

**Collective Rights, State Power, and Politics of Multiculturalism:
Liberalism, Communitarianism, and Non-Liberal Communities**

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Introduction:

This outline of my presentation aims to argue for the democratic need to recognize, respect, protect, and empower non-ruling communities in multicultural societies, including and especially non-liberal communities, such as fundamentalist religious and national communities. The talk refers mainly to my book:

Gad Barzilai, **Communities and Law: Politics and Cultures of Legal Identities**

(Ann Arbor: University of Michigan Press, 2003). The first part of my lecture is

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about the deficiencies of liberalism as an exclusive political doctrine of individual rights. The second part dwells on the significant discrepancy between the practices of non-ruling communities, liberalism, and what communitarianism might offer. The third part points to several strategies of conflicts and cooperation between the state and non-ruling communities.

Liberalism and Its Transnational, National, and Infra-State Effects on Legal Cultures

The liberal conception of individual autonomy, whether utilitarian or ontological in its origins, implies freedoms that states should comply with as long as one concrete individual right does not severely infringe upon another such right. Whether this means that liberalism contradicts the principle of collective goods continues to arouse controversy in the literature (Kymlicka 1995). Liberalism, however, contradicts the principle that non-ruling communities have their own communal liberties and collective rights due to their fundamental cultural meaning to our life as substantial collective entities with their identities, needs, and interests, and cultures_(Taylor 1994, Barzilai 2003).

Apparently, liberalism has enabled societies to better resolve predicaments affecting under-privileged human beings. Liberalism may claim that it has ensured individuals' equal access to state organs, as well as enhanced their voices in decision-making and allocation of public goods. Presumably, due to impartiality based on equal respect for

each individual regardless of her/his collective affiliations, the state allocates collective goods justly. Let me refute these contentions by relating to the Israeli context.

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, however, a different facet. State law itself has recognized and categorized several communal identities for purposes of legitimating 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 could be categorized as unlawful and illegitimate.

Such 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- like Arab-Palestinians or Ultra-Orthodox Jews- is grounded in its members' deep and conscious affiliation with that collectivity and 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. Non-ruling communities are not necessarily been 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 very 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 non-ruling communities. The predicament of Israeli Arab-Palestinians as participants in Israel's liberal moments is one example. It was shown that with few exceptions, Arab-Palestinians were not awarded more rights and liberties in the period following conclusion of the military governance (1966-1990s) than before (Barzilai 2003). 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 has improved. The liberal discourse of individual rights has ignored the community as a collectivity of identities and needs. Moreover liberal claims for equality are self-supportive only if based on the assumption that Arab-Palestinians and Jews have equal accessibility to national power foci, required for realization of proclaimed rights. But this assumption is false*.

What the theoretical logic of liberalism offers is somewhat more equality in allocation of collective goods, and somewhat more equality in materialization of individual rights, based on the asserted state impartiality and procedural justice. At the dawn of the third millennium, with expanding transnational American-led liberalism, Israel's jurisprudence has affected — through several court rulings — greater equality in budget allocations and in land allocation, though the latter is significantly more

circumscribed. The practice of liberalism cannot, however, offer redistribution of political power since it falsely assumes that the state is impartial. Nor can it call for significant equality for non-ruling communities as long as it evades their existence as collectivities and as collective legal entities, especially when the non-ruling community in question is a national minority perceived as a menace to state sovereignty.

More critically, liberalism has enabled state organs to weaken the communal status of non-ruling collectivities. The liberal rhetoric of individual equality based on individual rights has been used by the Supreme Court to evade recognition of Israeli Arab-Palestinians as the non-ruling community and to deprive that community of the status of a collective minority having distinct historic characteristics. By the same token, the court has recognized Jews as a dominant collectivity. This has meant that individual rights were conferred to Arab-Palestinians provided that they recognized the 'Jewish and democratic' essence of the state. The possibility of their generating collective practices as Palestinians while enjoying collective rights was subdued by discriminatory liberal court rulings in progressive guise (Barzilai 2003).

I do not claim that liberalism is a complete failure. Individuals deserve personal rights that should be protected and no democracy can exist without individual rights. Individual rights are indispensable for democratic governance and cultures of plurality. Protecting non-ruling, deprived communities is necessary if we wish to achieve democratic justice based on empowerment and 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 non-ruling 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, non-ruling communities are required 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 culture, needs, and interests tend to be intimidated (Selznick 1992, Barzilai 2003). Hence, recognition of non-ruling communities is an essential ingredient of multicultural societies.

Thus, in the midst of transnational American-led liberalism and under the regime of a Jewish state, the Arab-Palestinian community has achieved unique legal cultural characteristics. Its individual members have been embodied in, and have constituted these characteristics because 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 their ability to fulfill these aspirations as individuals and a collectivity has been severely restricted. And yet, they have constituted a non-ruling 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, especially following September 11, 2001. On the one hand, its exclusion is understandable. 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) pointed out, their religious fanaticism has shaken the principles of Protestantism and liberal thought. The activities of Muslim extremists in the US 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).

Our experience of the association of violence with religious extremism around the globe may justify the democratic intolerance and exclusion of such communities, at least superficially. The terrorist attack on the Pentagon and the World Trade Center on September 11, 2001 significantly contributed to reinforcing such a commonly held view. However, looking deeper, fundamentalist religious communities are not necessarily extreme or violent, historically and at present. Extremist groups have remained on the margins of much larger non-ruling communities almost everywhere. There are important theoretical and empirical distinctions between religious fundamentalism and religious extremism. Hence, no justification can be found for the

democratic exclusion and intolerance expressed toward religious fundamentalism, as long as it is nonviolent.

Democracy should protect fundamentalist religious communities if it seeks multiculturalism that extends liberalism. I suggest that we 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 liberal individual freedom — yet without valid justification. Whereas individuals often enjoy some level of personal autonomy and protection in the most traditionalist non-ruling communities (Barzilai 2003), advocates of liberalism may endeavor to compel members of non-ruling communities to relinquish their own collective identities and adjust themselves to identities alien to their traditions and politics.

Legal liberal pluralism will not suffice since it has protected the principle of individual affiliation but not non-liberal and non-ruling communities as such. Thus, Ashkenazi ultra-Orthodoxy's strained efforts to protect its communal legal culture as the state, incited by the liberal rhetoric of individual equality, intervenes in the community's autonomy. Mizrahi ultra-Orthodoxy, comprising about 30% of the ultra-Orthodox community, has become politically active among non-Orthodox traditionalist constituencies. In doing so, it utilizes folkloristic messages for

expansion of its political strongholds, well beyond its strictly ultra-Orthodox boundaries.

But more so. The seeds of conflict between liberalism and communalism have been embedded in state laws framing democratic practices. Liberal concepts of freedom and decision making that mythologizes 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 non-liberal 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 enabling realization of those values. In the process, these elites have transformed their own communal-legitimate worldview as the absolute criterion for a democratic justice.

My studies of non-ruling communities, such as Israel's ultra-Orthodox, that pay utmost attention to social being, identities, consciousness, and legal practices have shown that liberal images of religion, fundamentalism, and rationality are distorted. Contrary to these images, 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 inter-communal space in which human beings can articulate their desires and beliefs in law. It is possible because religious fundamentalism is not necessarily anti-democratic, and because democratic states simply cannot subdue fundamentalist inclinations.

We would 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-a-vis) ultra-Orthodoxy, and vertical (vis-a-vis the state) power. At such a point, liberalism can become a force of generating social change and enabling cultivation of the human spirit. 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 grievances of the ultra-Orthodoxy. Transnational American-led liberalism can be conducive to privatization of religion, but it is coercive toward non-liberal religious communities, particularly- religious fundamentalist communities that believe in non-liberal moralities and practice non-liberal legal texts despite globalization.

Yet, another example. Israeli feminists have widely 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 results of liberal feminist endeavors, have been publicly celebrated in the feminist community. This mobilization has benefited the Jewish Ashkenazi women. While

Israeli Arab-Palestinians are located outside the meta-narratives upon which state law was and continues to be founded, and while Jewish fundamentalists have been located inside the Jewish meta-narrative, but outside the Zionist meta-narrative, liberal feminists, predominantly Jewish Ashkenazi women, have been located at the center of these meta-narratives. Accordingly, they have benefited from relatively broad support from political parties and various sociopolitical coalitions.

Liberal feminist achievements in legislation and adjudication notwithstanding, their epistemological contributions to construction of feminist consciousness and the empirical ramifications of their legalistic efforts on behalf of women's sociopolitical status are limited and problematical. In many spheres of life, with an exception of some achievements at the elitist political level, women's predicament in comparison to men has remained more-or-less the same, similar to pre-1990 conditions.

Furthermore, 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. State law — under some effects of liberalism has individualized and atomized women. It has neglected in turn

underprivileged women who could 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. *Inter alia*, women's participation in military combat units and the increasing nomination of women for managerial positions in public companies are symptomatic of this subordination. Women are trying to be like men in male-oriented institutions, instead of replacing the sameness principle with autonomous feminist consciousness.

Critical communitarianism on state, society, and law

Our individual selves are constructed, shaped, and generated in and through communities. The boundaries between communities and their sociopolitical surroundings remain tangible despite the possibilities of forming coalitions — anticipated and unanticipated alike — across communal boundaries. The liberal theoretical literature stresses the observation that non-ruling communities subdue individual autonomy. This condition should be expected, as all communities, religious fundamentalists in particular, indeed display their own structures of power and discipline. Yet, the intensity of disciplinary power varies from one community to another community; while generally communities have not eliminated autonomy of individuality.

Thus, 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 the respective non-ruling communities. However, these communities have constituted, maintained, and protected those identity practices that the state has attempted to eliminate or marginalize.

Viewing individuals, as legalistic atoms would have not assisted us in analyzing national minorities, socio-cultural collectivities, and religious collectivities. These collectivities or communities carry identities that have been grounded in memorized histories and sustained through consciousness and practices embodied in cultural structures and organizations. We can therefore conclude that looking at non-ruling communities through the theoretical prism of critical communitarianism assists us in unveiling the collective identity practices ordinarily veiled in daily life by state ideology, state law, legal ideology, and myths about freedom of autonomous individuals.

This research has evolved critical communitarian conceptual framework to study three non-ruling 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 non-ruling 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, pointed, communities may have significant effects on the epistemologies of their individual members (Hardin 1999; Selznick 1992; Shapiro 1999). Therefore, understanding of non-ruling communities enables us to comprehend individuals. Analysis of a feminist approach to law would be incomplete without knowing more about the terminological environment to which feminists belong, the organization/s that has/have touched their lives, the struggles over legal practices waged between feminist organizations, and the collective consciousness and identities that they have generated. It is incumbent upon us to get to know more about the communal legal culture in which feminists have been embedded as meaningful human beings.

Our understanding of Arab-Palestinian and Jewish fundamentalist images and practices of law requires the analysis of their historical experiences, consciousness and beliefs, identity practices, authority structures, organizations, social being, terminological environment, and aspirations of the collectivity in which their members have spent most of their lives. This means accepting that communities are not only spaces of local power foci, as Michel Foucault has correctly suggested (Foucault 1972; Gordon 1980); they are also spaces of legal meanings, factors that likewise constitute and generate individuals.

Non-ruling communities have constantly challenged states. An individual challenges the state only rarely, pressure groups have important functions but also functional constraints, while political parties shape and change tactics according to dynamic electoral considerations. In contrast, non-ruling communities fairly readily constitute and generate alternative legal hermeneutics, modes of communal legal mobilization, and other communal dissident practices toward state law. Furthermore, non-ruling communities are themselves spaces of law making, adjudication, and law enforcement.

Therefore, non-ruling 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 non-ruling communities as factors central to legal and political theorizing, and to visions of multiculturalism and legal pluralism. If non-ruling communities are as important to our legal and political life as I argue, legal systems in democratic settings should assign a crucial place to non-ruling communities. However, if laws and political regimes continue to fail seeing the significance of non-ruling communities, they will bungle those social values and virtues that bond us.

State and communal strategies: From resistance and terrorism to litigation and legislation

States can repress communal identities by imposing legal restrictions and prohibitions. India's strategy against Sikhs and Muslims, Turkey's strategy against Kurds, England's strategy against Catholics in North Ireland, 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 will face severe legitimacy problems if they resist rival non-ruling communities with direct, brutal use of state law (Rossiter 1949; Linz 1997). Hence, more compound 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 non-ruling communities, we can list autonomy (Dinstein 1981). Autonomy is multifaceted. For non-ruling 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 to deprive a non-ruling 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 de-legalized and de-legitimated 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 enlarges 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 in the US exemplifies constitutional arrangements that are exclusionary in their intent (Dinstein 1981; Kymlicka 1995).

There are various strategies of state responsiveness in the legal field to the concrete efforts of those non-ruling communities that have turned to legal mobilization (Barzilai 2003). Theoretically, 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 between legal practices, and tensions between various state organs. Although these 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 non- ruling communities.

One state response to non-ruling communities is adjudication and incremental construction of individual rights. I have pondered these proclivities from the critical communitarian perspective while focusing on the meta-narratives underlying communal legal cultures. We have to look at which non-ruling 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 ideology and legal ideology. Thus, state responses to the legalistic allegations of Israeli Arab-Palestinians, non-Orthodox Jewish religious movements, ultra-Orthodox Jews, and feminists were varied. Thus, even in liberal rulings, the Israeli Court gingerly limited

the degree to which it upheld appeals so as to evade any recognition of the collective rights of Israeli Arab-Palestinians as a national minority. It did grant some individual rights to other minority members whilst underscoring the Jewish essence of the state as inherent in its being “Jewish and democratic.”

Meta-narratives have not been the only constraints placed on adjudication of non-ruling communities. Concerning Jewish communities, in rulings within the sphere of those meta-narratives, the Court was quite aware of possible coalition and governmental repercussions of its rulings. Thus, with respect to appeals made by 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 much of the deep crisis surrounding 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 to purposes of population's registration. Judicial recognition of these conversions for other than administrative purposes would have driven ultra-Orthodoxy to exert severe political pressures to legislatively confine the Court's jurisdiction. In contrast, on issues of gender equality, the Court was less hesitant to confront the executive and to render legal remedies in instances of male discrimination against women. Because the appellants were Jewish and resorted to the popular liberal rhetoric about gender equality, Court acceptance of their appeals was not expected to induce governmental, parliamentary, or media-oriented negative reactions.

Legislation embodying concrete rights or supporting those rights has been introduced as the second major response to non-ruling communities. In democracies, non-ruling communities may be recognized under state law as deserving specific rights thanks to their very 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 or subversive of 'national' interests, and due to their actual sociopolitical status outside state power foci. Their paltry political representation in the *Knesset* is insufficient to convert their *Knesset* members into a parliamentary bloc capable of vetoing legislation and, as of 1948 up to and including the Sharon-led government of 2003, they have never been invited to join any government coalition. Overall, the state has not been legislatively responsive to this minority. Accordingly, most of the community's legal mobilization has shifted to the arena of the Supreme Court. Alternatively, Jewish ultra-Orthodoxy has attained much more parliamentary power, which it has successfully used to generate and sustain legislatively based legal mobilization and counter-mobilization.

Thus, the position of a non-ruling 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 meta-narrative. That cultural constraint notwithstanding, ultra-Orthodoxy has been recognized within the Jewish meta-narrative. As such, the Zionist elite has considered this community to substantiate its legitimacy.

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 their being a non-Zionist minority. Through such legislation, the Jewish and Zionist state has managed to preserve its legitimacy for 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 in the offing, ultra-Orthodoxy has used legislative mechanisms for promoting counter-mobilization in order to forestall the possible impacts 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) upon women in several western countries. 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 were the most successful group, within and outside the feminist community, to mobilize state law in two power foci, the legislature and government. Hence, some individual Israeli women, chiefly from the Jewish middle and upper class, were able to marginally benefit from improvements in

their position in the male-dominated legal space, whereas Israeli women were remain unable to enjoy their own legal space of femininity.

Now, we can turn to the legal strategies framed and generated by non-ruling communities (for the theoretical sociopolitical and legal analysis of the concept of non-ruling communities, see- Barzilai 2003). Remember that repression of non-ruling communities can breed violence. When deprived of collective and individual rights, non- ruling communities may react in the only space still accessible to them: collective violence. Such a response does not derive from a communal ideology. It is a mode of political expression and of political pressure that, according to the state, is illegal or even terrorist. The Kurds and their political representative, the PKK, provide good examples of this dynamic. The Turkish government's refusal to render community's rights to the Turkish Kurds fed the waves of guerilla attacks.

My study among Arab-Palestinians in Israel has detected a similar tendency toward such communal violence whenever the state imposes its own identities, practices, and policies on this community. Jewish ultra-Orthodoxy has also not been immune to communal violence against the state. This tendency has been variously articulated as armed resistance, violent demonstrations, and vandalizing "licentious" public advertisements (Lehman-Wilzig 1990, 1992).

Nevertheless, violence is not indispensable for non-ruling community protest against external 'enemies'. I suggest further differentiating between several kinds of violence

in communal legal cultures. One facet is violence as part of mechanisms maintaining social discipline. As an internal mechanism of communal discipline, meant to suppress internal rivals and coerce obedience, violence is a major characteristic of non-liberal communities that, almost by definition, frown at communal pluralism and internal dissent. Religious fundamentalists have used internal violence of this kind. For instance, Ultra-Orthodoxy 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 patriarchic elements in the Arab-Palestinian community has encouraged murder as a viable instrument to uphold 'family honor'.

Such internal and 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. To the contrary, the more liberal a state would be, the more alert a communal elite should be in order to hamper attempts by community members to exit, to out migrate.

In contrast to the first, the second facet of internal communal violence is not divorced from liberalism. Liberals do not violently prevent exit of community's members. But, in liberal non-ruling communities, violence can be utilized as a collective symbol to generate communal solidarity and communal mobilization. Thus, liberal feminists have used male violence against women as a primary symbol in their collective

efforts to monopolize the entire feminist community, to establish coalitions within state law, and as a means to generate grass roots 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 executor's perspective. Thus, in Israel, participation of women in military combative functions, and increased gender equality within the military ranks, have been considered by liberal feminists as a major social breakthrough.

Alienation and apathy are other facets of communal strategies in the context of legal cultures. Formally, a non-ruling community cannot be outside the reach of formal 'rule of law' in the state where its members reside. A certain amount of regulation will most certainly apply to members of all non-ruling 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 and apathetic to state law, a condition conducive to their evasion of its control.

Using Albert Hirschman's terminology (Hirschman 1970) and applying it to state-community relations, a community may preserve its basic loyalty to the state through significant evasion of state law, but without exit from the relational framework. The

Amish community in the US and some rural communities in Japan (Apter 1984) 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 significantly disengaged themselves from daily interactions touching upon state law and its ideology.

A different instance of alienation and apathy is that of radical feminists. Their practices 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 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 these of men is viewed as a mechanism inherent to male-dominated state law. Hence, grass roots action, remote from the formalities and niceties of state law, has become accepted as the most authentic avenue of women's liberation.

Communitarians have not necessarily endorsed either politicization or de-politicization of communities (Compare, Mautner 1998; Shapiro 1999; see also: Etzioni 1998). As Ian Shapiro has incisively stated, no human realm is beyond politics (Shapiro 1999). Still, this accurate generalization should be contextualized; the more politicized a community, the less will it be inclined to apathetic attitudes toward state law.

From alienation and apathy let us move to the study of 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 more adversarial legalism, in Kagan's powerful terms (Kagan 1991, 1999), legal mobilization is a broader phenomenon, displaying interactive, symbolic, and constitutive legal and sociopolitical results.

Legal mobilization, principally through litigation and legislation, when exercised by non-ruling communities, is interactive because it is utilized as part of 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. Such a mobilization, framed by members of non-ruling communities, is consciously meant to articulate and promote communal interests and their public morality.

Take Israeli Arab-Palestinians, for example. Their 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 legal case in the Supreme Court is desirable, but withdrawing one without any ruling may be catastrophic. 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, even the organization itself, and further legitimize discriminatory state policy.

In the communal practice of legal mobilization, formation of a communal legal consciousness has been considered its most desirable aim, whilst concrete legal results, obtained in adversarial court proceedings, have been conceived as secondary to that aim of framing consciousness. 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 reallocation of public goods.

Strategically speaking, it is a highly costly approach. As the Arab-Palestinian experience teaches, legal mobilization has induced very problematic ramifications from a communal perspective beyond the crucial fact that it has not generated any change in the regime's structure of power. Employing Iris Young's distinction between change of power and reallocation of collective goods (Young 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 (Fraser 1997), while legal mobilization has somewhat highlighted very

limited recognition of their sociopolitical deprivation, it has done little to alter a minority's political deprivation.

The critical communitarian perspective that I develop and elaborate in my book (Barzilai 2003) has enabled me to make these observations. Its sensitivity to the politics of identities among communities under state domination has exposed that power has not changed along two dimensions. First, state power has significantly remained untouched by communal legal mobilization. Second, the structure of power within communities based on male domination and religion has likewise remained significantly untouched.

A similar process of legal mobilization has characterized liberal feminists, and non-Orthodox Jewish religious movements. They have carefully selected instances having sociopolitical significance for adjudication, and striven to obtain media coverage for the litigation conducted in court. Such public celebrations of access to the courts were considered by communal lawyers as crucial for organizational success, and for the elaboration of a more strictly legal consciousness with respect to communal needs and the potentiality of litigation.

Communal legal mobilization should not, therefore, be conceived as an autonomous process. Rather, it is preferable to perceive it in light of identity practices (compare, Bringham 1987, 1998). Non-ruling communities have utilized law, as a sociopolitical asset, in ways that have been contingent upon the diverse identities of their members.

Communal legal mobilization has articulated, generated, and constructed identities under state domination. Thus, Arab-Palestinian feminists have mobilized law differently than male Arab-Palestinians. Palestinian feminists have urged state officials to intervene in communal life and protect women against their violent husbands and relatives. Whilst *Adalah* has mobilized state law in order to pursue more communal autonomy, Palestinian feminists have mobilized it in the opposite direction, specifically, by calling for greater imposition of state supervision over communal life and interference in its patriarchic 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 concepts of legality (Cover in Minow, Ryan, Sarat 1993; Shamir 1996; Silbey 1998) applied in interactions between the state and non-ruling communities, as well as within and between communities. Hence, due to diversity of collective identities in non-ruling communities, their expression, generation, and construction through communal legal mobilization may incite conflicts inside and outside the community.

Legal mobilization is neither linear nor harmonious; legal mobilization does not begin in a certain point or end at a specified higher point. Conflicts in the midst of mobilization may occur mainly in horizontal, vertical, and internal communal spaces. In each space, communal legal mobilization may face counter actions procreated by other non-ruling communities (horizontal space), the state (vertical space), and other groups within the community (intra-communal space). As an example, although

Israeli Arab-Palestinians have had to confront primarily the state, its intra- communal space has been in conflict as well. Counter-mobilization by Jewish non-ruling 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 by counter-mobilization in their vertical and horizontal spaces. The state has evaded court rulings and legislation in contradiction to liberal feminist expectations. Other communities, particularly the ultra-Orthodoxy, have opposed feminist initiatives and have attempted to hamper legislation, evade implementation of court rulings, and initiate counter legislation as a means to nullify 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 few achievements have been. Jewish fundamentalists, who have frequently enjoyed veto power in parliament and government, have faced horizontal legal counter-mobilization, primarily actions launched by non-Orthodox religious movements.

But mobilization and counter-mobilization of state law is not cost-free. Critical communitarianism allows us to locate these costs, which are heavy, for the non-ruling community in the major confrontational arenas. Constructing state law as a sociopolitical source of change necessarily evokes the legitimacy of state law and its ideology. Therefore, communal legal mobilization can alter allocation of collective

goods, not hegemonic meta-narratives. Those Israeli Arab-Palestinians who have activated communal legal mobilization of state law have practically legitimated the state as Jewish and Zionist. Feminists who have embraced mobilization of state law have practically legitimated the state as male-dominated. Jewish fundamentalists who have been engaged in legal mobilization of state law have practically legitimated the state as non-Halachic and Zionist.

Why have activists, organizations, and attorneys consciously invoked such legitimating acts, which are contradictory to their communal identities and interests? In all the instances that were mentioned, 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 presenting almost no other options, but offering some chances of success in the effort to attain very confined reforms.

The characteristics of these no-choice situations have varied from one non-ruling community to another. Two dimensions, however, have been particularly important: institutional configuration and the state's narrative. A non-ruling community that has perceived itself as deprived at least in one of these dimensions has veered 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 miniscule parliamentary representation. Yet, contrary to the Arab-Palestinian minority, liberal feminists (a decisive majority being Jews) have been included in the Zionist and Jewish narratives. Therefore, they have managed to utilize legislation somewhat more efficiently than Arab-Palestinians have done. In both instances, particularly in the case of Arab-Palestinians, an inferior disposition vis- a- vis the institutional structure has made litigation and adjudication sources open to communal legal mobilization.

The case of ultra-Orthodoxy deviates substantially. Since the 1970s, 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 to counter-mobilize against liberal effects, either vertically (e.g., against rulings that confine Orthodox monitoring of Jewish faith) or horizontally (e.g., increasing pressures on non-Orthodox Jewish movements). Ethnic collective identity has been relevant to this struggle. While Ashkenazi ultra-Orthodoxy has opposed liberalism as such and demanded exclusionary preservation of its autonomy, Mizrahi ultra-Orthodoxy has used the liberal spirit to articulate the

multicultural argument that has promoted its popularity within observant deprived Mizrahi constituencies.

Conclusion

This essay expounded some of the problems of non-ruling, often non-liberal communities, in democracies, and the inability of various trends of liberalism to respond to the challenges of the legal cultures of those communities. Rather than veiling such conflicts, and reduce them to the banality of individual rights, my studies call for the need to construct and implement theoretical critical aspects of communitarianism as a crucial project, that enables non-ruling communities to empower themselves and their members despite not being liberals.