# 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.