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 metanarratives—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.

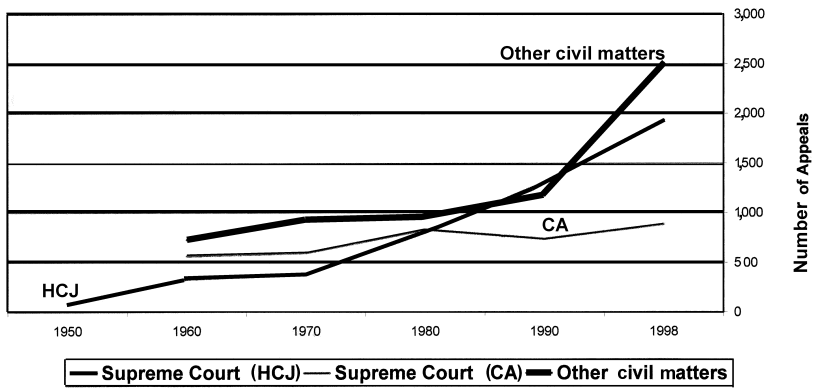

Fig. 1. Litigation in Supreme Court

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.

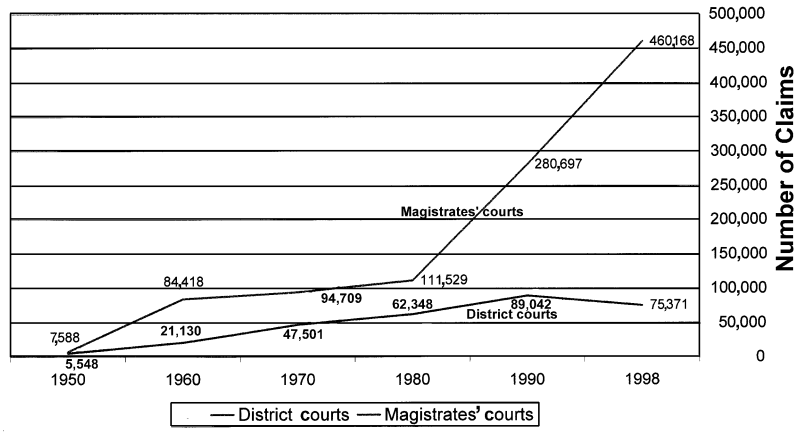

Fig. 2. Litigation in District and Magistrates' Courts

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]

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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.