized within the state's ideological postulates.

Ultra-Orthodoxy, Ashkenazi or Mizrachi, is largely not Zionist. At a practical level, Ashkenazi ultra-Orthodoxy has struggled over its position within state law in order to maintain its relative communal autonomy. Mizrachi ultra-Orthodoxy, on the other hand, has acted much more vigorously, using state law to attract electoral support among deprived Mizrachi Jews. In both instances, anti-Zionism has been more prominent in legal rhetoric than in legal practice.

In practice, the fundamentalist religious community has struggled to defend, preserve, and enlarge its autonomy and power. Additionally, it has endeavored to empower its monopoly over several issues and has attempted to enlarge its electoral strongholds by precipitating governmental, judicial, and parliamentary crises and utilizing democratic procedures and liberal rhetoric. The Zionist state has legalized this anti-Zionist ideology and has subsidized it for its own legitimacy purposes. This demonstrates that communal legal cultures may do more than stand outside or inside the state and its laws. Even religious fundamentalist cultures, which emphasize strong antistate sentiments, may be legalized by the state and may legitimize the state.

Since critical communitarianism is sensitive to both intercommunal multiculturalism and state domination, it shows that contradictory legal cultures can coexist, despite antithetical legal interpretations of opposing texts and various practices amid political and constitutional conflicts.

Violence has been a significant part of this intercommunal fabric under state domination in times of globalization. Communal violence has been used as both a multidimensional counterhegemonic and a hegemonic force. "Externally" it has been used to oppose state organs and officials; "internally" it has been used as a disciplinary communal mechanism. But the boundaries between external and internal are largely imagined. Communal violence against state organs and officials has not only been in reaction to liberal and secular coercion directed against the community; it has also been a means of consolidating communal solidarity. Internal violence directed against community members aims to prevent the intrusion of liberal and secular values into the community. Hence, communal violence has been a counterhegemonic liberating force against coercive liberalized state law and legal ideology. Yet communal violence has also been a hegemonic coercive means of maintaining communal discipline. From the

critical communitarian perspective, which conceptualizes violence as a practice of collective identities and domination, we can see that violence has been a component of the communal legal cultural fabric.

Liberal facets of state law and legal ideology have strained relations between the Haredim and the state but not always in modes that might have been expected. On the one hand, court rulings that could have dismantled ultra-Orthodoxy's monopoly and interfered with its autonomy were avoided. Furthermore, religious fundamentalists have conducted countermobilization by using the parliament, the government, the judiciary, and democratic procedures. However, fundamentalist religious communities may discover possibilities within the sphere of state law and decide to utilize legal ideology and the language of liberalism. The religious fundamentalists have used the liberal tools of litigation and procedures and, based on arguments of multiculturalism and tolerance, have attempted to advance their partisan political aims.

The strong ties between the individual and his or her religious fundamentalist community make the understanding of the modern world impossible unless a communal perspective is employed. The authoritative, sometimes violent, and disciplined structure of the religious fundamentalist community is characterized by the fierce opposition of its spiritual and political establishment to state involvement through liberal arguments of individual rights. A strong sense of community inside ultra-Orthodoxy and collective suspicions toward the outside world make the perspective used in this book a prerequisite for an incisive analysis of religious fundamentalist legal culture.

Chapter 6

Conclusions: The Return to the Communal Space

Globalization

"Globalization" has penetrated a popular eschatology among more than a few academics. As I showed in chapter 1, the essence and meaning of that faith is unclear, as human beings conceive of globalization in many contradictory ways. If globalization means the triumph of American liberalism as the sole criterion for the advancement of human rights (based on the reduction of central state power), its spread implies the eradication of nonruling communities in numerous states, which continue to need recognition, protection, and empowerment as collectivities. This would be a tragedy. Instead, these communities can be either embraced or further marginalized. As we have seen, liberalism cannot provide solutions for this dilemma. If globalization means something other than transnational American-led liberalism, what will it mean following the demise of communism and the decline of the "welfare state"?

Global culture is a long way off. Local cultures are so diverse that it is very questionable whether we need an international culture and whether one morality can be universally accepted. This book calls for an improved theory of local culture, one that will spur public policy and jurisprudence to take the needs and interests of nonruling communities into account within the broader framework of a multicultural democracy.

A possible criticism of collective rights may be that these rights endanger national sovereignty and the "stability" of political regimes. Intercommunal states such as Yugoslavia and Lebanon, as historical precedents, illustrate the fragility of regimes that allocate collective rights to nonruling communities. Their experiences may be

particularly relevant to Israel and the Palestinians residing within it. These cases may encourage students of Israeli politics to consider the possibility of granting collective rights to the Palestinians as a prescription for the destruction that threatens the Israeli state.

But these fears do not rest on solid ground. A political regime that recognizes the collective rights of nonruling communities is not a confederation; it is not even a consociation. The only prerequisite for a regime's embrace of nonruling communities is recognition of their legitimate existence as political collectivities with distinct virtues and communal goals. This step can be taken by unitary and federative regimes alike. Communitarianism does not threaten sovereignty, as was clarified in chapter 1.

There is also a fear that recognizing nonruling communities in law may lead to the breakdown of political regimes. Theoretically, there is no pillar in communitarianism that necessitates such a political breakdown in democracies. Furthermore, my research has shown that there is no empirical basis for dread in the Israeli context: my field study of Arab-Palestinians residing in Israel revealed that this minority expects social equality but has accepted the state as its only political framework.

Critical communitarianism, I submit, is a critical theory of human rights that embraces concepts of decentered law and power, state domination, and communal legal cultures that are constituted through identity practices. Hence, the questions with which this book grapples concern issues of legal consciousness, identity, and the legal practices of nonruling communities addressed within the political context of state-society relations.

Legal Cultures

Chapter 1 is devoted to the conceptualization of legal cultures, within the generic framework of political cultures, understood from a critical perspective. I then analyzed several intellectual traditions of law and society so as to suggest a new avenue for exploring communal practices toward law. The approach suggests that formalities, categorizations, and practices of state law should not be overshadowed by new theoretical variables; instead, their complex interactions with nonruling communities, and with their legal-cultural facets—consciousness, identi-

ties, and practices—should be comprehended. Communal practices include alternative hermeneutics, legal mobilization (i.e., utilization of state law, mainly in legislation and litigation), demobilization (rejection of state law), and countermobilization (action against state law by means of communal law or agents of state law). The hegemonic nature of state power, state ideology, legal ideology, and state law notwithstanding, this book explores the diversity of communal identities, hermeneutics, and practices toward and within state law.

This study shows that in each of the three nonruling communities analyzed, collective set of consciousness, identities, and legal practices exists. These are articulated in a variety of dispositions and actions toward and within communal and state law. In theory, two kinds of legal cultures are generated by nonruling communities: first, legal interpretations and other practices that lack formal recognition and are subdued by the state; and, second, legal cultures that are formally recognized by the state as various forms of state legality. Following my study of nonruling communities, I would suggest that the same community might generate these two sociopolitical and legal products in parallel.

Prominent scholars such as Robert Cover and Stephen Carter have somewhat dichotomized the character of state-community relations. In contrast, this book has shown how the state employs dual legal strategies toward nonruling communities. The state can and does render one facet of a community legal while excluding other identities or facets of the same community, thereby ignoring the existence of the alternative legal culture. Legal cultures of nonruling communities have become, in consequence, complex and diversified. Let me demonstrate this point by briefly referring to some concrete findings elaborated in the previous chapters.

Notwithstanding their legalization in state law as a religious minority, the other collective identities and practices that define Israeli Arab-Palestinians as a distinct community remain formally unrecognized and politically evaded or—worse—subdued. Under a veil of democratic, egalitarian citizenship, the state's strategy, expressed in its policy of granting "legal" status to religious identities, has been to more or less legitimize suppression of other communal identities in accordance with its preferences. As chapter 3 explained, the Arab-Palestinian community has exhibited various perceptions, dispositions, and practices

toward that bifurcated yet exclusionary public strategy. Palestinian feminists (e.g., Al-Fanar) have condemned state legalization of practices that maintain male dominance. The Muslim judicial-religious elite, however, which has partially benefited from the limited juridical autonomy of the Sharia, has acted quite differently by acknowledging those constitutional arrangements of the Jewish state that support their status. Therefore, the term *communal legal culture* may be misleading unless it is perceived as an intellectual tool, a device to be used to explore the multidimensional and unpredictable cultural legal facets exhibited by a community.

As in Western societies, women in Israel are closer than other nonruling communities to achieving group-differentiated rights, although they have never been formally recognized as a community in state law. Conversely, but not paradoxically, state law has assumed that women desire to be like men, that equality means the application of male standards to women's sociopolitical positions and behaviors. The "feminist" concept framed in state law is a male interpretation of gender equality, that is, women are viewed as an extension of the male community rather than as a unique, nonruling community. Chapter 4 presented a detailed examination of liberal and critical theories of feminism, dwelling, inter alia, on male violence against women, political violence, and feminist mobilization of state law and state ideology through symbolic violence. The findings indicate that state law has ignored the option of constructing a separate feminine epistemology in state law as well as the possibility that women deserve rights as a defined community endowed with its own virtues.

Women's rights have also been viewed from another perspective in this book. The epitome of liberal constitutionalism is to endow a woman with the right to be like a man, not the right to be an autonomous woman. Israeli law, as in many liberal legal settings in Europe and North America, has adopted the concept making women equal to men by bestowing the rights held by men upon women. Hence, a variety of feminist practices remain unrecognized in state law; women subsequently challenged liberal legality in various ways, as detailed in chapter 4.

The same theoretical argument concerning complex and diversified communal legal cultures is drawn from an analysis of the Jewish fundamentalist community (chapter 5). Ultra-Orthodox education and adju-

dication of family issues, and some legal practices such as adjudication of private issues by communal courts, have been accepted in state law as autonomous communal activities because such acceptance has served the state in its attempts to gain legitimacy among anti-Zionist religious Jews. Alternatively, other practices, including the use of traditional ("irrational") symbols for electoral purposes and the collective exemption from compulsory military service of religious fundamentalists, have come under tight judicial review by state courts. These were declared unlawful because the state was interested in imposing liberal values on this nonliberal community.

In all three instances, nonruling communities have retained their particular meanings at legal and sociopolitical junctures. Within each community, a diversity of identities and practices has continued to exist although, contrary to liberal anxieties, nonruling communities are not necessarily traditional. As my interpretation of critical communitarianism has suggested, by generating modes of social existence, consciousness, identities, and practices under state domination, communities have produced manifold collective goods. Within this context, Israeli Arab-Palestinians, feminists, and Jewish religious fundamentalists have articulated their unique collective experiences, memories, and legal practices and protected them from state law with comparable complex legal cultural forms of evasion, (counter)mobilization, cooperation, conflict, and resistance.

Individuals—embedded but not selfless—were constituted and generated within the three communities selected; their personal consciousness, identities, and legal practices were affected accordingly. Chapters 3, 4, and 5 illustrated the different characteristics of each nonruling community. The variance between these three communities and their distinctive locations in the state narratives notwithstanding, observable as well as latent structures of communality have been sustained by organizations. Each communal organization carries an entire set of consciousness, identities, and practices through interactions with law.

The ability of individuals to leave a nonruling community varies by community. In a more open community like that of the feminists, the availability of exit is significant. In much less open communities, like that of the ultra-Orthodox Jews, exit is very restricted. Within the Arab-Palestinian community, exit has largely been contingent on local

variables, inter alia, religiosity and patriarchy. Yet in all three communities the collective has imposed a set of optional and nonoptional concepts of the communal "public good" and legal practices that impinge on the possibility of exit. In all three instances, unique types of practices toward state law have been promulgated, based on their own legal texts, social conditions, identities, and hermeneutics.

The relevant legal texts vary as well. Legal culture need not rely on a concrete formal legal text exclusively. Dispositions and practices, unrecognized in state law, may evolve without concrete reliance on a specific communal legal text. Renteln and Dundes (1994) have documented dozens of examples of lex nonscripta. The feminist community analyzed in this book provides a good illustration of such a corpus.

There is no single formal legal text on which all feminists rely as a community. After the 1970s, liberal feminists relied on state law and constructed their language of rights to suit their needs and interests. They protested its male principles but adopted its legal ideology overall. Radical feminists, alienated from state law, have opposed it, and have abstained from reliance on other formal texts. However, as was shown in chapter 1, communal law need not be grounded in unwritten routines or conventions. Contrary to the feminist community, the ultra-Orthodox have been rather strictly directed by interpretations of the Halachah, as have Muslim Arabs by interpretations of the Sharia.

The relevance of lex scripta as the sole text recognized for communal constitutive and declarative purposes is problematical even in religious communities. As chapters 3 and 5 have shown, authoritative sacred legal texts represent only a fragment of the legal culture upheld by religious fundamentalists and Arab-Palestinians. Several major legal practices of Jewish fundamentalists are not grounded in the Halachah at all. Their origins lie in the community's sociopolitical needs, internal political and cultural structures, and dynamic interactions with the state and its laws. Nor have Arab-Palestinians (80 percent declared themselves to be Muslims at the time of writing) consistently relied on the Sharia. Palestinian nationalism, agrarian needs, collective perceptions of deprivation, and the universal language of human rights have provided the roots for many, often contradictory facets of their legal culture. These forces operate quite independently of state legal ideology, although they have been affected by transnational liberalism. As was seen in chapter 3, Arab-Palestinians have localized

certain aspects of global liberal trends and practice them under state domination while litigating rights in Israeli courts.

The Role of State Domination in the Constitution and Generation of Communal Legal Culture

If we define *legal culture* as a more or less autonomous phenomenon and communities as nonstate entities,[1] we may get the impression that state law and its ideology are divorced from communal legal culture. This book demonstrates the contrary; it shows how state law, legal ideology, state ideology, and communal practices interact, often to the point where the state dominates communal consciousness, identities, and legal practices.

It is hardly conceivable that any community, when facing the coercive nature of state law as a constituent of legal and state ideology, could be completely isolated from its influence. Yet, due to the differences between culture (as a set of identity practices) and ideology (as a concept inherent in the normative order), legal ideology and legal culture are neither synonymous nor entirely overlapping. Rather, they are distinct but interactive phenomena. The state's effect on a nonruling community may vary from one community to another as well as within the same community. Nevertheless, state domination is a pillar of communal legal culture, however diverse that nonruling community may be.

The frequent and convincing assertion that Israel is a centralist state significantly engaged in almost every aspect of society may limit the applicability of my findings to societies with similar political regimes. Yet other studies have shown that even in decentralized political regimes state law, through regulation, penetrates communal practices (Kagan 1999).[2]

Awareness of the actuality of state law and its image as a system that should be obeyed exists in all three of the communities explored in this book. Based on field surveys, unpublished protocols, other unpublished primary sources, and personal interviews, it was found

1. See chapter 1.

2. There is a notable difference between a federal and a unitary system. In federal systems, *state law* refers to both the federal (national) and state levels.

that, despite various and contradictory identities operating among and between the selected nonruling communities, a significant portion of each community tends to obey state law. This pattern of behavior results from utilitarian legitimacy (in the case of religious fundamentalists), dependence and fear of punishment (in the case of Arab-Palestinians), and civil and liberal concepts (in the case of many feminists), either separately or in combination. Thus, despite the availability of alternative legal texts and hermeneutics as well as contradictory practices, state law has retained its place in communal legal culture, however challenging to the state that communal culture may be.

Nevertheless, this presence is not limited to the processes listed hitherto; it has likewise emerged from elitist strategies, legal categorizations, and various communal practices to which I shall refer later. For now, I turn to a discussion of state ideology and its role in the constitution and generation of communal legal cultures.

Every state displays the hegemonic ideology required for production and reproduction of its governance and legitimacy. Just why state law and legal ideology are constitutive elements of that ideology need not be repeated here, as the issue was explored in previous chapters. We should remember, though, that each of the three communities examined in this book occupies a different location with respect to state ideology, to its metanarratives.[3] The most readily illustrated case is that of liberal Jewish feminists who identify themselves as Zionists. They have challenged gender discrimination while demanding equality with men in state law based on assertions of their equal contributions to the realization of Zionism. Accordingly, they have incrementally mobilized state law as a source as well as a target of their legal activities. On the other hand, some radical Jewish feminists have identified themselves as non-Zionists and criticized state law and its legal ideology; in doing so, they have overshadowed possibilities of its mobilization as a source for the generation of gender equality.

In the course of daily life, state law and legal ideology are indistinguishable from state ideology. This ontological status does not prevent their meaningful interaction as analytically or behaviorally distinct dimensions in the spheres of state control and governance.

3. See chapter 1.

Hence, from a communal perspective, the practical implications of law and ideologies are different. Israeli Palestinian feminists, for example, have urged the intervention of state law in instances of violence against women and have demanded state punishment for murders committed for the sake of "family honor" (Katal Al-Sharaf) by male members of the Palestinian community. This has not prevented their condemnation and criticism of the essence of Israel's state ideology as Zionist and its legal ideology as Jewish. Religious fundamentalists provide another good example. Democratic procedures have been utilized for electoral and other political purposes amid denunciations of Zionism as a state ideology.

These two examples, which indicate how nonruling communities may remain independent of state ideology while mobilizing and countermobilizing state law, help to clarify the problematic distinction between state ideology and state law in the context of legal practices. This issue has, regrettably, been relatively neglected in the literature on law and society. The scholarly lacunae notwithstanding, state law, as differentiated from state ideology, should be an important issue on public agendas as an available avenue for challenging the state, by using definitions of *legality,* for example. An intercommunal, multicultural fabric that incorporates challenges to state ideology and state law may survive if diverse communities legitimize it for whatever utilitarian reasons.

Furthermore, as we have seen, although state law may recognize a certain measure of communal autonomy for the purpose of producing and reproducing state legitimacy, no law can be completely stripped of its ideological identity. Hence, for nonruling communities wishing to challenge the hegemonic ideology, the high and problematic cost of taking advantage of existing legalities may be that of providing the state with utilitarian legitimacy.

State and Communal Strategies: From Resistance and Terrorism to Litigation and Legislation

States can repress communal identities by imposing legal restrictions and prohibitions. Chapters 2 and 3 depicted implementation of such a legalistic strategy against Israeli Arab-Palestinians. India's strategy against Sikhs and Muslims, Turkey's strategy against Kurds, England's

strategy against Catholics in Northern Ireland, and Australia's and New Zealand's strategies against aboriginal people are all similar legalistic acts. These states have utilized "democratic" legality to subdue challenging collective identities. Yet, as Kymlicka (1995) has correctly pointed out, democracies face severe legitimacy problems when they resist rival nonruling communities with the direct, brutal use of state law (Linz 1997; Rossiter 1963). Hence, more complex legalistic strategies—advanced through public policy—have been used to activate state law against these communities.

Among the leading constitutional arrangements available to multicultural democracies during struggles between the state and rival nonruling communities, we can list autonomy (Dinstein 1981). In chapters 2, 3, and 5, the concrete autonomy-oriented arrangements available to ultra-Orthodoxy and Arab-Palestinians were explored. Autonomy, as we have shown, is multifaceted. For nonruling communities, it may be a channel for affecting national policies without accepting state and legal ideologies, as in the case of Jewish ultra-Orthodoxy. But it may also be an exclusive means of depriving a nonruling community of its collective memories and historic claims. This has been the case with Israeli Arab-Palestinians, who have been formally categorized and legalized as a religious community and thereby delegalized and delegitimized as a national and agrarian community. The autonomy granted to non-German communities in Switzerland and the Basques in Spain are examples of cooperative frameworks in which the community increases its participation in decision making while accepting state ideology for little more than its utilitarian value (especially in Spain). In contrast, the autonomy granted to native Americans in Canada and the United States exemplifies constitutional arrangements that are exclusionary in intent (Dinstein 1981; Kymlicka 1995).

In chapters 2, 3, 4, and 5, we studied strategies of state responsiveness to the efforts of those nonruling communities that have turned to legal mobilization. Theoretically, as was clarified in chapter 1, the state is not a uniform, cohesive legal entity: no state is given and fixed. We always have to look for internal conflicts within the ruling elite, contradictions among legal practices, and tensions among various state organs. Although such factions may display many common

interests and sociopolitical characteristics, they often engage in internecine struggles in the sphere of state law and legal ideology. This lack of cohesion directly impinges on the strategies the state uses in its confrontation with nonruling communities.

One state response to nonruling communities is adjudication and the incremental construction of individual rights. I have pondered these proclivities from the critical communitarian perspective while focusing on the metanarratives underlying communal legal cultures. I have looked at which nonruling community is bestowed (or not bestowed) with rights, what kinds of rights, to what degree, and in which spheres of life and how these rights are constructed within state and legal ideologies. My research has revealed that state responses to the legalistic allegations of Israeli Arab-Palestinians, non-Orthodox Jewish religious movements, ultra-Orthodox Jews, and feminists are varied. Thus, even in liberal rulings the Israeli Supreme Court gingerly limited the degree to which it upheld appeals so as to avoid recognition of the collective rights of Israeli Arab-Palestinians (see chap. 3) as a national minority. It did grant some individual rights to minority members while underscoring the essence of the state as "Jewish and democratic."

Metanarratives have not been the only constraints placed on the adjudication of nonruling communities. Concerning Jewish communities, in rulings within the sphere of those metanarratives the Court was well aware of the possible coalitional and governmental repercussions of its rulings. Thus, with respect to appeals made by the conservative and progressive movements, the Court has tended to underscore its evasion of the issue of "who is a Jew," an issue that has generated a deep crisis involving the identity of the state. In turn, the justices have emphasized that their legal opinions recognizing non-Orthodox religious conversions performed outside Israel were relevant solely for purposes of population registration. As noted earlier, judicial recognition of these conversions for other than administrative purposes would have driven ultra-Orthodoxy to exert severe political pressures to legislatively restrict the Court's jurisdiction. In contrast, on issues of gender equality the Court was less hesitant to confront the executive and render legal remedies in instances of male discrimination against women. Because the appellants were Jewish and resorted

to the popular liberal rhetoric of gender equality, the Court's acceptance of their appeals was not expected to result in governmental, parliamentary, or media-oriented negative reactions.

Legislation embodying concrete rights or supporting those rights has been introduced as the second major response to nonruling communities. In democracies, nonruling communities may be recognized under state law as deserving specific rights due to their status as collectivities. Native Americans in Canada are one documented instance of such state recognition, however limited and circumscribed those rights may be. In contrast, Israeli Arab-Palestinians cannot enjoy the fruits of similar legislation due to their stigmatization as disloyal to or subversive of "national" interests and due to their sociopolitical status outside state power foci. Their paltry political representation in the Knesset is insufficient to convert their MKs into a parliamentary bloc capable of vetoing legislation and, from 1948 up to and including the Sharon-led government of 2003, they have never been invited to join a government coalition. Overall, the state has not been legislatively responsive to this minority. Accordingly, as was systematically revealed in chapter 3, most of the community's legal mobilization has shifted to the arena of the Supreme Court. Alternatively, as analyzed in chapter 5, Jewish ultra-Orthodoxy has attained much more parliamentary power, which it has successfully used to generate and sustain legislatively based legal mobilization and countermobilization.

Thus, the position of a nonruling community in and/or outside the state narrative is crucial for the constitution of its legal practices. Ultra-Orthodoxy has been, by and large, outside the Zionist metanarrative. That cultural constraint notwithstanding, ultra-Orthodoxy has been recognized within the Jewish metanarrative. As such, the Zionist elite believes that this community confers legitimacy to it (see chap. 5). Furthermore, the structural position of Haredi veto power in a polarized and fragmented parliament has enabled their political parties to acquire massive state support and win not a few legislative victories affecting several spheres of everyday life despite the fact that they are a non-Zionist minority. Through such legislation, the Jewish and Zionist state has managed to preserve its legitimacy with this Jewish and non-Zionist (if not anti-Zionist) minority, which has generated an ambivalent communal legal culture toward state law. However, whenever more liberal Supreme Court rulings appear to be in

the offing, ultra-Orthodoxy has used legislative mechanisms to promote countermobilization in order to forestall the possible impact of non-Orthodox litigation.

States may also designate group-differentiated rights, whether as a means of exclusion—as in the case of Israeli Arab-Palestinians—or as a means of inclusion—as in the case of Jewish religious fundamentalists. State law has bestowed group-differentiated rights (e.g., affirmative action) on women in several Western countries. Due to motives such as those explicated in chapter 4, Israel's state law has adopted a liberal concept of gender equality in some spheres of public life. Yet state law has not acknowledged women as a community, a separate collectivity having its own social consciousness, identities, practices, and needs and therefore entitled to special collective rights. Indeed, in the matter of state-endorsed rights, liberal feminists have been the most successful group, within and outside the feminist community, in mobilizing state law in two other power foci, the legislature and the government. Hence, as could be anticipated from the critical communitarian lessons taught about liberalism, some individual Israeli women, chiefly from the Jewish middle and upper classes, have been able to marginally benefit from improvements in their position in the male-dominated legal space. Israeli women as a group, however, still do not enjoy their own legal space.

With this summary of the state's legal strategies concluded, we can turn to the legal strategies framed and generated by nonruling communities. As a way of concluding this issue, remember that repression of nonruling communities can breed violence. When they are deprived of collective and individual rights, nonruling communities may react with the only tool still accessible to them: collective violence. Such a response does not derive from a communal ideology. It is a mode of political expression and political pressure that, according to the state, is illegal or even terrorist. The Kurds and their political representative, the Kurdistan Workers Party (PKK), provide good examples of this dynamic. The Turkish government's refusal to grant community rights to this community fed the waves of guerrilla attacks.

My study of Arab-Palestinians in Israel detected a similar, notable tendency toward such communal violence whenever the state imposes its own identities, practices, and policies on this community. Chapter 3 examined that proclivity within diverse spheres comprising

state-community interactions in state and communal law, including land appropriation. Nor has Jewish ultra-Orthodoxy been immune to communal violence against the state. This tendency has been variously articulated as a very limited armed resistance, violent demonstrations, and the vandalizing of "licentious" public advertisements (Lehman-Wilzig 1990, 1992). Nevertheless, violence is not indispensable for nonruling community protest against external "enemies."

Critical communitarianism considers power to be a part of culture in law, and law in culture, and recognizes violence as a form of power in communal legal culture. After studying the three collectivities, I suggest further differentiating between several kinds of violence in communal legal cultures. One facet is violence as a part of mechanisms that maintain social discipline. As an internal mechanism of communal discipline meant to suppress internal rivals and coerce obedience, violence is a major characteristic of nonliberal communities that, almost by definition, frown on communal pluralism and internal dissent. Religious fundamentalists have used internal violence of this kind. For instance, as was explained in chapter 5, the Haredi community has, inter alia, been able to impose the jurisdiction of private courts and puritanical sexual norms by using violence against its own members. In the Israeli Arab-Palestinian community, the Muslim religious fundamentalist (male) elite that controls and supervises patriarchal elements in the Arab-Palestinian community has encouraged murder of women as a viable instrument with which to uphold "family honor."

Such internal or collective violence, as a mechanism of discipline, control, and supervision of community members and as a component in communal legal cultures, is not contingent upon state repression. On the contrary, the more liberal a state is the more alert a communal elite should be in order to hamper attempts by community members to exit, to outmigrate.

In contrast to the first, the second facet of internal communal violence is not divorced from liberalism. Liberals do not violently prevent the exit of community members. But in liberal nonruling communities violence can be utilized as a collective symbol to generate communal solidarity and mobilization. Chapter 4 showed how liberal feminists have used male violence against women as a primary symbol in their collective efforts to monopolize the entire feminist community, to estab-

lish coalitions within state law, and as a means to generate grassroots and elite support of liberal feminist organizations. Paradoxically, male violence against women has been framed as a permanent objectified motif justifying the existence of feminist liberal organizations.

Liberal feminists have not used symbols of violence solely from the victim's perspective but also from the executioner's perspective. As chapter 4 notes, the participation of women in military combat and gender equality within the military ranks are considered by liberal feminists to be a major social breakthrough. This intimacy of liberal feminism with collective violence was problematized in chapter 4.

Alienation and apathy are other facets of communal strategies in the context of legal cultures. Formally, a nonruling community cannot be outside the reach of the formal "rule of law" in the state where its members reside. A certain amount of regulation will most certainly apply to members of all nonruling communities. But state law—and transnational legalistic arrangements—cannot exert absolute control over human consciousness, identities, and communal practices. It follows that community members may become alienated from and apathetic toward state law, a condition conducive to evasion of its control.

Using Albert Hirschman's terminology (1970) and applying it to state-community relations, a community may preserve its basic loyalty to the state through significant evasion of state law without exit from the relational framework. The Amish community in the United States and some rural communities in Japan (Apter and Sawa 1984; Hostetler 1993) provide good examples of such communal legal cultures. Jewish religious fundamentalists in Israel, particularly the more conservative groups, have largely behaved in the same way. Due to alienation from non-Orthodox state law, they have disengaged themselves from daily interactions touching upon state law and its ideology. Chapter 5 delved into the sources of such practices and the legal religious hermeneutics that have justified such a response.

A different instance of alienation and apathy is that of radical feminists. Feminist practices (see chap. 4) have largely reflected such a stance toward state law. Male-dominated state law has been perceived as hostile to feminist endeavors to advance a separate feminist epistemology and a distinct legal consciousness. Individualization of women

as private persons—as opposed to members of a community—endowed with personal (rather than communal) rights that are equal to those of men is viewed as a mechanism inherent to male-dominated state law. Instead of attempting to understand and resolve women's legal predicaments, these are perceived as the inevitable outcome of male domination. Under such circumstances, grassroots action, remote from the formalities and niceties of state law, has been accepted as the sole authentic avenue of women's liberation.

Communitarians have not necessarily endorsed either politicization or depoliticization of communities (compare Mautner 1998; Shapiro 1999; see also Etzioni 1998). As Ian Shapiro has incisively stated, no human realm is beyond politics (1999). Still this generalization should be contextualized; the more politicized a community the less it will be inclined to adopt apathetic attitudes toward state law. The observation that apathy is less prominent among Israeli Arab-Palestinians (including Arab-Palestinian feminists) is therefore understandable.

Yet my field survey finds that even among that highly politicized community, with its diverse identities and practices, apathy has been introduced into its communal legal culture. State law has been acknowledged as given, with no interest expressed in its modification. Alienation has likewise penetrated the Israeli Arab-Palestinian legal culture, chiefly articulated in the Islamic movement's localized actions. As chapter 3 describes it, the movement has denounced state law because it is Jewish and Zionist. Yet, fearful of their possible exclusion from national parliamentary elections, the Muslim fundamentalists have limited their activities, in the main, to localities containing concentrations of Muslim Palestinians. They have thus initiated a variety of grassroots activities practiced under the shadow of state law and intended to generate a Muslim, Palestinian, and anti-Zionist legal consciousness.

From alienation and apathy, this book has moved to legal mobilization. It has been one mode of political action within a diverse fabric of practices. While the liberal rhetoric of individual rights (Scheingold 1974) and a loose state hierarchy may generate a more adversarial legalism, in Kagan's powerful terms (Kagan 1991, 1999), legal mobilization is a broader phenomenon, with interactive, symbolic, and constitutive legal and sociopolitical results.

Legal mobilization, principally litigation and legislation, when exer-

cised by nonruling communities, is interactive because it is utilized in the political games played by public adversaries. It is symbolic because it codes and decodes public issues and constructs images of "reality." It is constitutive because, as Epp, Feeley and Rubin, and McCann have demonstrated (Epp 1998; Feeley and Rubin 1998; McCann 1994), it can change law, politics, and society, even if limited in degree, while remaining under the umbrella of state power. These aspects have been examined with respect to the communal mobilization of nonruling collectivities. Such mobilization, framed by members of the nonruling communities, is consciously meant to articulate and promote communal interests and public morality.

Chapter 3 deliberates on how legal mobilization has been utilized by Arab-Palestinians residing in Israel and what benefits it has generated for this community. Appeals to the Supreme Court, following a sagacious case-selection process and voiced in the terminology of liberalism and human rights, have resulted in several judicial wins. The outcomes of the optional scenarios available are revealing. Winning a case in the Supreme Court is desirable, but withdrawing one without any ruling may be catastrophic for the minority. The benefits of winning go beyond the attendant legal remedies. Winning is a symbolic victory for the deprived; it supports and may even ensure organizational survival, membership recruitment, and financial contributions, whereas withdrawing a legal case prior to a court ruling can marginalize the issue contested and further legitimatize discriminatory state policies.

Within the accepted model of legal mobilization, formation of a communal legal consciousness is considered to be its most desirable aim while concrete legal results, obtained in adversarial court proceedings, have been perceived as secondary. Communal legal mobilization has not focused on judicial victories but on litigation as a sociopolitical resource for consolidating collective consciousness and inciting political action aimed at the reallocation of public goods. Strategically speaking, it is a highly costly approach. As the Arab-Palestinian experience teaches, legal mobilization has produced very problematic ramifications from a communal perspective beyond the crucial fact that it has not generated any change in the regime's power structure. Employing Iris Young's distinction between changes of power and the reallocation of collective goods (1990), legal mobilization has achieved limited

reallocation of collective goods in a somewhat more egalitarian fashion. In terms of Nancy Fraser's distinction between power and recognition (1997), while legal mobilization has resulted in very limited recognition of sociopolitical deprivation, it has done little to alter a minority's political deprivation.

The critical communitarian perspective has enabled me to make these observations. Its sensitivity to the politics of identities among communities under state domination demonstrates that power has not changed along two dimensions. First, state power has remained significantly untouched by communal legal mobilization. Second, the structure of power within communities based on male domination and religion has likewise remained untouched.

A similar process of legal mobilization has characterized liberal feminists (chap. 4) and non-Orthodox Jewish religious movements (chap. 5). They have carefully selected cases with sociopolitical significance for adjudication, and have strived to obtain media coverage for the litigation conducted in court. Such public celebrations of access to the courts are considered crucial for organizational success and the elaboration of a more strictly legal consciousness with respect to communal needs and the potential of litigation.

Communal legal mobilization should not, therefore, be conceived of as an autonomous process. Rather, it is preferable to perceive it in light of identity practices (compare Brigham 1987, 1998). Nonruling communities have utilized law, as a sociopolitical asset, in ways that are contingent on the diverse identities of their members. Communal legal mobilization has articulated, generated, and constructed identities within nonruling communities under state domination. Thus, Arab-Palestinian feminists have mobilized law differently than male Arab-Palestinians have. In chapter 4, I showed how Palestinian feminists urged state officials to intervene in communal life and protect women against their violent husbands and relatives. While Adalah mobilized state law in order to pursue more communal autonomy, Palestinian feminists mobilized it in the opposite direction by calling for greater state supervision over communal life and interference in its patriarchal practices.

We can therefore expect to find an intricate network of relations woven between the diverse forms of communal legal mobilization and the numerous collective identities available. This is particularly

true with respect to the concepts of legality (Cover 1992a, 1992b, 1992c; Ewick and Silbey 1998; Shamir 1996) applied in interactions between the state and nonruling communities, as well as within and between communities, as analyzed and demonstrated with respect to the feminist and ultra-Orthodox communities in chapters 4 and 5.

Due to the diversity of collective identities in nonruling communities, their expression, generation, and construction through communal legal mobilization may lead to conflicts inside and outside the community. Chapter 4 detailed the ways in which identities have diversified communal legal action and mobilization within the feminist community. Inter alia, it explored conjunctions and conflicts resulting from differences in the collective identities carried by individuals, groups, organizations, and their assorted practices. Collective identities do matter as sociopolitical and legal practices, and this has exposed multicultural and communal experiences that have not been sufficiently conceptualized in noncommunitarian theories. Chapter 5 dwelled on the way in which ethnicity within ultra-Orthodoxy has affected communal legal mobilization in contrary fashions. Indeed, identities should be taken seriously in the context of communal legal cultures.

Legal mobilization is neither linear nor harmonious; legal mobilization does not begin at a certain point or end at a higher point. Throughout this book, I have analyzed conflicts mainly in their horizontal, vertical, and internal communal spaces. In each space, communal legal mobilization may face counteractions created by other nonruling communities (horizontal space), the state (vertical space), and other groups within the community (intracommunal space). Although Israeli Arab-Palestinians (chap. 3) have mostly had to confront the state, its intracommunal space has been in conflict as well. Countermobilization by Jewish nonruling communities (horizontal space) has been less visible because the state has articulated and generated the Jewish majority's interest in discriminating against this minority.

Feminists have been confronted with countermobilization in their vertical and horizontal spaces (chap. 4). The state has avoided court rulings and legislation, contrary to liberal feminist expectations. Other communities, particularly the ultra-Orthodox, have opposed feminist initiatives and attempted to derail legislation, evade the implementation of court rulings, and initiate counterlegislation as a means of nullifying some liberal feminist achievements. Internal conflicts within the

feminist community over legal mobilization tactics have been rare. With basic solidarity, radical feminists have condoned the successes achieved through legal mobilization, however limited these have been. Jewish fundamentalists, who have frequently enjoyed veto power in parliament and government, have faced horizontal legal countermobilization, primarily actions launched by non-Orthodox religious movements.

But mobilization and countermobilization of state law are not cost free. Critical communitarianism allows us to locate these costs, which are heavy, to the nonruling community in the major confrontational arenas. Constructing state law as a communal sociopolitical source of change necessarily evokes the legitimacy of state law and its ideology because communal legal mobilization can alter the allocation of collective goods, not hegemonic metanarratives. Those Israeli Arab-Palestinians who have activated communal legal mobilization of state law have practically legitimized the state as Jewish and Zionist. Feminists who have embraced mobilization of state law have practically legitimized the state as male dominated. Jewish fundamentalists who have been engaged in legal mobilization of state law have practically legitimized the state as non-Halachic and Zionist.

Why have activists, organizations, and attorneys consciously invoked legitimizing acts that are contradictory to their communal identities and interests? Each of the relevant chapters has portrayed the sociopolitical forces that stimulated communal legal mobilization. In all three instances, despite their unique forms of realization, legal mobilization has emerged from a belief that state law cannot be either demolished or replaced by an alternative legal setting, nor can it instigate any meaningful sweeping reforms. For many, communal legal mobilization has been a pragmatic collective political action taken in a setting that presents almost no other options but offers some chances of success in the effort to attain very limited reforms.

The characteristics of these no-choice situations have varied from one nonruling community to another. Two dimensions, however, have been particularly important: institutional configuration and the state's narrative. A nonruling community that perceives itself as deprived in at least one of these dimensions veers toward mobilization of state law. Consider Israeli Arab-Palestinians. Because they could not successfully promote their communal interests through legislation

and because they have been marginalized in Zionist and Jewish narratives, communal mobilization of state law through litigation in courts has been accepted as the last legal resort for improving the minority's predicament.

Liberal feminists are in a related position, having suffered from a negligible parliamentary representation. Yet, contrary to the Arab-Palestinian minority, liberal feminists (a decisive majority, being Jews) are included in the Zionist and Jewish narratives. Therefore, they have managed to utilize legislation somewhat more efficiently than Arab-Palestinians have (see chap. 4). In both instances, particularly in the case of Arab-Palestinians, an inferior disposition vis-à-vis the institutional structure has made litigation and adjudication sources open to communal legal mobilization.

The case of ultra-Orthodoxy deviates substantially. Since the 1980s, Jewish fundamentalists have been able to exercise veto power in Israel's polarized and fragmented political space. Accordingly, they have gained increasing amounts of political power. Since the liberal elements in state law endanger their autonomy and political status, they have used their veto power to counteract liberal effects, either vertically (e.g., against rulings that confine Orthodox monitoring of the Jewish faith) or horizontally (e.g., increasing pressures on non-Orthodox Jewish movements) (see chap. 5). A collective ethnic identity has been crucial to this struggle. While Ashkenazi ultra-Orthodoxy has opposed liberalism as such and demanded exclusionary preservation of its autonomy, Mizrachi ultra-Orthodoxy has used the liberal spirit to articulate the multicultural argument that promotes its popularity within deprived Mizrachi constituencies.

Liberalism and Its Transnational, National, and Infrastate Effects on Legal Cultures

As may be recalled from chapter 1, the liberal conception of individual autonomy, whether utilitarian or ontological in origin, implies that states should respect certain freedoms as long as one concrete individual right does not severely infringe on another. Whether or not this means that liberalism contradicts the principle of the collective good continues to arouse controversy in the literature (Kymlicka 1995). Liberalism, however, contradicts the notion that nonruling communities

have their own communal liberties and rights due to their fundamental cultural meaning to our lives as substantial collective entities with their identities, needs, and interests (Taylor 1994). With that rebuttal in mind, we can review the research findings about the state, legal cultures, and nonruling communities under liberalism.

Apparently, liberalism has enabled societies to better resolve the predicaments of underprivileged human beings. Liberalism may claim that it ensures individuals' equal access to state organs and enhances their voices in decision making and the allocation of public goods. Presumably, due to impartiality based on equal respect for each individual regardless of his or her collective affiliations, the state allocates collective goods justly. This book refutes these contentions.

Chapter 2 analyzed the way in which state law in Israel has presumably enforced a coherent set of regulations aimed at generating the state as an egalitarian "Jewish democracy" for the benefit of its citizens. A deeper look reveals a different facet, however. State law itself has recognized and categorized several communal identities for purposes of legitimizing or delegitimizing specific communities. The Zionist ruling elite has in effect recognized the existence of some communal identities and practices so that other communal identities and practices can be categorized as unlawful and illegitimate.

This differential and power-oriented process could be realized for several reasons, some of which relate to the ontology of individual and community identity. Each of the communities explored in this book is grounded in its members' deep and conscious affiliation with that collectivity and their preference for membership in that community over many other affiliations. Individual identity, empowerment, and participation are constituted by membership in a particular community, whereas individual autonomy is subject to definitions of the communal good. Nonruling communities are not necessarily against the state, nor are they necessarily endorsed by the state. At times, the state has categorized some communal identities within state law for its own legitimacy purposes; at the same time, it has evaded, ignored, or subdued other identities belonging to the same community for that very reason.

Liberal elements in Israeli politics and jurisprudence—within the framework of transnational liberalism—have not significantly altered the deprivation of nonruling communities. The predicament of Israeli

Arab-Palestinians as participants in Israel's liberal moments was explored in chapter 3. It was shown there that with few exceptions Arab-Palestinians were not granted more rights and liberties in the period following the end of military governance (1966–90s) than before. Several court rulings asserting greater equality between Arab-Palestinian and Jewish citizens notwithstanding, it is hardly feasible to claim that the constitutional status of the Arab-Palestinian minority, as a community (see chap. 3), has improved. My conclusion is based on the argument that the liberal discourse of individual rights has ignored the community as a collectivity of identities and needs. Moreover, liberal claims for equality are self-supporting only if they are based on the assumption that Arab-Palestinians and Jews have the equal access to national power foci required for realization of proclaimed rights. As I have shown, this assumption is false.

What the theoretical logic of liberalism offers is somewhat more equality in the allocation of collective goods and somewhat more equality in the materialization of individual rights, based on supposed state impartiality and procedural justice. At the dawn of the third millennium, with expanding transnational American-led liberalism, Israel's jurisprudence has affected—in several court rulings—greater equality in budget allocations and land allocation, although the latter is significantly more circumscribed (see chaps. 2 and 3). The practice of liberalism cannot, however, offer the redistribution of political power since it falsely assumes that the state is impartial. Nor can it call for significant equality for nonruling communities as long as it denies their existence as collectivities and collective legal entities, especially when the nonruling community in question is a national minority perceived to pose a danger to state sovereignty.

More critically, liberalism has enabled state organs to weaken the communal status of nonruling collectivities. The liberal rhetoric of individual equality based on individual rights has been used by the Supreme Court to avoid recognition of Israeli Arab-Palestinians as a nonruling community and to deprive that community of the status of a collective minority having distinct historical characteristics. By the same token, the court has recognized Jews as a dominant collectivity. This means that individual rights were conferred on Arab-Palestinians provided that they recognized the "Jewish and democratic" essence of the state. The possibility of generating collective practices

as Palestinians while enjoying collective rights was negated by discriminatory liberal court rulings in progressive guise (see chap. 3).

I do not claim that liberalism has been a complete failure. Individuals deserve personal rights that should be protected, and no democracy can exist without individual rights. Individual rights, as explained in this book, are indispensable for democratic governance and cultures of plurality. I conclude, however, that protecting nonruling, deprived communities is necessary if we wish to achieve democratic justice based on empowerment and an equitable allocation of public goods and political power in a world where almost no human being is an island in the practice of daily life. Politics and jurisprudence should protect nonruling communities as collective entities because some portion of our personalities is embedded in these collectivities and because a democratic political culture, in order to function, requires their empowerment. The same can be said from an individual perspective; in addition to their cultural added value, nonruling communities are needed as vehicles for the participation and empowerment of their members, who display distinct identities and practices. For these people, personal autonomy within the social and cultural confines of their communities is greater than that experienced in overall society, where their distinct cultures, needs, and interests tend to be disregarded. Hence, as this book shows, recognition of nonruling communities is an essential ingredient of multicultural societies.

Thus, in the midst of transnational American-led liberalism and under the Jewish state, the Arab-Palestinian community has developed unique legal cultural characteristics. Its individual members have been embodied in and have constituted these characteristics because, as my field survey shows, they crave the opportunity to articulate their memorized histories, traditions, habits, language, religions, agrarian attachments, and nationalities. Under the somewhat liberal constitutional configuration of state law, as explained in chapters 2 and 3, their ability to fulfill these aspirations as individuals and a collectivity has been severely restricted. And yet they constitute a nonruling community.

Many among us expect enlightened political regimes to confer rights that guarantee the expression and practice of diverse beliefs. Yet religious fundamentalism has been somewhat ostracized from the fabric of democratic tolerance. On the one hand, its exclusion is under-

standable. Some religious fundamentalist and extremist communities have violently challenged the Western democratic "order," and have called for violent restoration of religious dicta as the polity's proper moral framework. As Russell Hardin (1999) has pointed out, their religious fanaticism has shaken the principles of Protestantism and liberal thought. The activities of Muslim extremists in the United States and Jewish extremists in Israel have not been conducive to sustaining democracy. More pointedly, extremist Muslim factions in Egypt, Jordan, Indonesia, Pakistan, and Turkey have been the most severe and persistent opponents of democratization (Huntington 1993).

The experience of the association of violence with religious extremism around the globe may justify intolerance and the exclusion of such communities, at least superficially. The terrorist attack on the Pentagon and the World Trade Center on September 11, 2001, significantly reinforced this commonly held view. However, looking deeper, fundamentalist religious communities are not necessarily extreme or violent, historically and at present. Extremist groups remain on the margins of much larger nonruling communities almost everywhere. As I elaborated in chapter 5, there are important theoretical and empirical distinctions between religious fundamentalism and religious extremism. Hence, no justification exists for the exclusion of and intolerance toward religious fundamentalism as long as it is nonviolent.

As my analysis has demonstrated, democracy should protect fundamentalist religious communities. Legal liberal pluralism will not suffice since it protects the principle of individual affiliation but not nonliberal and nonruling communities as such. I suggest that we must read religious fundamentalism from a critical communitarian perspective, that is, from the communal cultural perspective of being under state domination. We can then learn why cultural relativism is crucial to democratic political culture. Without such relativism in law, politics, and society, one system of collective values will attempt to impose itself on another—often through arguments advocating individual freedom—without valid justification. As this book demonstrates, whereas individuals often enjoy some level of personal autonomy and protection in most traditional nonruling communities, advocates of liberalism may endeavor to compel members of nonruling communities to relinquish their collective identities and adjust themselves to identities alien to their traditions and politics.

Chapter 5 inquired into Ashkenazi ultra-Orthodoxy's efforts to protect its communal legal culture as the state, incited by the liberal rhetoric of individual equality, intervenes in the community's autonomy. Mizrachi ultra-Orthodoxy, comprising about 30 percent of the ultra-Orthodox community, has become politically active among non-Orthodox traditionalist constituencies. In doing so, it utilizes folkloric messages to expand its political strongholds well beyond its strictly ultra-Orthodox boundaries. The collision between these communal practices and liberalism is inevitable.

But more so, the seeds of conflict between liberalism and communalism are embedded in the state laws that frame democratic practices. Liberal concepts of freedom and decision making that mythologize the individual's ability to be a self-propelled, informed, and rational actor have been constructed as the sole formal legal criteria for ascertaining the fairness of democratic electoral procedures. Furthermore, liberalism has individualized and atomized nonliberal communities. Thus, by means of judicial practices, privileged elites have imposed certain liberal values on ultra-Orthodox Jews, many of whom are underprivileged and lack access to the assets that could enable realization of those values. In the process, these elites have transformed their own communal worldviews into the absolute criteria for democratic justice.

My studies of nonruling communities, such as Israel's ultra-Orthodox, that pay utmost attention to social existence, identities, consciousness, and legal practices have shown that liberal images of religion, fundamentalism, and rationality are distorted. Contrary to these images, chapter 5 has explained why communitarian respect and legal protection of religious fundamentalism in democracies is desirable and quite possible. It is desirable due to cultural relativism and the need for a multicultural and intercommunal space in which human beings can articulate their desires and beliefs in law. It is possible because religious fundamentalism is not necessarily antidemocratic and because democratic states simply cannot subdue fundamentalist inclinations.

We assume that liberalism should encourage greater religious expression and practice as complementary sociopolitical voices. This has indeed occurred in some progressive and conservative movements as they gained more horizontal (vis-à-vis ultra-Orthodoxy) and vertical (vis-à-vis the state) power. At this point, liberalism can become a force

for social change and cultivation of the human spirit. Chapter 5 showed how non-Orthodox religious communities have generated a liberal rhetoric and constructed legal arguments supportive of pluralism, religious freedom, and individual rights. They have mobilized state law in this direction; hence they have reduced ultra-Orthodoxy's monopoly over religion.

While liberalism has empowered other religious non-Orthodox communities, it has failed to address the grievances of the ultra-Orthodox. Transnational American-led liberalism can be conducive to privatization of religion, but it is coercive toward nonliberal religious communities, particularly religious fundamentalist communities that believe in nonliberal moralities and follow nonliberal legal texts despite globalization.

Israeli feminists have constructed liberalism as a rationalization for mobilization of state law through legislation and egalitarian adjudication. A few prominent court rulings and not a few laws enacted in the 1990s, the result of liberal feminist endeavors, have been publicly celebrated in the feminist community. This mobilization has benefited Jewish Ashkenazi women for the following reasons. While Israeli Arab-Palestinians are located outside the metanarratives on which state law was and continues to be founded, and while Jewish fundamentalists are located inside the Jewish metanarrative but outside the Zionist metanarrative, liberal feminists, predominantly Jewish Ashkenazi women, are located at the center of these metanarratives. Accordingly, they have benefited from relatively broad support from political parties and various sociopolitical coalitions.

In chapter 4, the diversity of feminist identities, practices toward state law, and contentions about the meaning of feminism and its aims were outlined. Liberal feminist achievements in legislation and adjudication notwithstanding, their epistemological contributions to the construction of a feminist consciousness and the empirical ramifications of their legalistic efforts on behalf of women's sociopolitical status have been limited and problematical. In many aspects of life, with the exception of some achievements at the elitist political level, women's predicament has remained more or less the same, similar to pre-1990 conditions. Furthermore, as chapter 4 has shown, liberal feminism seems to be characterized by an inherent inability to constitute a separate feminist consciousness. We may ponder as to why.

One reason for this may be that the constitution of a separate feminist consciousness may curtail those liberal feminist activities that rely on cooperation with the male-dominated political establishment. Radical feminism, in contrast, offers a different, alternative type of empowerment promised by feminist communitarianism. These feminists have articulated an epistemology that empowers women who have been marginalized by liberal conventions and practices. In chapter 4, I analyzed why an egalitarian state law created through liberal activities does not address the needs of women as a community displaying a consciousness that is independent of male conceptions. State law—under liberalism—has individualized and atomized women. It neglects underprivileged women who do not enjoy accessibility to and utilization of those individual rights. It follows that, due to its roots in male-oriented concepts and domination, liberal feminism can offer legal, procedural remedies but it cannot generate a divergent feminist consciousness. In this context, I have pointed out, inter alia, that women's participation in military combat units and the increasing number of appointments of women to managerial positions in public companies are symptomatic of this subordination.

Critical Communitarianism on State, Society, and Law

As was pointed out in chapter 1, our individual selves are constructed, shaped, and generated in and through communities. The boundaries between communities and their sociopolitical surroundings remain tangible despite the possibility of forming coalitions—anticipated and unanticipated alike—across communal boundaries. The liberal theoretical literature stresses the observation that nonruling communities subdue individual autonomy. This condition should be expected, as all communities, and those of religious fundamentalists in particular, display their own structures of power and discipline. Yet, as this study has shown, the intensity of disciplinary power varies from one community to another, while generally communities have not eliminated individuality.

As chapters 3, 4, and 5 demonstrate, the diversity of feminine, Arab-Palestinian, and religious identity practices could not have been articulated without at least some opportunities to express personal autonomy in and through their respective nonruling communities.

However, as was also demonstrated, these communities have constituted, maintained, and protected the identity practices that the state has attempted to eliminate or marginalize.

Viewing individuals as legalistic atoms would not help us to analyze national minorities (chap. 3), sociocultural collectivities (chap. 4), or religious collectivities (chap. 5). These collectivities or communities carry identities that are grounded in memorized histories and sustained through consciousness and practices embodied in cultural structures and organizations. We can therefore conclude that looking at communities through the theoretical prism of critical communitarianism has assisted us in unveiling the collective identity practices that are usually veiled in daily life by state ideology, state law, legal ideology, and myths about the freedom of autonomous individuals.

This research has developed a critical communitarian conceptual framework in order to study nonruling communities through their own hermeneutics, consciousness, identity practices, social being, politics, and organizations. Hence, legal culture has been sustained and generated either unrecognized or partially recognized in state law. Each community has its own mechanisms for generating identities and mobilizing, controlling and supervising its individual members. Similarly, each nonruling community has its own avenues of legal action. As Russell Hardin, a proponent of liberalism, Ian Shapiro, a critic of liberalism, and Philip Selznick, a communitarian, have pointed out, communities may have significant effects on the epistemologies of their individual members (Hardin 1999; Selznick 1992; Shapiro 1999). I have illustrated how each nonruling community mobilizes its members to support specific interpretations of the public good and to promote legal practices while sustaining its separate localities of power, discipline, and organization.

Therefore, understanding nonruling communities enables us to comprehend individuals. An analysis of the feminist approach to law would be incomplete without learning more about the linguistic environment in which feminists dwell, the organizations that have touched their lives, the struggles over legal practices that have been waged between feminist organizations, and the collective consciousness and identities that they have generated. It is incumbent upon us to learn more about the communal legal culture in which feminists are embedded as meaningful human beings.

Our understanding of Arab-Palestinian and Jewish fundamentalist images and practices of law requires analysis of their historical experiences, consciousness and beliefs, identity practices, authority structures, organizations, social existence, and linguistic environment and the aspirations of the collectivity in which their members have spent most of their lives. This means accepting the fact that communities are not only spaces of local power foci, as Michel Foucault has correctly suggested (Foucault 1972, 1980); they are also spaces of legal meanings, factors that likewise constitute and generate individuals.

Nonruling communities constantly challenge states. An individual challenges the state rarely, pressure groups have important functions but also functional constraints, and political parties shape and change tactics according to dynamic electoral considerations. In contrast, nonruling communities readily constitute and generate alternative legal hermeneutics, modes of communal legal mobilization, and other communal dissident practices toward state law. Furthermore, nonruling communities are themselves spaces of lawmaking, adjudication, and law enforcement.

Therefore, nonruling communities should be treated as major subjects of normative concerns and conceptual development. Liberalism, encased in its predominantly individualistic prism, has failed to perceive or promote nonruling communities as factors central to legal and political theorizing and to visions of multiculturalism and legal pluralism. If nonruling communities are as important to our legal and political life as this book argues, legal systems in democratic settings should assign a crucial place to them. However, if laws and political regimes fail to see the significance of nonruling communities, they will bungle the social values and virtues that bond us.

The Place of Violence as a Multifaceted Cultural Phenomenon and Its Meaning in Critical Communitarianism

Although we have dwelled on the strategies employed by state and nonruling communities toward each other, we have also explored violence in communal legal practices and state domination. As a theory, communitarianism points out the relativity of cultures and violence, in form and meaning, in legal cultures. Since critical communitarianism stresses both domination and communal culture, it con-

ceptualizes violence as a cultural phenomenon in communal law and as a legalistic strategy in state law. Furthermore, given that violence is conceptualized in this book as being in the repertoire of available control mechanisms and as inherent in communal culture, it is viewed as a source of individual repression as well as redemption.

The meaning of violence in critical communitarianism is often a matter of context. This implies that the context of communal legal cultures may contribute to better comprehension of the violence expressed in a range of political localities. Thus, in the case of national minorities, violence may be an instrument of state repression but also a means of collective resistance to state law (see chap. 3). In the case of religious fundamentalists, violence may be a source of communal discipline but also a "remedy" suggested in state law as a defense against nonliberal communities (see chap. 5). Liberal feminists have fought hard against male violence but have also embraced it to generate liberal equality in state law (see chap. 4). To summarize, violence, from a communal perspective, does not belong to one specific category, nor does it occupy one specific location in legal cultures; rather, it displays numerous dynamic legal cultural sources and meanings.

The Sociopolitical and Legal Relevance of Nonruling Communities in the Midst of "Globalization"

Globalization in its narrow sense of American-led transnational liberalism has affected nonruling communities as localities of legal cultures. The book has cited instances found in the Israeli setting, such as Arab-Palestinian lawyers who were professionally trained in the United States and became active in advocating minority rights as cause lawyers; liberal feminists who were aspired by American liberal feminism and utilized that philosophy in Israeli state law; and conservative and progressive movements that, guided and inspired by American Jews, fought against the veto power of ultra-Orthodoxy in Israel.

In all cases in which the global has interacted with the local, legal conjunctions have become sources of some empowerment. From these platforms, Arab-Palestinians can articulate their predicament and demand legal remedies using the terminology of group-affiliated rights and legal pluralism in multicultural societies. Liberal feminists can more easily instigate reforms in a gender-structured society by

referring to American and European precedents. Non-Orthodox religious movements can mobilize public support by raising liberal arguments regarding the need for plurality of religious beliefs and practices and the individual freedom to choose among them.

Yet globalization has still not affected communal legal cultures in a straightforward manner. Arab-Palestinians have contextualized their demands within state law, but they have rarely relied on international law directly. Liberal feminists have constructed egalitarian elements within state law; so have conservative and progressive religious movements. In all of these examples, general concepts have been utilized to comply with very specific local needs and interests. In effect, globalization has inspired the use of communal mobilization of state law as a means—however limited and problematic—of reforming individual rights. Hence, globalization has not undermined state hegemony. Instead, from the communal perspective one can observe that globalization has altered facets of that domination and subjected it to greater conflicts over individual rights while marginalizing the communities to which these individuals belong. On the contrary, the position of nonruling communities has not changed drastically, although they face new challenges and a problematic liberal legalistic linguistic environment. In chapters 3, 4, and 5, critical communitarianism has been employed to explore and analyze the costs and benefits of communal legal mobilization, particularly litigation, that have contributed to this localization of global trends in the legal cultural fabrics explored.

The nonruling communities investigated in this book have lengthy historical traditions. The ultra-Orthodox and the Arab-Palestinian communities have existed for several hundred years, remaining loyal to the same communal legal texts and preserving some of the hermeneutics throughout while experiencing episodes of varying political space during the regimes of emperors, rulers, and states. Feminists as well were active during the period of the Palestine Mandate prior to the founding of Israel as a nation-state. Communities may endure for years because their collective memories, histories, identities, and practices allow them to retain their viability under various cultural, political, and institutional contingencies.

If states become less effective and their power dwindles, nonruling communities can become empowered as substitute sources of identity. Globalization, even in its more illusive, transnational form, is not

a source of personal meaning; it is too remote from the local needs and predicaments of nonruling communities. Hence, communities will remain and become even more empowered as sources of identity and practices as globalization progresses. Paradoxically, nonruling communities will themselves globalize their cultures as the need for personal meaning grows. Conversely, if states become stronger they will have to renegotiate their legitimacy with empowered nonruling communities that under globalization were able to further mobilize the resources required to demand equality. Hence, I share Santos's (1995) claim that nonruling communities are postmodern as well as modern entities.

Traditions are not only a collection of "past" experiences; they articulate sustainable communities. Nor can individual fantasies of liberalism and globalization alter the fact that communities are important carriers of tradition, including the liberal tradition. The argument developed in this book states that nonruling communities are crucial entities for individuals, who carry some embedded identities and cultures, marginalized in state spheres and under conditions of American-led liberal globalization. Multicultural societies cannot be preserved without some serious commitment to nonruling communities as collective, self-sustaining entities having rights, duties, and responsibilities in the context of a democratic political culture. If we abandon multiculturalism in law, society, and politics, we shall lose those virtues that remain beyond the boundaries of the dominant culture. We will thereby transform ourselves into captives of an illusory single culture expounding rigid criteria of good and evil. Such a concept, largely disseminated by liberalism and its version of globalization, will eventually make democracy even more intolerant.

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