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## Beyond Relativism: Where Is Political Power in Legal Pluralism?

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# Beyond Relativism: Where Is Political Power in Legal Pluralism?

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*Both decentralization of state law and cultural relativism have been fundamentally embedded in legal pluralism. As a scholarly trend in law and society, it has insightfully challenged the underpinnings of analytical positivist jurisprudence. Nevertheless, a theoretical concept of political power has significantly been missing in research on the plurality of legal practices in various jurisdictions. This Article aims to critically offer a theoretical concept of political power that takes legal decentralization and cultural relativism seriously and yet points to how and where we should look into political power, assuming that legal pluralism itself may be a strategy of elites and nation-states amid globalization. First, the Article explores the contributions of legal pluralism, and its limits, in intellectually revolting against analytical positivist jurisprudence. Second, it explicates why a concept of political power has been missing, and why such a concept is required for better comprehension of legal pluralism. Third, it calls for a look into three sites of political power in the praxis of legal pluralism: politics of identities, non-ruling communities, and neo-liberal globalization. Last, the Article constructs a concept of political-legal transformations that enables us to unveil political power in the context of de-centralized legal pluralities. Power is produced in, resides in and is generated in the dynamic interactions between nation-states, localities and global*

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*agents. Transformative relations along these dimensions allow the nation-state to forfeit some elements of power, both in economics and in law, but they also enable it to maintain some essential ingredients of political power that are often veiled in the rhetoric of globalized pluralism.*

## I. WHAT IS LEGAL PLURALISM?

"Legal pluralism" has been one of the most salient and influential academic trends in law and society scholarship since the 1970s. It primarily articulates detachment from legal centralism revolving around state law, criticism of the exclusiveness of state law, decentralization of court-centered judicial studies, exploration of non-state legal orders, unveiling of informal socio-legal practices, and an understanding of law as a multi-centered field that deals with the convergence of a multiplicity of norms, localities, states, global sites, and practices.<sup>1</sup> Scholarship of legal pluralism has underscored the ways in which various identities and traditions have decentralized state law and offered non-state legal orders.

Political power<sup>2</sup> (namely — control over public resources and control over means of socioeconomic and political discipline in ways that significantly affect social consciousness and behavior) should have been of crucial significance to legal pluralism in its various forms as normative concept, theory and praxis. The study of political power may enlighten us as to

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1 For some examples, see GAD BARZILAI, *COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES* (2003); Talia Fisher, *Nomos Without Narrative*, 9 *THEORETICAL INQUIRIES L.* 473 (2008); ANNE GRIFFITHS, *IN THE SHADOW OF MARRIAGE: GENDER AND JUSTICE IN AN AFRICAN COMMUNITY* (1997); ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* (2006); Menachem Mautner, *From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 *THEORETICAL INQUIRIES L.* 609 (2008); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); SALLY E. MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001); Ido Shahrar, *Practicing Islamic Law in a Legal Pluralistic Environment: The Changing Face of a Muslim Court in Present-Day Jerusalem* (2006) (unpublished Ph.D. dissertation, Ben Gurion University) (on file with author); RONEN SHAMIR, *THE COLONIES OF LAW: COLONIALISM, ZIONISM, AND THE LAW IN EARLY PALESTINE* (2000).

2 For various definitions of political power, see *POWER* (Steven Lukes ed., 1986).

whether we want legal pluralism, how it has occurred, and what it entails for various societies. Yet despite its veiled presence in various facets of legal pluralism, both at the theoretical level and in praxis, political power has been ill-defined and, more challenging, rather ill-conceptualized. Although studies in legal pluralism have referred to issues concerning what state law and law generally are, the concept of what power is and where it lies in de-centered or poly-centered legal settings has been underdeveloped. Legal pluralism has often resonated with false images of symmetrical power relations, whereas power relations between and among various entities in legal pluralism, as analyzed below, have been asymmetrical.<sup>3</sup> Accordingly, I would like to explicate legal pluralism through the prism of political power. Where is the locus of political power in legal decentralization, and has political power been decentralized under legal pluralism? Since normative and theoretical models of legal pluralism have aimed at challenging the centralism of state law, I argue that we need to understand whether legal pluralism has had any concept of power and what it means to the understanding of law. Furthermore, the search for political power in legal pluralism requires special emphasis in the "age of globalization," as more intensive interactions between different types of practices and various regimes of regulation<sup>4</sup> seem to speciously obscure the existence of political power as a means of constructing and disciplining collective and individual experiences. The "age of globalization" will be further discussed below.

Research on legal pluralism has tended to disregard political power. In her trailblazing article, Sally Engle Merry argued for two types of legal pluralism — the classic and the new.<sup>5</sup> The first has dealt mainly with colonialism and its ramifications for postcolonial states. The latter has predominantly dealt with the multiplicity of legal identities and practices in non-colonial settings. Merry's schematic distinction notwithstanding, legal pluralism has posed a challenge to the fact that, despite the importance of identities to the constitution of our personalities, interests and behavior,<sup>6</sup> non-idiosyncratic and collective identities (such as race, ethnicity, gender,

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3 For a similar criticism, see MINDIE LAZARUS-BLACK, LEGITIMATE ACTS AND ILLEGAL ENCOUNTERS: LAW AND SOCIETY IN ANTIGUA AND BARBUDA 2 n.5 (1994); June Starr & Jane F. Collier, *Dialogues in Legal Anthropology*, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 1 (June Starr & Jane F. Collier eds., 1989).

4 Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES L. 349 (2008).

5 Sally E. Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988).

6 AMY GUTMANN, IDENTITY IN DEMOCRACY 1-15 (2003).

sexual orientation, disabilities, and religiosity) were largely overlooked as major topics for research in law and society until the 1960s. Accordingly, scholars have debated over what constitutes law for various identities, but have marginalized the question of where the political power that generates and constructs law in poly-centered settings actually lies.<sup>7</sup>

On the other hand, even following the emergence of legal realism, and partly due to it, law scholars have been inclined to study the "internal" mechanisms of legal systems, delving into their institutional legalistic logic and procedures, while research into informal power in a multiplicity of identities in law has largely been ignored.<sup>8</sup> This disregard of political power was largely empowered with the surfacing of analytical positivist jurisprudence in the early 1960s along with other trends of thought that conceived of law as "autonomous," as independent of contingencies of practices and identities. To the contrary, other studies have eliminated political power from law because they have conceived law as completely dependent on politics, lacking any power to affect societies above its mere dependence on politicians. Hence, political scientists and sociologists have been inclined to contemplate law as either a given formal framework that sets the rules of the political game, as functionalists and structuralists have imagined, or as a purely ideological epiphenomenon, as Marxists and Neo-Marxists have claimed.<sup>9</sup> Against this backdrop, it is easily comprehensible why legal pluralism is an important trend in scholarship, and yet lacks a theory of political power. This absence of a theory of political power in legal pluralism invites explication all the more considering the fact that legal pluralism has not ignored state law but has considered it as only one part, however fragmented and polycentric, in a more compound setting of law that includes non-state legal orders.<sup>10</sup>

This conceptual absence of political power in studies of legal pluralism is the main topic of my Article, which is divided into the following arguments. First, referring to a specific intellectual context, it explores why legal pluralism is an important body of studies, yet has failed to conceptualize

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7 See, e.g., Woodman R. Gordon, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 21 (1998); Carol J. Greenhouse, *Legal Pluralism and Cultural Difference — What is the Difference: A Response to Professor Woodman*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 62 (1998).

8 THE POLITICS OF PROGRESSIVE CRITIQUE OF LAW (David Kairys ed., 1990); AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993).

9 Martin Shapiro, *Public Law and Judicial Politics*, in THE STATE OF THE DISCIPLINE II, at 356 (Ada W. Finifter ed., 1993).

10 See sources cited *supra* note 7.

the issue of political power while systematically addressing it. Second, it explicates three dimensions in which political power simultaneously controls and is challenged by the praxis of legal pluralism: identity politics, non-ruling communities, and neo-liberal globalization. Third, it demystifies the imagined separation between state law and non-state legal orders, accordingly analyzing why state power is (still) being maintained and how it is strategizing legal pluralism, also amidst neo-liberal globalization. Last, it suggests how legal pluralism can be integrated with a theory of political power.

## II. A PROBLEMATIC REVOLT: RELATIVISM VS. POSITIVISM, AND NO POLITICAL POWER?

Two contemporary trends have shaped the interests of scholars in understanding the effects of legal pluralism on law, and in analyzing how law is being pluralized and yet is marginalizing some identities. First, behavioral studies have explicated how identities may affect legal norms, legal institutions, and judicial behavior.<sup>11</sup> At one time, identities were primarily defined as given in this field, not as a matter of recurring construction, generation, and deconstruction. Later, however, behaviorists have looked into identities as being in a constant flux over time.<sup>12</sup> Yet the concept of political power, in its various possible forms and articulations, as a crucial social force that constitutes identities in law, has been missing from research.

A second scholarly trend that has affected the research of legal pluralism is critical studies of law, primarily authored by critical racial and feminist scholars who have referred to political power in the context of race hegemony and patriarchy. They have often, however, neglected in-depth investigations of political power, beyond general references. In these studies, identities were not taken as given, nor as autonomously constructed, but as manipulatively framed by state ideologies, social hegemonic groups, state mechanisms, and economic interests fanned by global forces. Identities in law were explicated

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11 See, e.g., JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

12 Gregory A. Caldeira & James L. Gibson, *The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support*, 89 AM. POL. SCI. REV. 356 (1995); LEE EPSTEIN & JOSEPH H. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE* (1992); JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2004).

as embedded in and constructed through social class, race, ethnicity, gender, sexual orientation and the state.<sup>13</sup> Mounting awareness of multiculturalism as a challenge to the nation-state, the emergence of diverse, politically active identity groups, especially after the formal end of the Cold War, and a certain weakening in the efficacy of the nation-state have enhanced studies on the politics of identities and legal pluralism.<sup>14</sup> Hence, at the outset of the 21st century, the scholarship on identities in law and legal pluralism has made significant advances and includes an inspiring array of knowledge.

The emergence of legal pluralism constituted a Western intellectual revolt that should be comprehended in historical context. It was a revolt against Western attempts, which — unlike rabbinical Judaism (primarily until the 18th century), Shari'a Islam, and Buddhism — aimed at separating law, politics, and religion. Further, it was a revolt against liberal attempts to "purify" law of politics and of social-class constraints. Legal pluralism was a revolt against a project that had resulted in analytical positivist jurisprudence. Such positivist jurisprudence was constructed through British modern positivism, Kelsen's pre- and post-war (anti-Shmittian) engineering jurisprudence, Scandinavian early 20th century rational naturalistic approaches,<sup>15</sup> and, more recently, U.S. judicial behavioralism.

Accordingly, legal pluralism was not merely an interpretative evolution of legal realism, nor a solely Western revolt against centralism. Rather, it was a critical reaction to the predominance of analytical positivist jurisprudence in many law schools. It was somewhat disconnected from Muslim scholars who have pointed to challenging multiculturalism in the Arab-Muslim Middle East<sup>16</sup> and European scholars who have documented how the European

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13 CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHARINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* (1989); JUDITH BUTLER, *GENDER TROUBLE* (1990); JOEL MIGDAL, *STATE IN SOCIETY: STUDYING HOW STATES AND SOCIETIES TRANSFORM AND CONSTITUTE ONE ANOTHER* (2001).

14 WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); Will Kymlicka, *American Multiculturalism in the International Arena*, *DISSENT*, Fall 1998, at 73; JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY* 140-60 (2000).

15 Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 *RATIO JURIS* 1 (2005); Leora Batnitsky, *From Politics to Law: Modern Jewish Thought and the Invention of Jewish Law* (2007) (paper presented at the University of Washington, on file with author).

16 Zahraa Mahdi, *Characteristic Features of Islamic Law: Perceptions and Misconceptions*, 15 *ARAB L.Q.* 168 (2000).

nation-state eliminated endogenous communities in Europe,<sup>17</sup> and it has been relatively innocent of other legal experiences in Asia where law could not sustain itself outside traditions.<sup>18</sup> Yet, under these constraints, legal pluralism has been a significant intellectual revolt.

First, legal pluralism has opposed the bias of teleological modernization embedded in analytical positivist jurisprudence. Following H.L.A. Hart, analytical jurisprudence has presumed that only pre-modern law was founded on morality, habits, and historical contingencies, while the validity of modern law is grounded in rules of interpretation and recognition, formal authorization and consent, and not in habits and practices.<sup>19</sup> In contrast, legal pluralism has explicated how identity practices, traditions, and various moralities constitute informal laws, and validate, challenge and deconstruct formal state law in various historical contexts. While neglecting to theorize political power, legal pluralism has been interested in the practical use of law and has unveiled its impermanency and dependence on contingencies.<sup>20</sup>

Second, while Hart and his intellectual followers have contemplated how to limit uncertainty in law and attain one "correct" solution to legal problems,<sup>21</sup> legal pluralism has considered legal uncertainty essential to elite practices and grassroots activities that may challenge and re/construct law in unpredictable ways. Third, as part of Hart's critical interpretation of the 19th century jurist John Austin, analytical positivist jurisprudence has presumed that consent, not state violence, is the cause of obedience to law. Legal pluralism, on the other hand, has considered conflict amidst law as central

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17 Legal pluralism has mainly referred to European scholars who have devoted their research to countries outside Europe, African and Asian alike. *See, e.g.*, Franz Benda-Beckmann & Han F. Vermeulen, *Adat Law and Legal Anthropology*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 103 (2001).

18 KONRAD ZWIEGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 286-302 (1998).

19 H.L.A. HART, *THE CONCEPT OF LAW* 62, 165, 178 (1961); *see also* Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 241 (Dennis Patterson ed., 1996).

20 John Griffiths, *The Social Working of Legal Rules*, 48 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2003); Morton J. Horwitz, 'Why is Anglo-American Jurisprudence Unhistorical?', 17 O.J.L.S. 551 (1997).

21 HART, *supra* note 19; Horwitz, *supra* note 20; *see also* P.M.S. Hacker, *Hart's Philosophy of Law*, in P.M.S. HACKER & J. RAZ, *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 1 (1997).

to its life, seeing both obedience and resistance as deriving from interactions between a multiplicity of conflicting norms, interpretations, and practices.<sup>22</sup>

Fourth, analytical positivist jurisprudence was a vertical movement, mainly preoccupied with formalistic central authorities of state law and the consent to their regulation.<sup>23</sup> In contrast, legal pluralism, as a bottom-up approach, has primarily been concerned with interactions between localities and state sites, and lately with interactions between localities and some global and transnational agents in international law and economy.<sup>24</sup> Fifth, considerations of social justice are not substantially central, if not essentially external, to issues of legal validity in analytical positivist jurisprudence. In legal pluralism, however, visions of social justice and their challenges to law are of prime importance to legal validity. Sixth, last and fundamentally not least, for analytical positivist jurisprudence rules of interpretation and recognition are autonomous in the sociopolitical space, independent of politics. For legal pluralists law is re/produced through political interactions, in a dynamic process through which various legal practices and other social forces negotiate and often come in conflict with each other.<sup>25</sup>

These very significant contributions notwithstanding, legal pluralism lacks a theoretical search for and conceptualization of political power. It recognizes state law as a source and articulation of legal domination, and underscores the significance of non-state legal orders and practices as carriers of dissent and mobilization. However, especially when dealing with non-postcolonial entities, legal pluralism does not theorize political power in the context of

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22 Ulrike Schmid, *Legal Pluralism as a Source of Conflict in Multi-Ethnic Societies — The Case of Ghana*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2001).

23 In this Article I am not analyzing more recent developments in legal positivism that have searched for new avenues to construct positivism. This topic is outside the scope of this Article. See, e.g., ANDREI MARMOR, *POSITIVIST LAW AND OBJECTIVE VALUES* (2001).

24 Nidhi Gupta, *Women's Human Rights and the Practice of Dowry in India: Adapting a Global Discourse to Local Demands*, 48 J. LEGAL PLURALISM & UNOFFICIAL L. 85 (2003); Benda-Beckmann & Vermeulen, *supra* note 17; Cesar Rodriguez-Garavito, *Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle Over International Labor Rights in the Americas*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 64 (Cesar Rodriguez-Garavito & Boaventura Santos eds., 2005); Ronen Shamir, *The Age of Responsibilization: On Market Embedded Morality*, 37 *ECON. & SOC'Y* 1 (2008); Ronen Shamir, *Corporate Social Responsibility: Towards a New Market-Embedded Morality?*, 9 *THEORETICAL INQUIRIES L.* 371 (2008); Yishai Blank, *Localism in the New Global Legal Order*, 47 *HARV. INT'L L.J.* 263 (2006); Yishai Blank, *The City and the World*, 44 *COLUM. J. TRANSNAT'L L.* 868 (2006).

25 Benda-Beckmann & Vermeulen, *supra* note 17.

a diversity of legal orders (state and non-state) that are in conflict over resources and control. Since it has largely been ingrained in de-centered conceptions of law, it has neglected to look beyond relativism in search of the political apparatuses that may construct and generate pluralism itself.

This Article argues that two moves are required for the conceptualization of political power in legal pluralistic contexts. We should look in greater depth into non-ruling communities, namely collectivities with concrete sets of identity practices and organizations (often minorities) that are excluded and marginalized in state power foci.<sup>26</sup> These communities may be sources of counter-hegemonic power against the state and yet may maintain intra-communal hegemonic power against their members.<sup>27</sup> Thus we need to understand how the state in a legal pluralistic context may dominate non-ruling communities and yet have some of its power transferred to these communities through strategies of individual rights and group rights alike. Globalization matters significantly since it fosters state abilities (e.g., through cooptation of more economic resources) and also imposes new constraints (e.g., through some international monitoring) on state control over non-ruling communities through transformative relations of political power.

Whether as an epistemological product, as ideology, or as daily practices, legal pluralism has not been only a consequence of irreducible historical developments. Rather, it is a significant product of strategies used by the state to control and construct power relations while giving up some of its political domination through transformative relations with local and global actors. These actors may be either more traditional, e.g., indigenous non-ruling communities, or more contemporary, like multinational companies. Legal pluralism is neither a given self-propelled cultural phenomenon nor an epiphenomenological articulation of disciplinary power. It should be studied (also) as a state strategy in the midst of globalization, designed to preserve dominating hegemonic legalistic "harmony." Yet it does acknowledge some legality of challenges to the nation-state, especially now that some of the state's powers are dwindling and others are reinforcing themselves amidst globalization and through its agents.

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<sup>26</sup> For more elaborated definitions, see BARZILAI, *supra* note 1.

<sup>27</sup> *Id.*; SHACHAR, *supra* note 1; Jeff Spinner-Halev, *Liberalism and Religion: Against Congruence*, 9 THEORETICAL INQUIRIES L. 553 (2008); Ido Shahrar, *State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism*, 9 THEORETICAL INQUIRIES L. 417 (2008); FOLK LAW (Alison Dundes Rentlen & Alan Dundes eds., 1994).

### III. WHERE IS POLITICAL POWER IN LEGAL PLURALISM?

#### A. Praxis of Pluralism and (De-)Centering of Politics

One dimension of political power in legal pluralism is that of the politics of identities. The politics of identities is not separated from the legal field; rather, it both poses a challenge to state law and expands its scope. No understanding of the legal setting, whether municipal, state, communal or international, can be promising without an analysis of how collective identities form, challenge and generate law in its various configurations. Analytical and theoretical separation between "public" law and "private" law may be confusing, since law neither can be separated nor should it be isolated from identities that compose our personalities and collectivities.<sup>28</sup> First, legal responsiveness depends on people with different identities, who narrate law differently and differ as to what expectations it should fulfill.<sup>29</sup> Second, law itself is not neutral since it engenders domination and is significantly constituted by hegemonic groups.<sup>30</sup> Rhetorically, state law asserts social egalitarianism, but in practice it marginalizes groups and individuals that may challenge hegemonic identities.<sup>31</sup>

Hence, identity groups<sup>32</sup> are crucial to generating legal pluralism. They are

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28 Elsewhere I have explained why the dichotomy of "individual" vs. "community" may be very problematic, and that a critical communitarian perspective does encourage symbiotic relationships between states, individuals, and communities. See BARZILAI, *supra* note 1; and also, in reference to the right to exit, Gad Barzilai, *The Redemptive Principle of Particularistic Obligations: A Legal Political Inquiry*, 14 RESPONSIVE COMMUNITY 133 (2004). For a similar approach, see Mautner, *supra* note 1.

29 BARZILAI, *supra* note 1; PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

30 *THE POLITICS OF PROGRESSIVE CRITIQUE OF LAW*, *supra* note 8; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); BOAVENTURA DE SOUSA SANTOS, *TOWARDS A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN PARADIGMATIC TRANSITION* (1995).

31 MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2004).

32 While some scholars distinguish between various types of groups, as if identity groups are distinct from cultural groups, I have explicated and conceptualized why law is being shaped through groups that have developed collective practices, whether based on "identity" or based on "culture." Accordingly, I have referred to identity groups as a generic term that points to any group that has generated some collective practices towards or in law. See BARZILAI, *supra* note 1.

the vehicles for the gathering of sociopolitical forces, which hold opposing views on what "equality" is and how it may be achieved, to attain more justice by challenging and reforming law. Their legal tactics may vary vastly from demobilization of state law and grassroots activities, through litigation, mobilization and legislation, to counter-mobilization. In many instances state law — partly due to globalization — is a major focus for concerns among and between identity groups.<sup>33</sup> Amidst essential attempts of identity groups to challenge politics that is embedded in law, struggles over political power are always a source of practices that constitute and further generate legal pluralism. In this context of political power in the politics of identities, several types of legal collective action should be unveiled.

Thus, demobilization of state law is often cemented in very significant lack of trust towards and even alienation from state law. While demobilization does not straightforwardly challenge political power through direct collective action that expressly defies agents of state power, it may lead to de-centering of state law, placing some limits on its effective scope by practically forming alternative communal systems of unwritten and written laws (*lex scripta* and *lex non-scripta*),<sup>34</sup> for example among religious fundamentalist communities.<sup>35</sup> It also may lead to grassroots activities, which are remote from formal state law and significantly within its shadows (e.g., feminists helping battered and sexually abused women, assisting prostitutes, and consciousness-raising groups). Accordingly, demobilization of state law may constitute formal and informal non-state localities of political power.

Another tactic of collective action in legal pluralism is mobilization of state law. This may reinforce the state's political power since its legalistic mechanism and recognizable hermeneutics are utilized and reproduced by social movements, NGOs, interest groups, lawyers, legislators, and human rights activists. Once identity groups start utilizing legislation, regulation and court rulings in order to secure state legal remedies, they grant legitimacy to the state and its agents in the context of national legal ideology. Hence, this kind of mobilization in legal pluralism serves to center the fundamentals of

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33 BARZILAI, *supra* note 1; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, in CRITICAL RACE THEORY 357 (Kimberle Crenshaw et al. eds., 1995); MENACHEM MAUTNER, *THE FALL OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW* (1993) (Hebrew); CHARLES R. EPP, *THE RIGHTS REVOLUTION* (1998); MCCANN, *supra* note 1; WALDEN BELLO, *DEGLOBALIZATION: IDEAS FOR A NEW WORLD ECONOMY* (2002).

34 FOLK LAW, *supra* note 27.

35 BARZILAI, *supra* note 1; Karine Barzilai-Nahon & Gad Barzilai, *Cultured Technology: The Internet and Religious Fundamentalism*, 21 INFO. SOC'Y 25 (2005).

state power. Yet, incrementally and in historical processes, legal mobilization through identity groups may generate group rights that better protect non-ruling communities from the state and better advance identity groups' interests. Due to developments in international law, mainly through an increase in international regulation and its incorporation into processes of domestic lawmaking (however rhetorical they may have been), legal mobilization has de-centered the politics of allocation of public goods in the nation-state, even to a limited degree. As I argue below, identity groups have pluralized the legal field but have not been inclined to alter the basic structures of political power. Rather, they have imposed some legal pressures on nation-states to equalize the distribution of some public resources, e.g., budgets.

Due to developments in international law and international tribunals,<sup>36</sup> identity groups are better able to transcend their local predicaments through the use of international forums in the hope that internationalization of their local predicaments will generate more justice.<sup>37</sup> However, the experiences of human rights NGOs in countries such as Israel, Mexico and Russia point to the fact that political power is very persistent and the structure of central governments' domination is hardly altered even when some egalitarian changes in the allocation of public goods are finally recognized in domestic politics.<sup>38</sup>

Indeed, law is being constituted through unexpected practices of identities which engender (also) an alternative *nomos* to the prevailing socio-legal "order."<sup>39</sup> They offer alternative world visions and practices. In the midst

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36 WILLIAM A SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006); NANCY A. COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* (2007).

37 RACHEL CHICOWSKI, *THE EUROPEAN COURT, CIVIL SOCIETY, AND EUROPEAN INTEGRATION* (2007).

38 My reflections on human rights activities in Russia are based on a meeting with Russian human rights activists at the Ellison Center for Russian, East European and Central Asian Studies, Jackson School of International Studies, University of Washington, in May 2007. See also PAMELA A. JORDAN, *DEFENDING RIGHTS IN RUSSIA: LAWYERS, THE STATE, AND LEGAL REFORM IN THE POST-SOVIET AREA* (2005); for a good study on Mexico, see Amanda Cats-Baril, *Legal Mobilization in Oaxaca: Towards Justice in Multicultural Societies* (2007) (unpublished paper, on file with author); regarding Israel, see Hassan Jabareen, *Toward a Critical Palestinian Minority Approach: Citizenship, Nationalism and Feminism in Israeli Law*, 9 *PLILIM* 53 (2000) (Hebrew).

39 TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (1993); MERRY, *supra* note 1; AUSTIN SARAT & THOMAS R. KEARNS, *LAW IN EVERYDAY LIFE* (1993); LIKHOVSKI, *supra* note 1; *THE HISTORY*

of a compound, multiplayer and politicized process, identities are shaped, practiced, generated, constructed, reconstructed and deconstructed, and in turn they form and deform laws in ways that serve particularistic socioeconomic and political interests. Most often the outcome is not an alteration in the basic structures of political power but greater equality in the allocation of public goods.<sup>40</sup>

Heretofore, I have established that there is no identity process in legal pluralism that is independent of political power. Thus, legal mobilization may empower and expand state law, but it also may somewhat equalize the allocation of public goods and limit discrimination through the use of a language of legal rights. Demobilization may construct non-state legal orders that, in turn, may challenge state power and also constitute intra-communal political power. These sources of non-state challenges to state power may be simultaneously hegemonic towards group members and counter-hegemonic towards the nation-state. Globalization counts in being a source and generator of further externalization of local predicaments and a source for internalizing some liberal values. Generally, however, identity politics in legal pluralism has not been inclined to reform the basic structures of states' political power. Now, let us proceed to look at non-state entities that may be localities of power and yet potential sources of challenge to state power. These entities should be a major factor in any theory of political power in legal pluralism.

### **B. Below and Above the Bridge: Non-Ruling Communities and Globalization**

Legal pluralism is embedded in communities that have largely constructed our personal attitudes towards law.<sup>41</sup> Furthermore, collective identities have been subjected to conflicts among and between state and communities

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OF LAW IN A MULTICULTURAL SOCIETY: ISRAEL 1917-1967 (Ron Harris et al. eds., 2002).

40 MCCANN, *supra* note 1; CHARLES R. EPP, *THE RIGHTS REVOLUTION* (1998); Gad Barzilai, *The Evasive Facets of Law: Litigation as Collective Action*, ADALAH'S NEWSL., Feb. 2005, <http://www.adalah.org/newsletter/eng/feb05/ar2.pdf>; RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

41 *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* (Amitai Etzioni ed., 1995); PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* (1989).

over recognition and even hegemony in legal pluralism.<sup>42</sup> Both indigenous communities and communities of immigrants may be at once a source of challenges to power and a basis for the constitution of power towards their own members and beyond. Often the very same communities, as religious and ethnic communities, may defy hegemonic ideologies and yet subjugate and marginalize their own members through the use of communal discipline and mechanisms of intra-communal regulation and punishment.<sup>43</sup> Hence, communities need to be a significant pillar in our understanding of political power in legal pluralism.

In legal pluralistic societies the democratic state, not to mention the non-democratic state, has used modern law to consolidate national consciousness, most often through legalistic codifications. In this context, state law has tended to suppress distinct identities of non-ruling communities, and in turn it has asserted "social integration" and has professed to ensure collective social and economic security and "harmony."<sup>44</sup> State (national) courts have frequently embraced such a centrist ideology and have promulgated norms dictated by the hegemonic culture.<sup>45</sup> Globalization has not drastically altered this situation. While the number of international covenants and institutions has sharply increased, criminal international law (particularly after the Pinochet affair) has developed, and litigation in international forums has risen dramatically at the outset of the 21st century,<sup>46</sup> state courts are (still) sluggish in empowering non-ruling communities. In countries such as, *inter alia*, Guatemala, Mexico, Spain, Turkey, Israel, India, and France, to name just a few, the globalizing language of individual rights may be used by courts not necessarily to promote justice but to subjugate non-ruling communities. Accordingly, individual rights have been perceived

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42 Crenshaw, *supra* note 33. The term "community" is preferred over "group" since the latter notion veils the fact that when people are bonded through collective identities they are significantly embedded in these identities and construct a specific collective culture. The term "community" also sharpens the differences between interest groups, which function for the promotion of specific interests of their members without necessarily being bonded by identities, and communities that are constructed by joint and bounded identities.

43 SHACHAR, *supra* note 1; Barzilai, *supra* note 28.

44 LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990); ANGELINA S. GODOY, POPULAR INJUSTICE: VIOLENCE, COMMUNITY, AND LAW IN LATIN AMERICA (2006).

45 JACOB HERBERT ET AL., COURTS, LAW AND POLITICS (1996).

46 R. v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [2000] 1 A.C. 147 (H.L.) (appeal taken from Eng.). See also ROHT-ARRIAZA NAOMI, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

and promoted as justifying the dissolution of communities for the protection of individual autonomy.<sup>47</sup>

Legal pluralism is not necessarily an inclusive phenomenon. Nation-states may construct ideologies and a public policy of legal pluralism for the purpose of promoting political control over non-ruling communities. Thus, separate jurisdictions of Shari'a (شريعة) in family law among Muslims have been useful for preventing the respective Muslim minorities from fully challenging the legitimacy of Israel, as a Jewish republic, and India, as a secular state yet under Hindu hegemony.<sup>48</sup> As a state strategy, legal pluralism may be generated as a sectarian categorization that promotes intolerance towards people, like immigrants, who don't "belong" to the core ideological and citizenship setting.<sup>49</sup> Hence, historically, legal pluralism in its basic sense of multiplicity of jurisdictions has been generated not only in democracies but also in authoritarian systems as the Hapsburg and Ottoman Empires where non-ruling communities were granted some autonomy under state control.

Globalization has not redeemed legal pluralism from its national constraints. Despite the greater ease with which non-state values can pass from one country to another in transnational interactions, the nation-state is still powerful in a legal pluralist context. While international neo-liberalism, which lies at the heart of globalization, has partially altered the location of capital — somewhat externalizing and internationalizing the means of production and capital — it has not drastically reduced the nation-state's political power. Furthermore, the globalization of the past quarter-century has been mainly a Western phenomenon, which has largely escaped black Africa, has only partly penetrated Latin America, and is barely recognizable in some parts of Asia. In all of these regions different forms of domestic control in various contexts of legal pluralism have been prominent.

True, in some instances globalization has weakened the structure of the nation-state and has empowered non-state agents, such as, for example, multinational corporations.<sup>50</sup> Privatization of some public

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<sup>47</sup> See, e.g., GLENDON, *supra* note 31.

<sup>48</sup> Gad Barzilai & Ayelet Harel-Shalev, *Rights and Governance of Power Resources: Why Do Non-Consociational Deeply Divided Societies Survive?* (2008) (unpublished manuscript, on file with author); Yuksel Sezgin, *Legal Pluralism in India, Israel and Egypt* (2007) (unpublished Ph.D. Dissertation, University of Washington) (on file with author).

<sup>49</sup> Alberto Spektorowski, *Multiculturalism of the Right: "Europe of the People"* (Aug. 2007) (paper presented at the Annual Meeting of the American Political Science Association, Chicago).

<sup>50</sup> *JAPANESE MULTINATIONAL COMPANIES* (D.R. Basu & V. Miroshnik eds., 2007); *CORPORATE GOVERNANCE LESSONS FROM TRANSITION ECONOMIC REFORMS* (Merritt

services, interactive economies of information technologies, international regulation, and multinational corporations are dramatically downsizing direct governmental control of some public spheres, such as industrial production, banking, education, electricity, communication, health, and policing. Yet globalization has not eradicated the state as a major source of political power in legal pluralism. Thus, numerous regions of the world have reacted very differently to more American-led, neo-liberal trans-nationalization of capital flow. Western Europe and North America have experienced intensive attempts to internationalize their economies. Thus, especially in the framework of the EU, the nation-state has lost some of its power.<sup>51</sup> Yet in East Asia, for example, following the 1997-1998 economic crisis, globalization has strengthened a China-led regionalism and resistance to what was perceived as the expansion of American-led market principles.<sup>52</sup> The effects of globalization on Arab and Muslim countries have been ambivalent: more domestic pressures for democratization of authoritarian political regimes, applied through a minority of liberal intellectuals, feminists, and the media, and conversely rather massive religious fundamental challenges to secular and religious moderate regimes.<sup>53</sup> In other words, from a global perspective, state power is being addressed and challenged in the midst of globalization, but it has certainly not been significantly eroded, and the effects of globalization on states are highly culturally and institutionally contingent and highly diverse.<sup>54</sup>

Nation-states have considered new strategies, which, relatively speaking, maintain their political power amidst a more interactive capitalist economy and the increasing effects of multinational economic bodies. *Inter alia*, examples include relatively non-litigious Japan, which has encouraged a more litigious culture in the WTO; China, which at the outset of the 21st century has adopted some property rights; the U.S., which has controlled the allocation of Internet domains through U.S.-owned multinational companies; North African countries like Egypt and Tunisia, which have modernized the Shari'a and its interpretations and have adapted it to more liberal

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B. Fox & Michael A. Heller eds., 2006); ANOTHER PRODUCTION IS POSSIBLE: BEYOND THE CAPITALIST CANON (Boaventura D. Santos ed., 2006); Shamir, *supra* note 24.

51 NEIL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION (2002).

52 Donald C. Hellmann, A Decade After the Crisis: Asian Regionalism and International Architecture in a Globalized World (Feb. 2007) (paper presented at the Thammasat-Berkeley International Symposium, Bangkok, Thailand).

53 See, e.g., AKBAR AHMED, JOURNEY TO ISLAM: THE CRISIS OF GLOBALIZATION (2007).

54 See, e.g., DANIEL D. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES (2007).

hermeneutics; and Venezuela, which nationalized the oil companies.<sup>55</sup> Indeed, globalization, with all its Western economic force and the increasing ability of the capitalist elite to transnationalize transactions and labor force, is neither outside the reach of state strategies of control, nor has it been incorporated without significant levels of resistance in various localities. Accordingly, legal pluralism at the outset of the 21st century has been centered on state power through its transformative interactions with global and local agents. Political power has been embedded in the state's abilities to strategize a plurality of legal jurisdictions while also giving up some of its strongholds that have been unveiled due to individual and group rights, to the degree that these rights have been recognized.

In this world setting of local-state-global, where legal pluralism is embedded in struggles over political power, non-ruling communities have constructed distinct legal practices and have asserted their collective expectations of recognition, protection, and empowerment in culture, law, and politics.<sup>56</sup> They may localize the language of human rights, reshape communal practices, and thus raise claims aspiring to anchor their local identities, even local laws, in state law and international law. Yet the empirical evidence as to whether a transnational language of human rights exists in practice is ambivalent at best. Thus, free-trade movements in Latin America and the U.S. have been relatively isolated from each other, and the cooperation between various NGOs around the globe has been very restricted.<sup>57</sup> Similarly, human rights activists in Russia and central Asia have been acting in isolation from the rest of the world, rather disengaged from human rights organizations

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55 See, e.g., Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt: On Islamic Law, Veiling and Civil Rights*, 21 AM. U. INT'L L. REV. 437 (2006); Saadia Pekkanen, *Bilateralism, Multilateralism, or Regionalism? Japan's Trade Forum Choices*, 5 J. EAST ASIAN STUD. 27 (2005); Barzilai-Nahon & Barzilai, *supra* note 35; For privatization in China, see, for example, the Privatization Dataset of the World Bank: The World Bank Group, Private Participation in Infrastructure Database, <http://rru.worldbank.org/Privatization/Results.aspx?countryid=42> (last visited Nov. 1, 2007); Noel J. Coulson, *Law and Religion in Contemporary Islam*, 29 HASTINGS L.J. 1447 (1978).

56 See, for example, the sources by Kymlicka cited in *supra* note 14; and ERIC J. MITNICK, *RIGHTS, GROUPS, AND SELF INVENTION* (2006).

57 MICHAEL B. BARRATT, *FAIR TRADE: REFORM AND REALITIES IN THE INTERNATIONAL TRADING SYSTEMS* (2003); Jen Caldwell, *Development, Impact and Future of the Fair Trade Movement: An Analysis of the Contemporary Fair Trade Movement and the Fair Trade Towns Initiative* (2007) (unpublished honor thesis, University of Washington) (on file with author).

in other parts of the globe.<sup>58</sup> What might seem to be a transnational language of human rights is still confined, at the outset of the 21st century, mainly to the West.

Since globalization is restricted and contingent, localities are central to legal pluralism that can be strategized by nation-states and generated through communities. Non-ruling communities may be very heterogeneous and may echo various cultural identities in conflict with each other. They often exhibit intersectional practices, through which individuals enrich legal pluralism by means of articulating and constituting various identities in law and towards it. Therefore, individuals who affiliate with different communities may challenge state power in at least two ways.<sup>59</sup>

First, they may prevent state law from invading a communal space. Thus, Kimberle W. Crenshaw, a prominent African-American legal scholar, has demonstrated how African-American battered females have suffered from a lack of legal mobilization because of intersectional deprivation under state law and within their communities.<sup>60</sup> They were disempowered within the community of women as African-Americans and in the African-American community as women. Should they prefer their female identity, Crenshaw wonders, and correspondingly inform the police — the agent of the ruling white social class — or should they prefer their ethnic identity and prevent the arrest of their violent African-American husbands? This example shows that a multiplicity of identities at the communal and individual levels may challenge state political power and hinder its expansion into the communal space. Accordingly, individuality in legal pluralism may justify the maintenance of non-inclusive communal cultures, if we presume that some individuals may prefer to live in non-liberal cultures that challenge state power. Since cultural relativism is an important value in legal pluralism, it may prefer non-liberal individual practices in a communal context over liberal state law, fully aware of the existence of non-liberal power in such a communal context.<sup>61</sup>

Second, communal law, either written or unwritten, may be preferred by community members over state law. Thus, some Muslims around the world adhere to the social practice of "honor killing," *Katal al-Sharaf ala'ila*

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58 Based on discussions with Russian human rights activists at the University of Washington in May 2007.

59 On the complexities of legal cultures in various places, see *COMPARING LEGAL CULTURES* (David Nelken ed., 1997).

60 Crenshaw, *supra* note 33.

61 Gupta, *supra* note 24; Oomen Barbara, *Group Rights in Post-Apartheid South Africa: The Case of the Traditional Leaders*, 44 *J. LEGAL PLURALISM & UNOFFICIAL L.* 73 (1999).

(شرف العائلة).<sup>62</sup> While some feminist NGOs among Israeli-Arab-Palestinian Muslims have mounted a public struggle against this habit, which is rooted in local Muslim practices, prominent members among the communal political elite, i.e., elders among large families, *Hammula* (حمولة), and communal religious judges, *Kadi* (قاضي), are forestalling attempts to report such events to the Israeli police. They are reluctant to cooperate with state legal authorities and fear that massive police intervention might undermine their power structure.<sup>63</sup> Hence, in legal pluralism, the very same non-ruling community may simultaneously support state law and challenge it dramatically in an endeavor to gain and maintain local political power. Accordingly, on the one hand legal pluralism may expand state law into communal spaces, but on the other it may hinder state law and curtail its power while offering alternative legal orders.

We should perceive multifarious identities in each community as sources of various and even irreconcilable legal practices in and towards state law. Postcolonial literature has correctly addressed the argument that communal identities have not been shaped in vacuums.<sup>64</sup> Under the guise of a liberating force, state law has been a colonizing power since it has constructed specific cultural identities through the marginalization of counter-hegemonic identities, this for the purpose of subordinating non-ruling communities, including and predominantly indigenous communities that preceded the modern nation-state. The latter were subjected to massive national efforts to enforce the hegemony of state law and prevent legal pluralism that might revive challenges to the nation-state. Such instances among democracies include, *inter alia*, Native Americans and Hawaiians in the U.S., the First Nation in Canada, Aboriginals in Australia, Maori in New Zealand, Kurds in Turkey, Basques in Spain, Arab-Palestinians in Israel, Ainu and Okinawans in Japan, Gaoshan in Taiwan, Mapuche in Chile, Maya in Guatemala, Huichol in Mexico, hundreds of other indigenous communities in Brazil, and Sami in Finland, Norway, Russia, and Sweden.

To summarize, as Michel Foucault has argued, Western cultures of rights have aimed at legitimatizing the sovereign power and legalizing

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62 See, e.g., Nadera Shalhoub-Kevorkian, *Law, Politics, and Violence against Women: The Case-Study of Palestinian-Israelis*, 21 *LAW & POL'Y* 189 (1999).

63 For more details, see BARZILAI, *supra* note 1, at 177-78.

64 Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society*, 32 *LAW & SOC'Y REV.* 409 (1998); LIKHOVSKI, *supra* note 1; MERRY, *supra* note 1; Merry, *supra* note 5; SHAMIR, *supra* note 1.

obedience to the King/ruler.<sup>65</sup> Yet, even state law, which has recurrently been mentioned as a more formal and stable *lex scripta* than other legal settings, has not been a fixed entity, with fixed and coherent interests and a single identity. Furthermore, the potentialities of non-ruling communities to be sources of challenges to state power as well as hegemonic spaces of power themselves constitute a significant layer of political power in legal pluralism. Accordingly, we have to pay attention to the dynamic interplay between state domination, its own fragmentation in the age of globalization, and the politics of identities through non-ruling communities in legal pluralism. In the next Section I explore how such a compound setting of legal pluralism constitutes transformative relations between various facets of political power.

### C. Transformations, Non-Ruling Legal Orders and the Maintenance of Political Power

Nation-states (or, states of nations), which are themselves legal pluralistic, heterogeneous and ruptured entities,<sup>66</sup> are losing some strongholds of political power in the age of neo-liberal globalization. Yet, while economic privatization may also privatize the legal field and form new sources of local and global non-state legal entities, the modern state may still choose different types of strategies vis-à-vis the phenomenon of legal pluralism to ensure that, though somewhat transformed, its power is not overwhelmingly eroded. While the internationalized economy may constitute its own spaces of regulation and control, nation-states are powerful enough to co-opt agents of globalization. Globalization has generated transformative relations between states and global and local agents, but these transformative relations have also preserved some of the state's power.

Nation-states are challenged, as we have seen, by non-ruling communities on the one hand and by global economic forces on the other. The first are asking for more legal autonomy, while the latter are demanding more national deregulation. Since political repression is often very costly, especially for democracies, other strategies drawing on the liberal discourse of human rights may be more available to nation-states in order for them to respond to these pressures and control legal pluralism. Thus, the application of strategies of individual liberal rights doesn't alter the main focus of political power, which is embedded in the state, but it may allow non-ruling communities

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65 MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Gordon Colin ed., 1980).

66 See also Shachar, *supra* note 27.

more leverage in reforming the allocation of public goods through the use of the language of rights. In other words, legal pluralism that is based on individual rights and legal mobilization may alter the allocation of public goods (e.g., reallocation of budgets) for the benefit of some non-ruling communities and deregulated economic organizations; it would not, however, be inclined to ameliorate the very basic structures of political power.

To some extent, political power in legal pluralism is practically negotiated, at local, national, international and transnational levels. Thus, international law has become more involved in domestic affairs, multinational companies are less subject to national regulations, and non-ruling communities enjoy a degree of access to non-state traditions of law that are challenging, even defiant, to the state and its ruling elite. These practical negotiations between states, non-ruling communities and non-state agents, however, have not dramatically altered the fact that the nation-state (still) fundamentally controls the sociopolitical setting. Indeed, legal pluralism may change some facets of political domination. Nonetheless, there are no tangible and consistent empirical findings that demonstrate that the state is entirely losing its political power. At the outset of the 21st century, nation-states have not become obsolete, nor are they overwhelmingly dwindling; rather, they are transforming some of their power through local and global agents. They are recognizing spaces of power of non-ruling communities and global agents, but retaining control of the regulation and boundaries with non-state forces. Consequently, the ways in which nation-states will practice domination may vary in response to pressures of various non-ruling communities through such means as violence, extra-parliamentary activities, legislation, litigation, and appeals to international institutions. Under these types of public pressures, the state may relinquish some of its traditional policies, may acknowledge limits to its scope of jurisdiction, and may accordingly reform some of its public policies.

To the same degree, however, legal pluralism both as a practical reality and as a trend in scholarship may certainly be a veil that legitimizes a strategy of control. States have legalized pluralism through more autonomy for non-ruling communities and more reliance on international regulation. Yet nation-states have not relinquished their control over basic means of surveillance, some taxation, means of producing "national patriotism," legal ideology and punishment. Accordingly, to presume that legal pluralism is critically and overwhelmingly changing political power is to ignore the fact that legal pluralism itself is also a product of the state's political and legal strategy. Thus, in countries such as India, Canada, and Israel, to mention just a few, the scope of legal pluralism and its essence were

carefully tailored by the political elite in a context that was shaped through various traditions and practices.<sup>67</sup> Thus, legal pluralism was aimed to furnish non-ruling communities with some legal rights, primarily in the religious and cultural spheres, while hindering demands for changes to the structure of the political regime. Legal pluralism has been a political tactic to use recognition in order to disempower claims for reforming the forms of political power organized and maintained by the nation-state.

### CONCLUSION

What a theory of political power in legal pluralism should do is differentiate between various dimensions in domination and state strategies. Some of these dimensions will be altered as part of the transformative relations between state's agents, non-ruling communities, the politics of identities, and globalization, with its various contingencies around the world. Other dimensions that are perceived by the political elite as crucial for preserving their political power will remain rather intact. Law is a mechanism to promote and maintain these processes. The legal pluralism scholarship has critically refined both Weber's state centralism and Foucault's emphasis on modern sovereignty; these advances notwithstanding, it has still to provide us with a more detailed and satisfactory theory of political power. Instead of asking only "what is law," a classic question in legal pluralism, we should ask who makes law, in which structures, through which agents, and for what purposes. We need to look into transformative relations between local, national, and global agents, and to locate political power through the ways in which it has been structured in these transformative relations. An elaborated theory of transformative law and power may also explicate for us how law may pluralize itself beyond the state, while political power partly embedded in the state, and partly located outside it, can and should be examined and reexamined.

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<sup>67</sup> Barzilai & Harel-Shalev, *supra* note 48.