Cultural Identities

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I. A Theme of Research

Despite the importance of identities to constitution of our personalities, interests, and behavior (Gutmann 2003, 1-15), non-idiosyncratic and collective cultural identities, such as race, ethnicity, gender, sexual orientation, and religiosity in law and towards it had largely been ignored or underestimated as major topics for research in law and society studies until the 1960s. On the one hand, students of law considered public policy and judicial processes more significant than identity politics. Even after the emergence of legal realism, in the outset of the 20th century, law scholars had inclined to study the 'internal' mechanisms of the legal system, delving into its internal logic (Kairys 1990). On the other hand, political scientists and sociologists contemplated on law as either a given formal framework, and as a set of rules of the political game, as functionalists and structuralists had imagined, or as an ideological epiphenomenon as Marxists have claimed (Shapiro 1993).

Yet, two contemporary trends have shaped the interest of scholars to understand and conceptualize the effects of cultural identities on law. First were behavioral studies that have explicated how identities may affect legal norms, legal institutions, and judicial behavior (Segal and Spaeth 1999). Cultural identities were primarily defined

as given, and not as a matter of recurring construction, generation, and deconstruction. Later, scholars affiliated with the behavioral trend have looked at identities as in a constant flux over time (Caldeira and Gibson 1995; Epstein and Kobylka 1992; Gibson 2004).

Second trend were critical studies of law, primarily written by critical race and radical feminist scholars. In these studies identities were not taken as given, nor as autonomously constructed, but as manipulatively constructed by state ideologies, social hegemonic groups, and economic interests. Identities were correctly identified with problems of social class, race, ethnicity, gender, and sexual orientation (Mackinnon 1987, 1989; Butler 1990; Crenshaw, Peller, and Thomas 1995; Migdal 2004; Young 1990). Mounting awareness of multiculturalism as a challenge to the nation-state, and emergence of diverse, politically active, identity groups along the weakening in the ideological and efficacy power of the nation-state (Kymlicka 1995; Sarat and Kearns 1999), have enhanced studies in politics of identity and legal pluralism (Merry 1998; Ewick and Silbey 1998; Brigham 1998). Hence, in the outset of the 21st century, research of identities in law has significantly been advanced and includes an inspiring array of knowledge.

II. Cultural Identities as Law

Politics of identities is not separated from the legal field, but it is a constitutive element of law. No understanding of legal fields either be it state, communal, and international, is promising without analyzing how cultural identities form and generate law. Law neither can be separated nor should be isolated from identities that compose our personalities and collectivities. First, legal responsiveness and legal

democratic virtues depend on people with different identities, who differ as to what expectations law should fulfill and who narrate law differently (Barzilai 2003). Second, law itself is not neutral and it reflects and significantly constituted by cultural hegemonic groups in any society (Kairys 1990; Horwitz 1992). While rhetorically state law asserts social egalitarianism, in practice it marginalizes groups that may challenge the hegemonic set of identities (Glendon 1991; Scheingold 1974).

Third, law is a necessary means of attaining more equality between various identity groups (McCann 1994; Epp 1998). Often identity groups are vehicles of mobilizing forces to attain democratic justice. Various identity groups may differ on the issue how to use law in order to attain equality. The legal tactics may vary from litigation, mobilization, legislation, and demobilization, but in all instances state law is a major focus of concern among and between identity groups (Barzilai 2003).

Cultural identities are crucial for us to understand the differences between law on books and law in practice since if we do understand how people with different identities conceive law, we may comprehend how they going to practice law. Hence, current research is focused not merely on the dilemma how law reflects and is being reflected through identities, but we also examine how law is constituted through practices of identities. From that perspective research has advanced from studies about identities towards law to cultural identities as constituent parts of law. Law is not simply an infrastructure of rules of political game, nor is it an ideological epiphenomenon. Law is largely an identity process in the realm of power struggles over hegemony. Through that compound multiplayer process identities are shaped,

practiced, generated, constructed, or reconstructed and in turn they constitute and reconstitute law.

III. Identities and Communities of Identities

Identities have been subjected to conflicts between state and communities, and among communities (Crenshaw, Peller, and Thomas: 1995). The term 'community' is preferred over 'group' since the latter notion veils that when people are being bonded by collective identities they are significantly embedded in these identities and construct a communal culture. Therefore, protecting these communities as entities with distinct cultures that deserve rights, become a major challenge for multicultural democracies. 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.

The democratic state in multicultural societies has often tended to ignore and suppress distinct identities of non-ruling communities, and in turn it has asserted 'social integration' and has professed that civic culture has ensured collective social and economic security, and 'harmony' (Nader: 1990). Courts have frequently embraced such a state's view, and have procreated norms dictated by the hegemonic culture and identities (Jacob, Blankenburg, Kritzer, Provine, and Sanders: 1996).

Non- ruling communities, however, have constructed distinct identities, and have asserted their collective expectations of recognition, protection, and empowerment in culture, law, and politics (Danielsen and Engle: 1995). Thus, Boaventura de Sousa

Santos has hypothesized that globalization may be utilized in communal localities to redefine local cultures. He has also hypothesized alternatively, that local communities may globalize their cultures (Santos: 1995). The first process is localization of globalization, and the second process is globalization of locality. Accordingly, communities may localize contemporary international language of human rights, reshape communal practices, and thus raise claims aspiring to anchor their local identities in state law. Alternatively, communities may procreate practices that transcend a specific communal identity and thus aim to benefit through transnational language of universal rights (Barzilai 2003). Hence, globalization does not hinder politics of identities, rather enhances it both at the communal and the international levels. Furthermore, globalization does not produce one universal identity but engenders variety of identities in various localities.

Community is not essentially a construct of a sole unified social unit that echoes one cultural identity. Communal legal culture has often included intersectional practices that have articulated and constituted various identities. Intersectional identities in communities may have resulted in multifarious and even contradictory legal practices (Barzilai: 2003; Nelken and Feest 2001). Specific groups within a community may be deprived from their ability to practice their identities. Kimberle Crenshaw (Crenshaw: 1995) has illuminated how Afro-American females have suffered from lack of legal mobilization because of intersectional deprivation. Since as women they have been embedded in the Afro-American community, they have not been considered as fully representing one distinct collectivity. They have been dis-empowered within the feminine community as Afro-Americans and in the Afro-American community as women. Crenshaw has distinctively explicated the quandary

of Afro-American battered females. Should they prefer their feminine identity, and correspondingly inform the police- the agent of the ruling white social class- or maybe they should prefer their ethnic identity, and avert the arrest of their Afro-American violent husbands. It has not been an abstract dilemma concerning an abstract identity, but an acute and personal dilemma about who will survive and who will not.

We should perceive the actuality and the potentiality of multifarious identities in each community as sources of various and even irreconcilable legal practices (Danielsen and Engle: 1995, 332-354). Postcolonial literature has correctly addressed the argument that communal identities have not been shaped in empty spheres (Garth and Sterling: 1998; Merry: 1998, Shamir: 2000). State law has been a colonizing power since it has constructed cultural identities through marginalization of non-hegemonic and counter-hegemonic identities, and for the purpose of subordinating non-ruling communities. Hence, state law has generated a somewhat 'new' identity of the hegemonic and ruling community veiled as a liberating national force. Notwithstanding, state law and its legal ideology have induced marginalization and subservience of identities of non-ruling communities, particularly those communities that have been remote from state's meta-narratives.

We have to pay attention to the interplay between state domination and politics of identities in communal context. Law relies on and it is a constitutive part of the coercive power of states (Scheingold: 1974); but not all types of law, only state law. For Michel Foucault, the innovative and intriguing post-Marxist, Western cultures of rights have been aimed to legitimatize the sovereign power and legalize obedience to

the King/the ruler (Foucault: 1976). Legal cultures of the bourgeoisie have accordingly been perceived not as a 'veil of ignorance' (to use a Ralwsian term) but rather as a veil that generates state domination. Legality has been- to phrase it in post-Marxist concept- state's reproduced illusion that has disguised micro-mechanisms of power, in which disciplines have enforced subordination.

There have been, however, multifarious collective identities engendered through non-ruling communities. These identities have constituted and reflected various legal practices that have challenged the 'rule of law' as professed by state law, in different ways. In resemblance to Foucault's concept of power, and as substantial ingredient of power, law is everywhere and anytime (Ewick and Silbey: 1998, Sarat and Kearns: 1993). Due to the essence of legal cultures as identity practices, law has formed, generated, and expressed human interests, expectations, desires, fears, behavior, and sense of belonging and alienation in politics. Identity practices are rendering law its political essence. They render to politics and law not only cultures as autonomous agents, but also cultures as state produced reflections of power relations in any given society. Hence, the essence of law is significantly determined by its identities.

These facets of human life have been meaningless without communities, because communities have largely constructed identities, and our personalities have partially been embedded in communities (Etzioni: 1995; Hardin: 1999; Hoebel: 1969; MacIntyre: 1984, 1988; Selznick: 1987, 1992; Taylor: 1994). Indeed, law has neither been concentrated only in courts nor has it been congested only in other adjudicative institutions (Brigham: 1998; Ewick and Silbey: 1988; Feeley and Rubin: 1998). Law,

culture, and identities are essential constituents of everyday life, and everyday life is to a large extent about communities in politics.

Even state law, which has recurrently been mentioned as more formal and stable *lex scripta* than other legal settings (Galanter: 1969, Renteln and Dundes: 1995), has not been a fixed entity with fixed and coherent interests and one identity. But rather, we may find different interests of ruling groups, which have generated complex- including contradictory- identity practices in state law.

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Barzilai's list of scientific publications includes several books, several monographs, several edited volumes, and dozens of articles published in leading refereed scientific and legal journals in USA and England. Some of his publications were translated to Arabic, Hebrew, French, German, Russian, Slovak, and Spanish. His recent prize-awarded book about legal cultures and non- ruling communities (minorities) under state domination and in the midst of globalization, is *Communities and Law: Politics and Cultures of Legal Identities (Ann Arbor: University of Michigan Press, 2003, reprinted 2005).* Among his articles, "Legal Categorizations and Religion: On Politics of Modernity, Practices, Faith, and Power." In Austin Sarat (ed.) *A Companion to Law and Society* (Blackwell, 2004); "Law is Politics." *UCLA*

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