

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; Twinning 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 non-ruling 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 meta-narratives 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), Mizrahi (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, Mizrahi 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 socio-political 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.