

## The World of Rules: A Somewhat Different Measurement of the World

Schuppert, Gunnar Folke

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Schuppert, Gunnar Folke

**Book — Published Version**

## The World of Rules: A Somewhat Different Measurement of the World

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GUNNAR FOLKE SCHUPPERT

# The World of Rules

A Somewhat Different Measurement  
of the World







# Global Perspectives on Legal History

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GUNNAR FOLKE SCHUPPERT

# The World of Rules

A Somewhat Different Measurement of the World

Translated from the German original  
by Rhodes Barrett



MAX PLANCK INSTITUTE  
FOR EUROPEAN LEGAL HISTORY

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However, my deepest gratitude is owed to my wife, who has accompanied my – notwithstanding my emeritus status – unquenchable exploratory urge with cheerful imperturbability. This book is dedicated to her.





## Preface

We have long taken the view that jurisprudence is a discipline that ought to develop into a yet to be delineated science of regulation. Were our proposal to address the fundamental issues of a modern science of regulation to find favour, (legal) norms would of course continue to be the subject of attention, but not the primary one: the focus would shift to ‘rules.’ This is the concern of Lorraine Daston, a permanent fellow at the Berlin Institute for Advanced Study, in a research project for the academic year 2015/2016 examining “Rules: The Prehistory of an Indispensable and Impossible Genre.” She explains: “Rules – in the form of everything from traffic regulations and government directives to etiquette manuals and parliamentary procedures – structure almost every human interaction. ... Drawing upon diverse genres – astronomical tables, traffic regulations, law codes, game manuals, handbooks of parliamentary procedures, cookbooks – I would like to reconstruct the history of the premodern rule as both a concept and a practice in order to better understand our own modern ambivalence about rules.” (Daston 2015, pp. 28 f.)

Our lens is not as wide as that of Lorraine Daston: our focus covers neither cookbooks nor astronomical tables, although it does include rules of the game and the law of thieves. This exploration of the universe of the rules governing human and institutional behaviour – the ‘World of Rules’<sup>1</sup> – is a middle-range venture. We investigate the multitude of normative orders, the plurality of norm producers and norm enforcement regimes. We shall not eschew the question, always hovering in the background, of what all this means for the concept of law.

We embark on the project in the conviction that the world of law needs to be resurveyed. Old certainties reflected in the equation law = state are out of true: the state and the law are gradually decoupling from one another.

1 By now (autumn 2017), because of our beneficial readings of Ralf Seinecke’s fruitful ventures on “The Law of Legal Pluralism” (“Das Recht des Rechtspluralismus”, 2015), we would have chosen a slightly differing title for our opus: “The Worlds of Rules”. Adding this “s” visibly acknowledges a plurality of *legal worlds*.

The pace of this process has differed from one field of regulation to another. If this is indeed the case, simply attaching a conservatory to the classical mansion of law with its reception rooms statute, ordinance, and bye-law will not suffice. Far more imperative is to replace the old house of law by a new edifice in which all regulatory regimes involved in exercising control find their place, whatever name they go by: standard, code of conduct, and so forth. A television series on the subject could perhaps bear the title ‘House of Rules.’ To avoid inapt associations, we prefer to describe our necessarily ambitious project as ‘Measuring the World of Rules,’ in the hope that the reader will forgive any cartographic imprecisions in this first attempt.

This enterprise has benefited greatly from the stimulating intellectual ambience at the Max Planck Institute for European Legal History, where I had the privilege of spending two months as fellow in 2014 and again in 2015. But this book has developed not only in dialogue with the history of law; it is my hope that the reflections and proposals it offers will also prove useful to this discipline. Such hopes are perhaps not quite unfounded: such cross-disciplinarily minded (legal) historians as Stefan Esders and Christoph Lundgreen have expressed gratifying appreciation of the governance perspective I have repeatedly brought into play.<sup>2</sup> This is reason enough for me to continue my exchanges with legal history.

Pranzo (Trentino) and Charlottenburg, spring 2015

2 Esders 2015; Lundgreen 2014.

# Chapter One

## Measuring the Universe of Regulation: Necessity and Procedure

### A. Introduction: Everything that can be Measured and How

To put the reader in the mood for our project, we start with three variants of measurement before explaining our approach in detail. Since ‘Measuring the World’ naturally calls to mind the bestselling novel by Daniel Kehlmann (2005), we begin with Alexander von Humboldt.

#### I. With Daniel Kehlmann in the Footsteps of Alexander von Humboldt

Alexander von Humboldt’s indefatigable peregrinations in the cause of the natural sciences, above all in South and Central America, have become rooted in the collective German, indeed European memory. Delving there could unearth the following cherished image:

Alexander von Humboldt was famous in all of Europe for an expedition to the tropics he had led twenty-five years earlier. He had been in New Spain, New Granada, New Barcelona, New Andalusia, and the United States; he had discovered the natural canal that connects the Orinoco and the Amazon; he had climbed the highest mountain in the known world; he had collected thousands of plants and hundreds of animals, some living, the majority dead; he had talked to parrots, disinterred corpses, measured every river, every mountain, and every lake in his path, had crawled into burrows and had tasted more berries and climbed more trees than anyone could begin to imagine (Kehlmann 2005, p. 19. Transl. Carol Brown Janeway).

Humboldt had the reputation of possessing an indomitable scientific curiosity, which seemed a little over the top to his travelling companion Bonpland; when Humboldt wanted to measure a hill encountered on their road to Madrid – before the expedition proper had begun – Bonpland inquired whether this was really necessary and whether they would not get to Madrid a lot quicker if they made straight there:

Humboldt thought. No, he said, he was sorry. A hill whose height remained unknown was an insult to the intelligence and made him uneasy. Without continually establishing one's own position, how could one move forward? A riddle, no matter how small, could not be left by the side of the road (Kehlmann, 2005, p 42. Transl. Carol Brown Janeway).

Thus much on the scientific exploration of the world exemplified by Humboldt's famous ascension of Chimborazo (see the stunning picture book by Böhme and Tesmar 2001).

Thus much on scientific curiosity, to which the author of this book also lays claim. But now the reader must accept a leap of several centuries to consider a way of measuring things that is practically omnipresent and which on closer examination has something imperialistic about it.

## II. Global Governance by Indicators or Measuring the World as a Problem of Power and Method

States are coming increasingly under observation and their performance is not only analysed and evaluated from every conceivable angle; the results of this institutionalized observation (see Schuppert 2010) are then recorded in "rankings." The indicators used and the evaluation results obtained with their aid are communicated worldwide; there is no escaping them even in the remotest corners of the globe. Although such classification does not hold direct sway over the world, its consequences can be considerable – see only the might of the rating agencies.

*Governance by Indicators* (2012) edited by Kevin A. Davis, Angelika Fisher, Benedict Kingsbury, and Sally Engle Merry offers a wealth of information and material on the subject – under an extremely pertinent subtitle: *Global Power through Quantification and Rankings*. This is exactly our present concern: the measurement of the world as a problem of power and method.

In the following overview Franz Nuschler (2009, p. 42 f.) gives us a good idea of who is involved and how in this "business of rating and ranking":

## Overview of International Index Constructions

Indices	Focus / Indicators	Methods	Source
Human Development Index (HDI)	Purchasing power per capita in PPP dollars Life expectancy at birth Literacy and school enrolment rates	Aggregate data from various sources	UNDP
Governance Matters Index	Rule of law Political stability and absence of violence Effectiveness of public management Accountability of government Corruption control Respect of human rights	Aggregate data from various sources Surveys of experts	World Bank
Polity IV Index	Democracy (party competition, elections, accountability of government) Semi-democracy / autocracy in the absence of democratic standards	Sub-indices, combined into an overall index	University of Maryland
Freedom in the World	Scale for civil rights: – Rule of law – Freedom of religion – Freedom of the press – Freedom of association Scale for political rights – Free and fair elections	Evaluation by experts, combined in an overall index with 7 levels of evaluation	Freedom-house, Washington D.C.
Political Terror Scala (PTS)	Rule of law Freedom from torture	Reports from Amnesty International and the State Department	University of North Carolina
Failed State Index (FSI)	Level of fragility on the basis of economic, political, and social data	Collection of country data	Fund for Peace
Corruption Perception Index (CPI)	Corruption in government and administration	Assessment by local experts	Transparency International
Bertelsmann Transformation Index (BTI)	1. Status index on the development of democracy and the market economy – divided 2. Management index on the evaluation of management performance by 17 criteria and 52 indicators	Country reports and second reports by local experts; comparison by regional experts; calculation and aggregation of means	Bertelsmann Foundation with the support of a scientific BTI board

The real problem with this “governance by indicators,” apart from the Western bias rightly criticized by Davis et al. (as compared, for instance, to the Mo Ibrahim Index of African Governance), is its weak spot: method. Nuscheler cautiously comments as follows:<sup>1</sup>

The methods used by such measurements and index constructions differ widely. They are mainly based on country reports by experts, who for their part examine and evaluate the data collected by international organizations in their specific areas of operation. It is then a methodological problem whose solution requires more than mastery of statistical tools to select the right indicators for constructing an index and ranking countries. How performance parameters are to be weighted must also be decided, such as economic growth, which the World Bank stresses in governance indicators; the status of freedom of the press and opinion, strongly weighted by *Freedom House* (Washington, D.C.); or the level of development of the market economy, emphasized in the *Bertelsmann Transformation Index* (BTI).

Apart from objective indicators and those that – depending on the quality of the data – can be quantitatively measured, there are many that are based on subjective perception and assessment. A prime example is the *Corruption Perception Index* (CPI), which draws on how the local business community appraises corrupt practices in government and administration, and which is used by many other indices. Even when such subjective assessments are cross-checked against multiple expert reports, as in the multi-stage BTI process, the allegedly ‘objectivized’ results of the various indices can differ considerably. It is therefore advisable to compare not only the data produced by country rankings but also the underlying indicators and data processing methods (Nuscheler 2009, 32 f. Transl. R.B.).

In using governance indicators, caution is advisable for two main reasons: first, they reduce complexity in a questionable manner while suggesting quantitatively grounded rationality for the evaluations made on the basis of them; second, the selection and weighting of such indicators is grounded explicitly or implicitly in a given political philosophy, which is thus propagated in Trojan guise.

As far as the trend towards simplification and the suggestion of rationality backed by data are concerned, we fully share the reservations of Kevin A. Davis et al.:

Simplification, or reductionism, is central to the appeal (and probably the impact) of indicators. They are often numerical representations of complex phenomena intended to render them more simple and comparable with other complex phenomena that have also been represented numerically. *Indicators are typically aimed at*

1 Highlighting in quotes is always by myself and only in exceptional cases by the author. G.F.S.

*policy makers and are intended to be convenient, easy to understand, and easy to use.* Yet, the transformation of particularistic knowledge into numerical representations that are readily comparable strips meaning and context from the phenomenon. In this numerical form, such knowledge carries a distinctive authority that shifts configurations and uses of power and counterpower. This transformation reflects, but also contributes to, changes in decisionmaking structures and processes.

Indicators also often *present the world in black and white*, with few ambiguous intermediate shades. They take flawed and incomplete data that may have been collected for other purposes, and merge them together to produce an apparently coherent and complete picture. Wendy Espeland and Mitchell Stevens identify this as a potential consequence of what March and Simon refer to as uncertainty absorption, which ‘takes place when inferences are drawn from a body of evidence, and the inferences instead of the evidence itself, are then communicated’ ... As Espeland and Stevens describe this process, ‘Raw’ information typically is collected and compiled by workers near the bottom of organizational hierarchies; but as it is manipulated, parsed, and moved upward, it is transformed so as to make it accessible and amenable for those near the top, who make the big decision. This ‘editing’ removes assumptions, discretion and ambiguity, a process that results in ‘uncertainty absorption’: information appears more robust than it actually is ... The premises behind the numbers disappear, with the consequence that decisions seem more obvious than they might otherwise have been (Davis et al. 2012, p. 76 f.).

Still more dubious in our view is the subcutaneous conveyance of certain political points of view immanent in the *standard-setting function* of governance indicators.

*Indicators set standards.* The standard against which performance is to be measured is often suggested by the name of the indicator – corruption, protection of human rights, respect for the rule of law, and so on. To the extent that an indicator is used to evaluate performance against one standard rather than another, the use of that indicator embodies a theoretical claim about the appropriate standards for evaluating actors’ conduct. Indicators often have embedded within them, or are placeholders for, a much further-reaching theory – which some might call an ideology – of what a good society is, or how governance should ideally be conducted to achieve the best possible approximation of a good society or a good policy. At a minimum they are produced as, or used as, *markers for larger policy ideas*. They may measure ‘success’ directly along this axis, or they may measure what, from the standpoint of the theory or policy idea, are pathologies or problems to be overcome. More frequently they address simply some measurable elements within a wider scenario envisaged by the theory or policy idea. *Often the theory or policy idea is not spelled out at all in the indicator but remains implicit* (Davis et al. 2012, p. 77).

We find this example of global governance by indicators extremely instructive: it shows that measuring cannot be reduced to a technical dimension but has a clear power component, an aspect we shall be coming back to.

### III. Measuring the World as an Applied Case of Governance By and Through Knowledge

With this third set of examples, we are – almost imperceptibly – approaching our topic of “*measuring the diversity of law*”; two examples will show how important, indeed indispensable it is for “governance of and through knowledge” to have not only a reliable cadastral system at one’s disposal but also a “*mental map of legal phenomena*” (Twining 2009, p. 117) that provides information about the law that is being applied.

#### 1. Knowledge and Early-Modern State Building: The Need for Knowledge about Country and People

A number of ingredients are needed to govern a country effectively (see Schuppert 1994). The most important (apart from symbolic investiture with crown and sceptre) are a constant flow of revenue to the state – the modern state as a fiscal state, a viable administration, and well-qualified administrative staff – the modern state as an administrative state. But another key governance resource is knowledge (see Schuppert 2008a): for this reason, the emerging early modern state is extremely eager to learn, as the contributors to *Das Wissen des Staates (The Knowledge of the State)*, eds. Peter Collin and Thomas Horstmann, (2004) demonstrate in many ways. The knowledge the state needs includes dependable, always available knowledge about the country and the people in it; after all, as Karin Gottschalk stresses in her informative article “Wissen über Land und Leute. Administrative Praktiken und Staatsbildungsprozesse im 18. Jahrhundert” (“Knowledge about Country and People. Administrative Practices and State Building Processes in the 18th Century”) this is indispensable governance knowledge for recruiting soldiers and collecting taxes efficiently:

The efforts of the early modern state to ‘inventory’ its territory were grounded firstly in the need for basic information on the population in connection with the establishment of standing armies (conscription). Similarly, the desire to collect regular taxes more effectively prompted the procurement of comprehensive and up-to-date information on the economic circumstance of subjects. The growing pretensions of the central state to power also encouraged the gathering of information and communication with subjects. In connection with tax collection and the claims to power of the authorities, the state initiated ‘major projects’ to generate and structure knowledge inspired not least by aspects of power legitimation (Gottschalk 2004, 150. Transl. R.B.).



But this indispensable governance knowledge also included knowing about the “living law” (Ehrlich 1989) practised in the sovereign territory of the state; on this subject, too, Karin Gottschalk has interesting things to report about Hesse-Kassel, for instance:

The example of Hesse-Kassel shows how the systematic documentation, storage, and provision of local information and administrative knowledge intensified in the first half of the eighteenth century. But civil servants had difficulties routinizing such procedures and subjects and local officials were reluctant to cooperate. Neither aspect was limited to this principality. Michaela Hohkamp, for instance, shows that for the Further Austrian bailiwick Triberg, the newly appointed bailiff placed very considerable value on the availability of official documentary knowledge. Confronted by subjects demanding the *retention of old customs of government* on which there was no or little written information, he was obliged to obtain exact knowledge about government matters. He had to choose between interrogating local government officials and sifting through old official records. The latter proved so arduous and time consuming that, in an effort to gain independence from local officials, the bailiff set out to make the records of his predecessor more accessible. He requested the government to assume most of the costs for establishing a records office on the grounds that this was more in the interests of the authorities rather than of the subjects. Whereupon the government paid for a archivist, who was sent to Triberg for thirty days to set up the office. ... Assured access to written knowledge was of great interest for the powers that be: *‘Written law made the authorities independent of cooperation – not always forthcoming – on the part of subjects*, and enabled the bailiff to establish regular administrative practices, hitherto constantly at risk with the frequent rotation of officials (Gottschalk 2004, pp. 163 f. Transl. R.B.).

## 2. *Scientific Colonialism: The Constitutive Link between Knowledge and Power for Colonial Governance*

Colonialism studies take it for granted that the gathering and utilisation of local knowledge were among the necessary functional conditions for colonial rule (Cohn 1996). This constitutive link – according to Sebastian Conrad, writing about the German and Japanese colonial regimes – has established the *concept of scientific colonialism* in the literature.

Characteristic of government in the colonial area was the close link between the practices of rule and geographical, legal, linguistic, and ethnological knowledge, ... which played a major role in the allocation of powers and responsibilities. In the case of German and Japanese colonialism – where the scholarly literature has adopted the concept of scientific colonialism – the close link between rule and knowledge was part and parcel of a modern colonial policy. The establishment of colonial knowledge served to guide the action of the colonial administration while setting

the boundaries between state power and ‘traditional’ authorities (Conrad 2007, pp. 134 f. Transl. R.B.).

Writing about the *types of knowledge relevant for governance* and the actors who collected and archived it, notably representatives of missionary ethnography (Bade 1982), Conrad has this to say:

The underlying knowledge was concerned with surveying the territory and recording its geography, taking ethnographic stock of the population, with medical and ‘racial’ classification, cultural patterns, and *legal customs*. Various actors were responsible for collecting the knowledge pertinent to the exercise of power. The roles of scholars, translators, and mediators could differ greatly – some were under way in a private capacity, most with government support, and some explicitly on behalf of the state. Apart from those who went to Africa to conduct field studies, there were also the anthropologists, doctors, and craniologists who remained in Germany and who participated in the work of ordering, classifying, and differentiating (Conrad 2007, p. 139. Transl. R.B.).

For a colonial empire like that of Germany, which – in contrast to the Japanese model – made do with very sparse personnel in the colonies, it was essential to come to an arrangement with *local governance actors* and to use their *governance capacity* for the purposes of German colonial rule. This *local governance competence* consisted above all in an authority based on knowledge and tradition, which also enabled it to operate as actor in a local *conflict culture* and settle disputes in accordance with local legal rules. For this reason, making sure about so-called “indigenous” or “native” law and delegating judicial powers to local dignitaries were among the most important pillars of colonial rule. Conrad:

This ... knowledge about native societies was important for a policy of limited delegation of governmental powers. One of the major areas of this knowledge-based policy of divide and rule was the *ascertainment of traditional legal customs*. From about the turn of the century, German jurists and legal ethnologists began to examine and record local customary law. The reasons behind this were first the self-appointed task of contributing to the ‘advance’ of legal customs and thus to fulfil the promises of the civilisational mission. At the same time, however, native law was the basis on which the *dual legal system* characteristic of German colonial practice was established. Colonial governance was hence marked by the cession of colonial legal powers in the administration of justice. Civil law cases involving native parties would be heard on behalf of the colonial government by chiefs (local power holders); and since the basis for the administration of justice was not written down, local ‘scholars’ (such as the so-called wali in East Africa) were called in as additional authorities ... (Conrad 2007, p. 141. Transl. R.B.).

But the local knowledge required for the exercise of *scientific colonialism* was not only geographical, legal, and administrative knowledge. What was also needed was profound *cultural knowledge*; in her fascinating book *The Secret War*, Eva Horn plausibly explains this state of affairs, taking the example of the literary classic *Kim* by Rudyard Kipling:

As Thomas Richards notes, Kipling's novel depicts in singular clarity a transformation of imperialism from the reliance on ethnocide, enslavement, or unfettered exploitation, that is, from the direct use of violence, to the skilled management of information – and of intelligence, for that matter. ... However, colonial intelligence as the accumulation of knowledge pertaining to the control of colonial territory is already encumbered by problems of communication and interpretation. Hence there is an urgent need for multilingual agents familiar with the many cultural codes, laws, and taboos of an extremely heterogeneous society such as India. In other words, the political and military reconnaissance of colonial space involves more than scouting and spying missions to explore the terrain and eavesdrop on the enemy; it also requires cultural fluency and social acumen. In short, it depends on 'local knowledge.' As the British had been forced to learn during the Indian uprising of 1857, they could not secure their rule if they disregarded local codes and customs. The uprising, known as the Indian Rebellion or Mutiny of 1857, was an armed insurrection of Bengali and Indian soldiers triggered by reports of cultural insensitivity triggered by reports of cultural insensitivity: rumors began to circulate that the cartridges of the newly introduced Enfield Rifled Musket had been greased with either lard or tallow, which was unacceptable to Muslim or Hindu soldiers, respectively. Throughout 1857 the revolt spread across central and northern India and ultimately put an end to the rule of the East India Company; from now on India was to be administered by the British government. (Eva Horn, 2013, p. 136. Transl. Geoffrey Winthrop-Young).

#### IV. Our Task of Measurement

Against the backdrop of these three examples of measuring, our own project is relatively easy to explain:

- What we want to avoid at all cost is to be suspected of *measurement imperialism*. It is not a matter of taking our own legal system as a yardstick or even – which we have always felt to be extremely foolish – to talk about exporting law under the motto “made in Germany” (Bundesministerium der Justiz 2011). Our concern is rather to explore the diversity of normative orders without attaching judgemental labels to them from the outset. Our project is hence analytic in nature, a

procedure we have explained in detail and on several occasions for applying the governance approach as an analytical tool (cf. Schuppert 2011a; 2011d). That is the first point to be made clear.

- Since we are concerned with the diversity of normative orders, this necessarily precludes limiting our investigation to state-made law. In the world of rules, state law doubtless plays a key role, but no more than that. We adopt the general jurisprudence approach pursued by William Twining (2009) and Brian Z. Tamanaha (2012), who, like us, see the world of law through a *wide-angle lens*; to elucidate our way of seeing things, we quote a passage from Tamanaha in which – as throughout his essay (2012) – he confronts Twining’s position with that of Scott Shapiro (2011), who by ‘law’ understands above all ‘state law’:

A general jurisprudence with genuinely global reach, Twining argues, must recognize the multiplicity of forms and manifestations of law that actually exist around the world today. Twining thus brings within his purview not just state law – heretofore the almost exclusive focus of analytical jurisprudents – but also global law, international law, transnational law, regional law, communal and inter-communal law, sub-state law, and non-state law. Going beyond the law of the US (which Shapiro addresses) and the UK, Twining raises the law of the EU, *lex mercatoria*, Gypsy law, the unofficial law in favela’s (urban slums), Islamic law, various forms of customary law, and much more (Tamanaha 2012, p. 10).

In fact, in examining the world of law we find it impossible to ignore, for example, tribal customary law – in Sub-Saharan Africa some eighty per cent of all disputes are heard before customary courts (see Kötter et al. 2015 for more detail on non-state justice institutions) – or to disregard religious law, which is becoming more and more important (see Schuppert forthcoming). This does not mean avoiding the question of “what counts as law”; in chapter five we shall be advancing proposals of our own on how to define what law is.

- Choosing a wide-angle lens to take in the broadest possible range of rules governing conduct necessarily implies an interdisciplinary approach, for which we are well prepared. The perspective we adopt is thus not a purely juristic one, for experience shows that such an approach almost automatically frightens off social scientists and almost severs communication between disciplines.

Werner Menski (2012) may well exaggerate a little, but is essentially right to accuse both jurists and social scientists of responsibility for the lack of communication between the disciplines; he exhorts jurists as follows:

Firstly, law as a discipline and activity often wants to be perceived as something separate from other human concepts and forms of business. Somehow, lawyers perceive themselves as a special caste and feel it would detract from the authority of law if it was polluted by social or religious matter. William Twining [...] has eloquently shown how law was put in a black box and tends to be segregated, ignoring that real life always contains what Santos [...] calls 'interlegality', links between different kinds of law. Lawyers, however, love to dismiss 'dirty words' like pluralism and diversity and then of course miss key messages about the ubiquitous nature of law [...] and fail to spot 'living law' right in front of them (Menski 2012, p. 77).

But Menski also admonishes social scientists:

Secondly, and probably more damaging, many social scientists are desperately trying to keep lawyers out of their allotments or cabbage patches. ... One has to wonder why. Do they simply not trust lawyers, who tend to be sharks? Or is there more to this than sharp tongues (or should I say teeth) and fear of professional domination? It does appear that the post-Enlightenment methodology of division of law and culture, and specifically of law and religion, still blinds scholar today, blocking a full view of the inherent connectedness of law and life (Menski 2012, p. 77).

We can leave open the 'question of guilt' Menski raises, but it does show what automatisms often shape relations between disciplines.

In our view, collaboration in exploring the world of rules is the task of all disciplines that, from whatever perspective, take an interest in the function and workings of law (in the broader sense) – and they are necessarily legion.

We naturally cannot even begin to cover this broad range and can only seek in our fashion to *build bridges between disciplines*. To this end, we turn again to the concept of *governance*, which has meanwhile been largely accepted in the scientific community as a *bridging concept* (see Schuppert 2005a; 2011d), particularly at the interface between jurisprudence and social science; the governance perspective will accordingly accompany us faithfully throughout the book.

There is broad consensus that governance always has to do with given governance collectives (Zürn 2008) and with the regulatory structures that shape these collectives (Mayntz 2005, Franzius 2006). This is only a

short step away from two sociological perspectives to which we have felt particularly committed in working on this book; first the group sociology perspective, which plays a major role in chapters two and five, and the legal sociology perspective, which is to be found throughout the book and which, by the nature of the issue – and this would have pleased Max Weber – moves us to advocate the development of a sociology of regulation; but we shall be coming back to this at a later stage.

- This brings us closer to another perspective we hold to be very important, and which we could call a *sociology of knowledge* perspective. It is concerned – as we well know from governance studies – with the *regulatory knowledge* indispensable for the design and change of *regulatory structures* (see Schuppert 2008c), but also with the *reflective knowledge* addressed by the Science Council in its report on the perspectives of jurisprudence in Germany (2012), whose importance the Council describes as follows:

The task of jurisprudence is to reflect on the specific quality of law as a central control medium of society alongside others such as the market, politics, morality, and religion. Since antiquity, respect for the law has been held a fundamental condition for a good and just order. This indicates that with the help of science, *reflective knowledge* constantly available to society is *handed down and discursively developed*. This also given the law a corrective function vis-à-vis the market, politics, morality, and religion. Jurisprudence participates in the discourse on the guiding principles of society, for instance in relation to justice, liberty, human dignity, and solidarity. It assumes this task not exclusively but in a specific manner that is shaped by the claim of law to validity and to the associated assertion of its generally binding force (Wissenschaftsrat 2012, p. 33. Transl. R.B.).

Let us linger for a moment over so-called *regulatory knowledge* and the interesting question of how it is distributed in state and society. Characteristic of the *knowledge society* is that an increasing number of actors dispose of an increasing fund of wide-ranging knowledge and – on this basis – can confront state plans and measures with their own knowledge: “The knowledge society is producing a fast growing number of well-informed actors” (Stehr 2009, p. 287. Transl. R.B.), and “since clearly defined solutions based on scientific knowledge are less and less possible and this is generally recognized, the number of individuals and groups who can mobilise scientific arguments for their purposes, i. e., for their different interests, is growing” (Stehr 2009, p. 284.

Transl. R.B.). On the other hand, the capacity of the state or other major social institutions to control let alone monopolize access to knowledge as a resource is declining: the more new forms of knowledge develop and the more diverse the modes of producing knowledge become, the more difficult it is for the state to steer, let alone effectively control the pluralisation and diffusion of knowledge (see Stehr 2003 on this control and regulation aspect). We must go a step farther and consider the dangers that can arise from the apparent increase in the state's dependence on supplies of non-state knowledge. Andreas Voßkuhle sees a particular danger in the neglect of the state's stock of knowledge:

Knowledge is power. This is all the more true for the state, whose power declines as its own stock of knowledge and experience shrinks. Although recourse to private expertise may cushion this development, it also accelerates the process because the need to maintain and optimize the internal organization of knowledge by the state is all too easily lost sight of. However, if state and private knowledge is to be productively coupled, the state must necessarily still have sufficient knowledge to contribute. Otherwise it loses every possibility to steer, control, and correct; only a well-informed state can assume effective responsibility as guarantor of the common good (Voßkuhle 2005, pp. 454 f. Transl. R.B.).

These considerations, too, suggest that a *state-centric perspective* is to be regarded with marked reservations; and this brings us to the next point, the key question of why the terrain of the law needs to be resurveyed. But first we turn to a final aspect relevant to the project.

The task of measuring the World of Rules would fall short if limited to describing and systematising developments that have come to an end. The 'surveyor' must also have a feeling for emerging developments and see himself as contributing to *jurisprudential innovation research* (see Hoffmann-Riem and Schneider 1998) and thus, as called for by the Wissenschaftsrat (German Science Council) (2012, p. 9), as playing "an active role in the making and formation of law"; to give a minor example, Helmut Philipp Auston discusses in a recent article the increasingly important role of megacities, especially as governance actors in global climate protection regimes (Aust 2013; see also Preuß 2013 on the role of megacities as political arenas). He asks whether we are "on our way to a law of the global city": if we understand urban metropolises as global players that play a responsible role in certain

governance regimes, this poses hitherto unanswered challenges for the legal order, in particular for international law – challenges that Aust describes as follows:

Also on the basis of a more open understanding of what constitutes an actor, ... the question arises of where the line is to be drawn between law and non-law in international relations. It would be asking too much of legal categories to automatically attribute legal relevance to all the normative statements and expectations of actors. The formation of categories in international law must take into account that not all action by the state and other public authorities is equally amenable to ‘legalization’ or judicialization. In international law, jurisprudence therefore has to develop categories for the phenomena described here that permit meaningful boundaries to be drawn between law and non-law. Sources of law theory and, in particular, its classical manifestation in Art 38 of the Statute of the International Court of Justice can provide no more than a pointer. In the light of the phenomena mentioned, a first criterion for drawing a useful dividing line could be the ‘imitation’ of legal action. If ‘new actors’ use a language that recalls traditional legally relevant forms of action, it could be assumed that such action is intended to achieve more than merely meeting politico-moral obligations. However, the presumed will of the actors involved can be only one factor. In particular a connection with institutions that are acknowledged to act through law such as the European Commission or the World Bank can provide further indications of legal relevance. After all, taking action by public means requires justification: as soon as questions of distributive justice arise, jurisprudence is called upon to address the cooperation phenomena described. This would, of course, be all the more to the point if the rights of individuals were to be affected by such cross-border cooperation between cities and communities (Aust 2013, p. 702. Transl. R.B.).

After this brief excursus on a jurisprudence open to development, we now turn to the question of the need to measure the world of law anew.

## B. The Need to Measure the World of Law Anew

The need to remeasure the world of law is not only asserted with growing frequency; it has become something of a commonplace among those who busy themselves with the law as a realm of communication. The fragility of the *law = state* equation is noted mostly in the light of the development of regulatory systems at the global level. However, at the national level and below there are also regulatory arrangements not set up by the state, and which we shall be considering in depth in the course of this book. We shall start, however, with a look at how the law = state equation is called into question by phenomena of supranational rule-making.



In an often quoted report, the Wissenschaftsrat has proved a particularly committed advocate of re-conceptualizing jurisprudence: “The internationalisation and Europeanization of law, above all by *opening up closed national legal systems*, calls for ... a method that reflects on and critical integrates international perspectives” (Wissenschaftsrat 2012, 29. Transl. R.B.). This points to the arch-enemy of an internationally connective jurisprudence: the fixation on the closed block of national law, which – as Patrick Glenn puts it (2013) – functions as an “element of closure” obstructing the overdue development of the nation-state into the “cosmopolitan state.” We need to take another look at the *law = state* or, as the case may be, *state = law* equation.

### I. Law = State / State = Law: A Seemingly Stable Marriage Heading for Divorce

Two examples show the formative power of this dominant *law = state* equation. We take the first from the 1971 article by Peter Baduras on “Law, Theory of Law, Philosophy of Law” in the Fischer Dictionary of Law (Fischer-Lexikon ‘Recht’). We start, however, with the introduction to the dictionary, which begins thus:

The legal system is the backbone of our society. Morality, custom, and convention having lost their efficacy to a lack of binding commitment in the private sphere, the mechanisms of social control and supervision, which keep our highly industrialised civilization running, all take the form of law. The paragraphs that, according to an old cliché of cultural critique, symbolize antiquated remoteness from reality in fact guide the individual and the whole in the form of binding rules of conduct more effectively than ever. This will continue to be so in the future. All the new findings of the empirical social sciences and all political demands to adapt our society to rapidly changing living conditions can effectively shape society only if transposed into law (Badura 1971, p. 7. Transl. R.B.).

These *pretensions of the state to control and shape society by means of law* are also what Peter Badura is addressing when he describes the *functional logic of the modern state* as follows:

The means of power by which the absolutist principality managed to stabilize its internal sovereignty and which constitute the particularity of its mode of government are a civil service designed as a tool of the princely will staffed by personnel (‘civil servants’) recruited and promoted on the basis of merit and not on that of class membership, and a standing army based not on feudal allegiance but on

scription and recruitment ('miles perpetuus'). But the decisive social technique by which feudal society is transformed into an absolutist society of subjects (Untertanengesellschaft) is the *power of the state to make law*. Legislative power, the comprehensive *competence of the state to make new law*, enables it to influence all aspects of society and societal processes according to its will. The state and its law-making competence established through superior force are the essential tools by which post-medieval society managed to attain its new goals and impose its interests, preparing the way for bourgeois society. Legitimated by sovereignty and the law-making monopoly derived therefrom, the state as the political organization of modern society replaced the medieval double rule of temporal and spiritual power; the legal order of the state replaced the medieval double order of temporal and spiritual law, and the anarchy of particular and regional sources of law was gradually overcome. Bourgeois economic society established a uniformly valid, reliable legal order guaranteed by the state (Badura 1971, p. 120. Transl. R.B.).

Even forty years later, nothing has changed in this basic stance and the validity of the law = state formula is unswervingly maintained. In his address to the public session of the Göttingen Academy of Sciences on the 29 May 2008 entitled "Where does law come from?" Christian Starck had this to say under the heading "Are Law and the State Identical?":

When the law is seen as embodied in positive law [Gesetzen], the answer seems easy. Such law is made by the state as legislator. Law is thus given by the state. This also applies for local government bye-laws, which in one way or another are authorized by the state. If in asking about the origin of law we turn to the concept of positive law, i. e., the search for the law in statutory law, this is an expression of the modern statutorification of the law. ...

Hans Kelsen overstated this modern view of law by more or less equating law with the state. The state not only makes law but conceptually is itself a system of legal norms. If the state is a system of norms, it can only be an order of positive law, because the parallel validity of any other would have to be excluded" (Starck 2009, p. 87 f. Transl. R.B.).

Despite the existence of European law and international law, this changes nothing:

Consideration of European law and international law has not changed the answer to the question of where law comes from. Law comes from the state either directly through state lawmaking or through treaties concluded with other states, or indirectly through the top-down empowerment of entities within the state or bottom-up empowerment of supranational entities. The connection between the law and the state is – as we have seen – statist in the sense that the state is the creator of all law (Starck 2009, p. 88. Transl. R.B.).

Even the fact that private persons could, within the framework of the private autonomy conceded to them, make law by contractual means only margin-

ally limits the dominance of law made by the state, since – as Starck himself puts it in footnote 12 – such contracts are “statutorily tamed” under the state’s responsibility as guarantor of the entire legal system.

We leave it to Thomas Duve to portray the *state-centricity of legal thought* – which finds expression even in the design of legal training – from the “long” nineteenth century to the present day; the point of departure is a process that can be described as the *statization of the legal system*:

‘The law’ was equated with ‘state law’; jurisprudence was accordingly concerned with the state and its law: positive law made by the institutions of the nation-state. The same is true of the administration of justice: a state monopoly in and the progressive ‘statization’ of the *administration of justice* was sought, whether on the federal or centralist principle. ... It is this national tradition and the disciplinary self-conception based upon it that have shaped jurisprudence to this day – in Germany itself, in many parts of Europe, and to a lesser extent in other parts of the world, too, which have adopted this model. The codifications of the nineteenth and early twentieth centuries have remained the most visible expression of what some observers have called ‘*juridical absolutism*’, a notion of law and jurisprudence closely associated with the nation-state – despite certain trends towards ‘decodification’ of the cherished monuments to these efforts to nationalize and centralize law and justice (Duve 2013b, p. 4. Transl. R.B.).

Precisely because of this far-reaching agreement among legal scientists, we find it interesting to place the formula

$$law = state$$

under renewed scrutiny and to examine more closely the two constitutive elements ‘*law*’ and ‘*state*’ – in the expectation that each will display a marked dynamic of its own, increasingly reducing the *law = state* equation as a *static world formula* to absurdity. We now consider this idea in greater detail.

## II. *Law = State*: A Formula with Two Extremely Dynamic Constitutive Elements

When discussing the state nowadays, ‘*changes in statehood*’ is a topic sure to crop up; we have ourselves participated in this discourse on change with commitment and pleasure and cannot resist quoting at least the first three sentences of our contribution:

There is now almost no escaping talk about change in statehood, not even by the admittedly somewhat old-fashioned method of emigrating to far-flung regions of

the world. Hardly disembarked, the emigrant is – as the May 2007 number of ‘Aus Politik und Zeitgeschichte’ notes – confronted by “new forms of statehood” and/or so-called spaces of limited statehood that pose particular governance problems. Wherever one looks, the ‘adaptability of the state’ is taken for granted; the scenarios drafted by the numerous writers on change range from taking leave of the state to attempting its ‘re-enthronement’ (Schuppert 2008c, p. 325. Transl. R.B.).

We shall not go into this semantics at this point; the interested reader is referred to Philipp Genschel and Bernhard Zangl (2008) “Metamorphosen des Staates – Vom Herrschaftsmonopolisten zum Herrschaftsmanager” (Metamorphoses of the State – From Power Monopolist to Power Manager) and to the article by Arther Benz in Voßkuhle et al. 2013, *Verabschiedung und Wiederentdeckung des Staates im Spannungsfeld der Disziplinen* (Taking Leave of and Rediscovering the State from Discipline to Discipline).

Whenever law is spoken or written about, the *endogenous dynamics of legal systems* are almost certain to be stressed: we turn once again to our favourite witness, the Wissenschaftsrat, which in the report mentioned above on the “Perspectives for Jurisprudence in Germany” convincingly argues that:

It is the task of jurisprudence to investigate the prerequisites, validity conditions, and effect of this key societal control medium [law] under the changing conditions of modern societalization. The law is always confronted not only by external change but also by that constantly generated by the legal system itself. It is therefore characterized by both external and internal *dynamics*. At the present time, internationalization and Europeanization are changing law. European law pervades and (partially) changes national law. Meanwhile not only national constitutional, administrative, and economic law is affected but also such fields as the law of obligations, family law, the law of succession, and criminal law. The Europeanization of law and the rulings of the European courts that apply it have given rise to a new *dynamic*, which in unprecedented fashion challenges existing norm hierarchies and raises questions about the making and application of law in all areas. This meeting of sovereign state powers and international legal circles and non-state systems of norms also leads to the pluralization of legal orders. The legal space still shaped by the state is being changed by the private organizations assuming regulatory tasks (the rules and regulations of associations such as the German Standards Institute DIN, the TÜV safety standards authorities, the German Football Association DFB, or the terms and conditions of so-called social networks on the Internet) and by existing and new, non-state ordering systems with strong binding force (for instance religious communities) (Wissenschaftsrat 2012, p. 26 f. Transl. R.B.).

If this is the case, then – as Wolfgang Hoffman-Riem recently put it (2013) – not only are “*far-reaching alterations to the house of the law*” needed: the law must be acknowledged to be a *permanent construction site*. If the state and the law are continuously changing, only a processual perspective on the two

components of the law = state equation is appropriate. As far as the state is concerned, we have indeed taken a step in this direction, suggesting that in theory of the state terms we should speak of the “*state as process*” (Schuppert 2010). We can now take a consequent second step and propose treating the “*law as process*.” If we view the state and the law as processes, it is soon evident that the two are informed by the same dynamics.

For one thing, there is a striking correspondence between the examples offered: the same key concepts are to be found with respect to the state and with regard to law, namely Europeanization, transnationalization, privatization, informalization, etc. This is hardly surprising when we consider that modern statehood is a statehood shaped by law, in which – as the introduction to the law dictionary remarks – policy can gain the power to shape society only by being *transposed into legal norms*. To this extent, changes affecting the state and those affecting law necessarily go hand in hand.

But closer inspection soon reveals that the key concepts mentioned can mean quite different things for the state and for the law. The privatization of governmental functions – for instance in the field of rail transport and the postal service – is not the same as privatizing the law; and transnationalizing state activities – for example in environmental policy – is not the same as developing transnational law; the informalization of state control – for instance in information and persuasion programmes – is also different from the informalization of law in the sense of expanding classical legal sources theory. On closer inspection, all three examples show processes of the *gradual destatization of law* or – as Frank Schorkopf has recently put it (2014) – the *dejuridification of law* [*Entrechtlichung des Rechts*], and thus the drifting apart of the two component elements of the world formula law = state. We see this as the really interesting observation, which gives us occasion to embark on a somewhat longer excursus on the coupling and decoupling of state and law.

## C. The Coupling and Decoupling of State and Law as Manifestations of Change in Statehood

### I. Statization and Destatization of Law?

Change in statehood can be described – as Philipp Genschel and Bernhard Zangl have done – as a process of the statization and destatization of power. Writing about the “metamorphoses of the state,” they posit a swing of the pendulum from the statization of power – which they rightly understand to include not only instrumental statization through the monopolization of decision-making power by the state but also legitimatory statization, i. e., the appropriation of resources to legitimate state power – back towards the destatization of political power, beginning in the second half of the twentieth century and gaining momentum since the 1970s: “The progressive statization of power ... has been overlaid at the latest since the 1970s by the contrary development towards destatization. ... The monopoly of the state on power is eroding” (Genschel and Zangl 2008, p. 440. Translation R.B.).

If there is anything to this thesis, the swing of the pendulum from statization to destatization would also have affected one of the pillars of modern power – the law: it is not by chance that in the struggle for key monopolies, the early modern state also secured for itself the monopoly on making and enforcing the law. Hence, the *statization of the law* must presumably have been followed by the contrary process, the destatization of law, giving reason to lay the long dominant *statist concept of law* to rest in the hallowed ground of legal history.

And there are indeed weighty voices that have diagnosed such destatization – consequent upon two characteristic processes of modern statehood: *globalization* and the *growth in the importance of private actors*, notably in *law production* (see the contribution in Schuppert 2006 on the increasing importance of non-state actors). Under the heading “The Destatization of Law and New Actors” (“Entstaatlichung des Rechts und neue Akteure”) in a programmatic article on the “Legal Order in a Global World” (“Rechtliche Ordnung in einer globalen Welt”), Ulrich Sieber remarks that:

The changes we have described in normative control systems have already shown that the ‘*destatization*’ of law is taking place primarily at two levels: in the field of classical sovereign regulation in external relations between nation-states, regional or global arrangements develop owing to political control by international and supra-national institutions. This ‘*de-nation-statization*’ [‘*Entnationalstaatlichung*’] in regula-

tory arrangements under public law and in the public interest are supplemented in both the *internal and external relations of nation-states by an increase in law-making by private actors*, which create transnational arrangements in many fragmented areas. However, unlike the norms of international institutions, this private regulation does not develop through the political processes of top-down political management but through bottom-up societal processes; they are based no longer on the sovereign law-making of the territorially organized national community but on membership in personal associations, on the contractual acceptance of standardized rules and negotiatory processes. This *blurs the classical dividing line between private law and public law and transitions between law and other normative orders* (Sieber 2010, p. 169. Transl. R.B.).

Although we have ourselves long advised looking beyond state law-making activities to take in the full range of the *world of rules*, and are convinced of the need for a science of regulation in keeping with the times (we shall be coming back to this), our confidence in the destatization concept is hesitant, since it oversimplifies the proliferating *pluralization of norm producers* taking place before our eyes. We prefer to join Christoph Möllers in speaking of the *gradual decoupling of state and law* (Möllers 2001), and thus of a multi-stage process – varying from one area of law to another and from one subject matter to the next – which needs to be described *in scaling terms*. One such instance of *staging semantics* is to be found in studies on *global governance*. One of the leading theoreticians in this field – Michael Zürn – proposes an often cited tripartite classification of governance beyond the nation-state (Zürn 1998):

- *governance by government*
- *governance with government* and
- *governance without government*.

The point of reference is thus the state and its government; from this starting point – according to Zürn and, following him, the majority of authors on the subject – the three modes of governance can plausibly be distinguished. A review of this example suggests the advisability of marking differences in the intensity of relations in the hitherto so closely woven web of relations between the state and the law by distinguishing between

- *law by the state*
- *law with the state*, and
- *law without the state*.

The first of these corresponds to the traditional state = law equation, whereas types two and three form constellations in which the state is no longer the

sole maker and enforcer of law. This procedure permits us to identify and examine *variations of decoupling between state and the law*; we shall be doing so in what follows, and propose four groups of cases.

## II. Four Variations of Decoupling State and Law

In this section we present four constellations of gradual decoupling of state and law. Whereas law-making by private organizations within a state framework order is a sub-case of the second type in the schema – law-making with the state – the following constellations are variants of the third type, rule-setting without the state.

To avoid an over-hasty answer to the qualifying question “law or not law?” we shall be generally speaking of “regulatory structures” when we are not concerned solely with ordering structures established by the state (see Schuppert 2005b). Given the hotchpotch of state and non-state rule-setters, such a generic term is indispensable as the point of departure for our investigation. To make sure of what is meant, we turn briefly to Hans-Heinrich Trute, Doris Kühlers and Arne Pilniok for help in defining the term:

The term regulatory structures refers not only, for example, to the systematic link between different sets of rules but also to the institutional arrangement concretised in relation to specific tasks by which the collaboration of different actors is coordinated. This recognizes any intrinsic logic pursued by the actors involved, which, although shaped by the institutional arrangement, does not determine the action taken. It should thus also be stressed that *actors can be subject not only to legal requirements but also to other social coordination mechanisms* that influence their action. Whether these mechanisms are normatively relevant is another matter, which has to be settled in the concrete, task-related context. Addressing regulatory structures thus brings a *shift in perspective*, supplementing the traditional focus of administrative jurisprudence on the single action *at the meso-level*, ... (Trute et al. 2008, p. 177. Transl. R.B.).

### 1. Regulatory Structures in the Shadow of the State: State Law as a Framework Legal Order

The first example of not purely state regulatory structures is a prime example of the *role of the state as frame-setter*, whereas the second example is concerned with the *enforcement dimension of law*.



a) *Regulated Self-Regulation: The Example of Collective Bargaining Autonomy*

Norm production by industrial coalitions – the system of collective bargaining autonomy – is generally considered a perfect example of regulated self-regulation (see the articles in: Berg et al. 2001) and thus of a governance regime in which the state legal order – be it in the form of state legislation or of rulings by the Federal Labour Court – *operates as a framework order*. Since we can assume that the institution of collective bargaining is known, we can limit ourselves at this point to lending an ear to the words of Gerd Bender at a workshop on the 2 February 2013 at the Max Planck Institute for European Legal History in Frankfurt, who rightly describes the functional logic of the “governance regime of collective bargaining” as follows:

It is negotiating systems as such that in the course of history have increasingly taken centre stage in good governance – ‘learning social systems’ which have to be ‘nurtured’ and ‘controlled.’ Regulated self-regulation or, to put it more generally, ‘more complex recombinations of autonomous self-organization and societally binding contextual guidelines’: this is the only way, according to Willke and all the other Third Way authors, to keep the big societal risk reasonably under control – the risk of society dissolving into free-floating functional systems. In its search for a viable control mechanism, regulation theory put its hopes in the *link between non-state norm production and state procedural law* as a mighty *deus ex machina*, particularly since, as in the case of collective bargaining autonomy, control in the form of state labour law could be combined at a second level with neo-corporatist negotiation mechanisms. What is called for here is not the prescriptive state with its substantive employment protection legislation but the indirect, *procedural regulation of the collective bargaining system*. In Teubner’s words, this is a legal order that ‘influences the internal organization of collective bargaining associations, makes their legal recognition dependent on certain structural prerequisites, draws up procedural norms for the negotiation system and for conducting disputes about expanding or restricting the powers of collective actors ...’ From this point of view, collective bargaining autonomy provides ‘the historical paradigm’ against which similar developments in other fields can be measured. *The freedom of collective bargaining therefore appears to be a crucial component in the modernisation of legal structures*, which in the complex course of the twentieth century links the legal system with the idea of control and that of the expanded state (Bender 2013. Transl. R.B.).

From this point of view, the framework-like containment of norm production by the parties to collective agreements is indeed a perfect example for the intelligent coupling of societal self-regulation and state framework setting.

b) *The Interlocking of Different Jurisdictional Communities and Jurisdictional Cultures: The Example of African Non-State Justice Institutions*

In our sub-project ‘On the Role of Law and the Rule of Law in Spaces of Limited Statehood’ in the Special Research Unit 700 devoted to Governance in Spaces of Limited Statehood, we also addressed the problem of the relationship between *non-state justice institutions* (NSJIs) and state law, because in spaces of limited statehood the state regularly has no monopoly on law-making and law enforcement, resulting in a plurality of legal norms and the associated enforcement regimes (see Kötter und Schuppert 2009). This raises the question of the relation between the various orders, above all of *the coupling of non-state traditional and/or religious systems of norms and the state legal system*. Important normative bridges are rules on the recognition of non-state systems of norms and their enforcement institutions in the state legal order (Kötter 2012).

In countries like South Africa and Ethiopia, where state courts function well only to a limited degree, we find very different but *complex arrangements by which local and mostly non-state decision-making centres are integrated in the state order*. These arrangements contain a wide variety of provisions:

- (1) On the jurisdiction of NSJIs
- (2) On the procedures they are required to follow and on substantive decision-making criteria such as basic rights under constitutional law
- (3) On the relationship between non-state institutions and state courts and their integration into the state judicial system, for instance by providing for appeal to state courts.

The validity and enforceability of legal regulation through the relationship between NSJIs and the state legal order depend in turn very much on the general effectiveness of state law in the given fields. To the extent that state law is generally ignored and/or complied with, and is thus not a component part of the non-state legal discourse (Teubner 1991/92), it cannot be expected that, for example, the judges of a customary or sharia court will respect corresponding guidelines for their procedures or rulings. Another effect manifests itself: nowadays the legitimacy of traditional authorities in their communities is based, sometimes quite considerably, on the circumstance that state law recognises them and vests special powers – and the associated political power – in them (Weeks 2011). NSTIs are thus not necessarily powerful only where state law cannot impose itself. They can also be pro-

moted and legitimated by state law. In our typology they can therefore be classified under rule enforcement without the state as well as under rule enforcement with the state.

## 2. Rule-Making In Lieu Of The State: Filling the Regulatory Gap

To illustrate this interesting case of decoupling between law and the state, we have chosen the example of standard terms of contract:

Not only technical dimensions can be standardized such as paper formats and the size of screws – a pioneering standardization story lovingly recounted by Miloš Vec (Vec 2006): *terms of contract can also be standardized.*

In the business of standardizing contracts – as told by Tilmann Röder in his compendious study of the trigger function of the San Francisco Earthquake (Röder 2006), a severe blow for the insurance industry – two main sectors played a groundbreaking role, namely insurance and transport. Not only to maximize profits but also to optimize risk distribution and retain control over policies, British insurance companies concluded all individual contracts *on the basis of identical terms*; the transport sector followed suit.

Röder identifies two main reasons for the rapid spread of standard contract terms: the *need for standardization in sectors strongly integrated in the global economy*, and the *lack of legislative regulation*, which produced a regulatory gap economic actors had to fill:

Special standard contracts, standard clauses, or contract forms for international business activities developed for a number of reasons. Basically, interest in standardizing the basis for contracts grew *in proportion to the integration of the sector concerned in the world economy*. As at the national level, businesses sought to obtain international standardization of their contractual basis when state regulation was lacking or considered unsuitable or obsolete. ...

The less states regulated the law of individual sectors, the more strongly non-state regulation of business and legal transactions spread. Thus the shipping agreements fob and cif, easy to handle telegraphically, governed international shipping. For more comprehensive agreements, overseas traders used their standard form contracts. They were used particularly widely in trade with staple commodities such as cereals, fodder, rubber, coffee, and sugar. Warehousing at the transshipment centres of world trade also operated on the firm basis of internationally recognized endorsable warehouse receipts. Marine and inland shipping used standard form contracts and bills of lading, the standardization of which was pursued by their sectoral organizations and the major shipping companies. These examples cover

some of the most important standardization phenomena at the level of international business transactions (Röder 2006, p. 321 f. Transl. R.B.).

Perusal of the functions of standardization for contract terms identified by Röder, leaves no doubt that standardization is rule-setting:

- *the power function* (asymmetrically distributed influence on the content of contract terms)
- *the communication and compatibility function*
- *the legal security function*, and
- *the gap-filling and further development function*,

Röder notes:

It was novel in many regards. Thus the decision on the content of the contract was kept separate from the conclusion of concrete provisions. Standard clauses and contracts were drafted in advance without reference to concrete transactions as the uniform legal basis for large numbers of future contracts. *Their formation hence recalls legislative processes rather than contractual practices in industry.* ... Standardized contractual elements perform essentially different functions from those of individual agreements between two contracting parties. *Their purposes are in-house rationalization, the exercise of economic power, the systematic displacement of state regulation; and they provided room for permanently updating law.* Only on the basis of standard form contracts could the more and more complex cooperation, investment, and exchange relations be handled that developed in doing business (Röder 2006, p. 319 f. Translation R.B.).

Standard clauses and contracts steer the behaviour of market players, who are guided by them and rely on them; what is agreed under them is regarded as the *authoritative regulatory regime*, which substitutes for, further develops, or even circumvents existing statutory law. It is therefore *rule-making* and a *novel structure of norm formation*.

### 3. Regulatory Structures beyond the State: Globalized Ordering Structures and their Regulatory Regimes

The processes referred to as *destatization* (*Entstaatlichung*; see Allmendinger 2003) or societal and political *denationalization* (*Denationalisierung*; see Beishheim et al. 1999) do not – how could it be otherwise? – spare the ordering factor law, as we can see in transnational governance structures: the national lawmakers of the territorial states that continue to structure the order of the world come up against the limits of their regulatory capabilities, leaving

certain areas legally unregulated; a phenomenon that we have called the regulatory gap.

Although these areas beyond national statehood may be ‘lawless’ they are not ‘orderless’: the now current terms ‘transnational governance’ (Djelic and Sahlin-Andersson 2006) and ‘global governance’ (compact summary in Zürn 2005) rightly call attention to the fact that, in these transnational areas beyond national statehood, ordering structures – and that automatically also means regulatory structures – have developed that cannot be adequately measured against the yardstick of a state-centric concept of law. In what follows we shall be looking at three areas that are globalized ‘by their very nature,’ so to speak, to examine the particularities and commonalities of the regulatory structures to be found there. The first is the Internet.

a) *www – Regulatory Structures of a Deterritorialized Entity*

The Internet is a goldmine for normative and governance theory; to take a closer look at its nature from the regulation studies perspective, we turn to one of the best authorities on regulatory problems in public communication, Wolfgang Hoffmann-Riem:

Since the operation of the Internet and its social networks depends on rules even where sovereign regulation does not apply, the Internet provides a very instructive example for the pluralization of rules and law and for the *co-existence of law and non-law*. In their practical validity, ‘non-law’ rules also form part of the regulatory structures essential to the Internet and ‘communicate’ with the other part, sovereign law.

The Internet, as well as Web 2.0 social networks, operate largely (but not solely) within the framework of rules made solely by private institutions. There are also many examples of private *soft law*. This does largely without state engagement, but is to some extent modelled on state law and sometimes depends on the state for support in enforcement. Some rules of this sort – for instance the ICANN rules for domain name allocation – have been subsumed under the terms *lex informatica* or *lex digitalis*. *Whether such and other non-sovereign rules are to have validity ‘as law’ is a matter for legal theory or definitional convention*. Since such rules do not come into being in an unlegislated area, to classify them as ‘non-law’ should not be misunderstood as overlooking their significance in the framework of the legal order. Moreover, it is increasingly recognized that state law is also indispensable in the field of the Internet, so that a *relationship of mutual influence* can and has developed between state and non-state norms (Hoffmann-Riem 2012, 531 f. Transl. R.B.).

These interesting findings show that the gradual decoupling between state and law also raises questions for legal theory, which we shall be looking at in detail in chapter four.

*b) IOC – Regulatory Structures in Internationalized Sport*

Sport cries out for internationality. We want to know not only who is the best in Germany but who can say that of themselves in Europe – or better still – in the world. There are therefore incessant international competitions, crowned by the Olympic Games – with or without wrestling.

This being so, sport is organized internationally, and – as Nils Ipsen explains – in the form of a hierarchically structured pyramid:

The associational system can best be described as a *strictly hierarchical pyramid*. The International Olympic Committee (IOC) stands at the apex of the pyramid and holds the exclusive rights to the Olympic Games (Rule 7 of the Olympic Charter) – a right that was never seriously challenged. As a result the IOC holds a monopoly at the highest level of competitive sports.

Within the Olympic movement, the *one-association principle* applies. This means that there can be only one top international organization for each kind of sport and only one National Olympic Committee (NOC) for each nation (Rule 29 of the Olympic Charter). This principle also applies at lower levels; the top international organization also recognizes only one national association. This gives rise to a hierarchical pyramid within competitive sport with the IOC at its apex, the international sports associations below it, followed by national organizations, then any regional sports associations, and finally sports clubs, and at the bottom the individual athlete.

This *pyramidal structure* enables the same rules – set by the umbrella organizations – to be applied internationally to achieve the essential comparability of performance. According to Rule 23 of the Olympic Charter, any sports association that contravenes the Olympic principles or the World Anti-Doping Agency's Doping Code (and thus fails to recognize them) runs the risk of exclusion from the Olympic Games. The respective rules of competition thus apply universally. (Ipsen 2009, p. 131 f. Transl. R.B. with reference to Gunnar Folke Schuppert, "Law Without a State? A 'New Interplay' Between State and Nonstate Actors in Governance by Rule Making." In Thomas Risse, ed. *Governance Without a State. Policies and Politics in Areas of Limited Statehood*, Columbia University Press 2011).

At the national level – for instance in Germany – there is controversy about whether the legally binding effect for each individual athlete is to be construed as falling under *the law of contract or under the law relating to corporate bodies* (see Adolphsen 2012), and whether the de facto monopoly of the associations arising from the one-association principle does not impose a

duty of protection and control on the state (see Vieweg 1990). For their part, the international sports associations clearly do not care less. Klaus Vieweg:

International sports associations naturally do not determine what legal status their rules, sanctions, and other decisions will have in a particular state. This is not surprising, for most such associations *seal themselves off from the law of the state*, largely ignoring its very existence. *They are satisfied with their de facto autonomy in setting and applying rules*, which are imposed not only on their national member associations but also on clubs, athletes, and officials, as well as on external persons. From their point of view, setting and applying norms amounts to making and enforcing law (Vieweg 1990, p. 122. Transl. R.B.).

c) *ISO – Global Standards for Globalized Markets*

Like the regulatory structures of the Internet, standards (see Brunsson and Jacobsson 2002) are a species of rule making extremely interesting from a legal point of view; at any rate, there is not lack of literature on the subject. Oliver Lepsius, an author well versed in matters of method, for example, sees them in *felt proximity to law*:

Standard setting is generally the outcome of a *purposive, organized and procedurally structured norm-setting process*. The function of standards is instrumental normativization limited with a defined purpose to a given subject matter. It is precisely these *formal qualities in standard-setting* that are probably responsible for the felt proximity to law (Lepsius 2007, 347 f. Transl. R.B.).

According to Lepsius with reference to Hans-Christian Röhl (2007), standards are therefore entities “of *graduated binding force with de facto binding effect*.”

Harm Schepel (2005) argues in similar vein in his copious book on product standards and their role in the integration of markets. Schepel, too, stresses that the setting of international standards has much in common with “normal law production”:

- Standards have a *clearly identifiable author (standard setting organization)*
- They are *produced* in an organized and procedurally *structured process*
- *Standard setters* generally have *regulatory authority* recognized by the circles involved, based above all on the *expertise* and *representativeness* of the standard-setting body
- Standards themselves are *published* in an appropriate manner and are publicly accessible to all and sundry, and
- They are *constantly monitored* and adapted to changing circumstances.

These characteristics can also be formulated as *normative demands* made of rule-making through standardisation (see Schuppert 2012); and this is done in practice, in the form of explicit rules for standard setting, so-called ‘standardization standards,’ which are laid down by all major standard-setters such as the International Standardization Organization (ISO) or the Deutsches Institut für Normung (DIN – German Institute for Standardization) (see Schuppert 2011).

Since standard setting is thus norm setting in a procedurally structured process, it is no surprise when Schepel notes that “*standardization looks a lot like lawmaking*” (Schepel 2005).

These insights, too, point to the questions that the gradual decoupling between state and law poses for *legal theory*, which we shall be looking into in chapter four.

#### 4. “Law” Without the State: The Example of the Lex Mercatoria

The *lex mercatoria* is regarded by many as the prime example of *non-state transnational law*. One of the leading proponents of this view is Graf-Peter Callies, who has presented this – as he puts it – “*post-statist approach: state versus self-made law*” (Callies 2006) on a number of occasions. He suggests defining transnational law as follows:

Transnational law is the third category of autonomous legal system beyond the traditional categories of state, national and international law. *Transnational law is made and developed through the lawmaking forces of a global civil society*: (1) it is based on (a) general legal principles, and (b) their condensation and confirmation in civil society practice, (2) its application, interpretation, and development is the task of – at least primarily – *private providers of alternative arbitration mechanisms*, and (3) its coercive nature is based on the organization and implementation of socio-economic sanctions under law. Finally, (4) transnational law is codified – if at all – in the form of catalogues of general principles and rules, standardized pro forma contracts and codes of conduct drawn up by *private standardization institutions* (Callies 2004, p. 244. Transl. R.B.).

The main applied case of such *civil society law production* is, he claims, the “new” (in contrast to its medieval predecessor) *lex mercatoria* (NLM) as manifested, for example, in the “UNIDROIT Principles of International Commercial Contracts,” the “Principles of European Contract Law” of the so-called Lando-Kommission and the so-called “CENTRAL List” (reproduced in Ipsen 2009, p. 261 f.) of the “Center for Transnational Law.”



Whether there really is such a new *lex mercatoria*, whose content consists essentially of general principles and general clauses inherent in state-made law (this is the Ipsen's (2009) main point of criticism) is highly disputed – see the brilliant and entertaining article by Karsten Schmidt (2007). This is not the place to resolve this controversy, but we cannot deny our scepticism. Be that as it may, we are interested in another point Karsten Schmidt makes.

He does not deny that there is such a thing as codification work by various non-state institutions to give shape to a globalized commercial law, applied and made principally by private arbitration tribunals; but he does diagnose that its *normative quality is lower than that of state-made law*:

The importance of the *lex mercatoria* alongside state-made law is decided by the 'normative quality' of the *lex mercatoria*. This is not meant in the sense of 'normative qualification,' for the *lex mercatoria* can generate legal norms. What is meant is 'normative quality' in the sense of competition in quality between sophisticated state regulatory regimes and homespun law. This is where the *deficits of the lex mercatoria* – in particular its incomplete, also substantively fragmentary nature – make themselves felt. The *lex mercatoria* is a basis for legal decisions almost only in business, but here it can come to bear by virtue of material reference or as mere commercial usage. For the rest, a contract referring to the *lex mercatoria* or otherwise subject to it has also to be situated in a comprehensive legal order,

- be it comprehensive global common law,
- or national law to be determined under international private law (Schmidt 2007, p. 175. Transl. R.B.).

This unideological position allows the discussion of principle on *lex mercatoria* to sail in calmer waters; we can live with it. Nor do we fail to acknowledge that the development of transnational norms in commercial law is an ambitious scientific project (see Jansen 2010; Jansen and Michaels 2008), but we cannot see it as a *sui generis* legal regime established purely by civil society.

In a mini-excuris at this point, and with the focus on international economic law – much more concrete than the *lex mercatoria* – we shift our our perspective to speak *not of lower normative quality but of different normative structure*. In this field Christian Tietje has identified *two main structural characteristics of transnational legal processes* (Tietje 2002) that merit our attention.

- The first he calls the deterritorialization of law:

The exclusiveness of the territorial reference of law may have been valid from an historical point of view, but it no longer reflects reality in fields such as transnational economic law. ... It must be acknowledged that there is a *complex web of territorial and deterritorialized structures of law*. This is particularly the case for the law production process and the actors involved in it. The ... examples from international financial law show this clearly: there are numerous actors engaged in elaborating norms at the national, supranational, and international levels. However, these norms can gain binding force only if applied in existing and largely territorially grounded legal systems. The national legal system accordingly retains its importance but is no longer the centre of legal order. It is necessarily one element in the *network structures* mentioned, but not the starting point (Tietje 2002, p. 416. Transl. R.B.).

- Another noteworthy process identified by Tietje is the progressive blurring of the boundary between binding and non-binding norms:

A further structural characteristic of transnational economic law is that the distinction between the legally binding and the legally non-binding, hitherto self-evident in juridical thinking, can now scarcely be upheld. To this extent, transnational economic law is a ‘mix of non-binding, semi-binding, and binding programmes of tasks marked in practical application by a high degree of informality and intransparency’. ...

The blurring of boundaries between legally binding and non-binding control instruments is accompanied by recognition that the circle of those exercising control under transnational economic law has grown considerably. In national and international legal systems, this function is no longer incumbent solely on the state. Intermediary institutions and subjects of private law increasingly perform tasks affecting the whole of society (Tietje 2002, p. 417. Transl. R.B.).

## 5. Interim Appraisal

The four groups of cases reveal a veritable patchwork. Apart from “posited” state-made law, there are many types of non-law regulation “which look a lot like law” such as accounting standards and entire fields characterized by a mixture of binding and non-binding standards of conduct. The state is often or usually involved in some way or other, even in the *lex mercatoria*, where it is an indispensable partner in the enforcement of arbitral awards; its role is frequently only one of *care*, as the following overview presented by Klaus-Dieter Wolf shows (Wolf 2012, pp. 194 f.):

## Variants of state fostering of private self-regulation in the transnational arena

Role of the state	Forms of cooperation / influence	Conduct	Examples from the field of economic self-regulation
A) Passive	Omission of prevention/tolerance	Restraint, neutrality	'Responsible care' initiative by the chemical industry for compliance with environmental and labour law standards
B) Reactive			
+	Implicit recognition	Flanking support	Adoption by executive order of FSC standards for public procurement
++	Explicit recognition of private standard setting by juridification	Integration by inclusion in law	Wolfsberg Principles of the banking sector to combat money laundering Adoption of food safety standards of the originally private 'Codex Alimentarius' of the food industry in agreement with the FAO and WHO
+++	Prevention/invalidation of private standard setting to protect basic rights/the public good	Juridification through corrective intervention	EU legislation on carbon dioxide emissions of motor vehicles Kimberley Process
C) Proactive			
+	Initiation	Invitation	UN Global Compact
++	Control of private self-regulation through performance agreements	Benchmarking	Self-regulation of carbon emissions by the European Automobile Manufacturers' Association 'Performance standards' for social and ecological sustainability of the International Finance Corporation (IFC)
+++	Mandating	Authorization to exercise sovereign regulatory powers	DIN/ISO 26000

+ = Authoritative quality of effects

It always has to do with *gradation*, whether the extent of state intervention is concerned or the intensity of the shadow cast by the state, the felt proximity to law, or whatever. This suggests the methodological consequence of operating neither with a statist concept of law to the exclusion of all others, nor with a pluralistic concept of law that declares almost everything to be ‘law’ but of thinking rather in terms of transitions, placing various normative orders on a conceptual continuum between the poles of law and non-law. We shall be going into this in detail in chapter five.

But we still have a long way to go. The next step is to consider how to deal with the notion of a gradual destatization, dejuridification of law, or the loss of state sovereignty over it. What is clearly needed is a perspective able to replace the hitherto predominant *state-centricity* by freeing the relationship between law and the state from the law = state equation, opening our eyes to the broad expanse of the world of normative orderings. It would be both useful and satisfying if we managed to conceptualize this long overdue shift in perspective; since we have yet to find such a ‘liberating’ concept, we shall content ourselves in the following section with introducing four key concepts that are, in our view, substantively and methodologically pertinent to achieving this shift in perspective.

## D. Four Key Concepts of a Non-State-Centric Perspective on Law

### I. The Function of Key Concepts

When reflecting on key concepts in this context, it is well worthwhile to consider how Andreas Voßkuhle (2001) describes their function, because it is our hope that the concepts we propose can do what Voßkuhle expects of them, namely to “give direction to thought”:

The function of key concepts is to make general ideas of ordering fertile for given argumentational contexts by concentrating, structuring and rendering comprehensible a mass of information and thoughts in a repository term. While reducing complexity they also serve as a platform for inspiration by releasing forces of association, giving a hold to ideas still in the making, bringing various perspectives together, and offering guidance for the future. In this sense they resemble ‘theories’ ... – but the format is smaller and the proposition at first glance more simplistic. Key concepts are therefore particularly dependent on concretisation; they supply no answers but give direction to thought (Voßkuhle 2001, p. 198. Transl. R.B.).

With other authors who have had something to say about key concepts (Baer 2004; Schoch 2008) we can describe them as concepts that:

- open new paths to thought – the *opening up function*
- mark new developments – the *marking function*, and
- enable interdisciplinary dialogue – the *bridging function*.

With the four concepts we propose, we can perhaps start to do justice to this demanding functional programme.

But before considering them in detail, we shall cast a glance at the Max Planck Institute for European Legal History in Frankfurt, which has engaged in a research programme addressing *four key concepts*. Thomas Duve – managing director of the institute – describes them:

1. The first is “*legal spaces*,” which is apparently not easy to define:

They may – as in the case of the Spanish monarchy, for example – be bound to imperial regions. But they may also – as in the case of Canon Law and the normative thought of moral theological provenance in early modern period – extend across political borders. No less complex are legal spaces which did not form because of imperial interconnection, but through a specific, often coincidental or temporary exchange – for example in the field of certain trading networks which generate rules for the traffic of goods, or of *discourse communities* which are observable in Europe in the nineteenth and twentieth century, between southern European and Latin American countries or in other regions. It should be a particularly important task for legal history research to reflect on this formation of legal spaces connected with *increasingly intensive communication processes*, investigate different area concepts and make them productive for legal history (Duve 2013a, p. 21).

We shall be coming back to this important communicative dimension.

2. The second key concept is “*multinormativity*”:

A second starting point is that we need critical reflection on the concept of ‘law’ that we are employing in order to structure our analysis. As mentioned above, it is quite useless to compare legal traditions taking our own past’s concepts and applying them to other areas, leading us to the conclusion that outside world is different. *We need ‘transcultural’ analytical concepts of normativity. ‘Multinormativity’ could serve as an appropriate term for these attempts of understanding law in the environment of other modes of normativity not structured by our idea of law* (Duve 2013a, p. 21).

This is also one of our four key concepts, which we shall be going into in detail.

3. The third key concept goes by the name of “*cultural translation*.” Since this is complex matter, the explanation is somewhat lengthy:

For legal history in the early modern and modern period, the concepts discussed under the heading of Cultural translation could be especially helpful. Even if one might be mistrusting the fashionable discourses promoting these perspectives, and even if one does not wish to regard all cultural production directly as a translation problem, it should be evident that, due to the linguistic constitution of our subject ‘normativity’, a professional approach is indispensable which takes the findings of linguistic and cultural studies seriously. This approach must even play a central role where the investigation of transcultural contexts is concerned. Looking at lawmaking, judging, or writing law books as a mode of translation (independently from the fact whether there is a translation from one language into the other, or whether it is just a translation by the person who is acting within the same language system) compels us to pay special attention to social practices, to knowledge and the concrete conditions of these translation processes. The analysis necessarily leads to the pragmatic and, above all, institutional contexts as well as to the mediality in which ‘law’ as a system of meaning is materialized. Thus, to focus on law as translation helps us to counterbalance the historical priority given to the ‘object’ of reception and to the ‘sender’. Furthermore it replaces this sender-centrism by privileging the local conditions in the ‘receiving’ culture, i. e. the conditions of recreation of potentially global juridical knowledge under local conditions (‘globalizations’). And it forces us to open our analysis to those methods that have been developed in cultural anthropology, linguistics, cultural studies and social sciences to understand the pragmatic contexts of human modes of producing meaningful symbols. (Duve 2013a, p. 22).

#### 4. The fourth and last key concept is “conflict resolution”:

There are many good reasons for this: First, we would try to counterbalance the longstanding privileging of normative options, always tending to forget their selection in practice. Second, we would try to counterbalance the longstanding privileging of learned law, and be more aware of commonplace legal knowledge, trying to understand how categories of learned law formed the minds, ideas, concepts and practices, but look on them through the eyes of practice. Third, different procedures of conflict resolution often produce sources reaching far into everyday local life and provide us with the opportunity to observe the available normative options and their activation. Looking at conflicts thereby gives us the opportunity of discovering the *living law* and at the same time draws our attention to extra-legal framings, especially important for the formation of law, to the accumulated knowledge of the communication community, their implicit understandings, i. e. to many factors that have been identified as crucial elements for an analysis of law in sociological and legal anthropology, or in culturally sensitive legal theory (Duve 2013a, p. 22 f.).

After this instructive look at the key Frankfurt topics, we shall now present ‘our’ four key concepts at length, which – as the attentive reader will soon notice – overlap to some extent with the research areas of the Max Planck Institute.

## II. The Four Key Concepts in Detail

The first of our four concepts is almost identical with the second of the Max Planck Institute, with which it shares the name ‘multinormativity.’

### 1. Multinormativity as a Key Concept

No-one will deny that we live in a society characterised by normative plurality; we have already mentioned this under the heading “gradual decoupling of state and law.” The next chapter treats the plurality of normative orderings at length.

It should therefore suffice to call a legal historian to the witness box, whose testimony will also demonstrate that normative plurality is by no means a new phenomenon. The remarks made by Miloš Vec on “Multinormativity in the History of Law” (2009) in his address to the Berlin-Brandenburg Academy of Sciences and Humanities are inspiring and his examples convincing.

- The first is so-called ceremonial norms:

*Ceremonial norms ... have been discussed as a normative category in their own right beyond law and morality.* This innovative idea can be attributed above all to Christian Thomasius, who knew how important questions of correct dress were to his contemporaries and how significant the norms of external appearance were for the perception of all content in science, society, and politics. In his secular theory of natural law, Thomasius developed a theory of decorum, which adequately reflected many contemporary aspects: the need for a society stratified in terms of estates for stabilisation; the desire of the individual for difference – and the incessant historical mutability of these outward signs, in brief: fashion. As such, these signs were arbitrary and to this extent were not to be overestimated in their concrete expression; on the other hand, the existence of a sign system contributed to ordering society. At times societal tolerance towards both specific principles and towards deviations from the norm was called for rather than adherence to the strict letter of the law. Details were settled by police ordinances, rules of public order and administration [‘Policey’ or ‘Policeyordnung’]. If the norms of decorum operated through a division of labour between law and morality, they managed to pacify society, an achievement highly appreciated at a time when memories of the conflicts that had raged in the seventeenth century were still very much alive. *Ceremonial theory thus came to complement a general normative theory very typical of the period* (Vec 2009, pp. 160 f. Transl. R.B.).

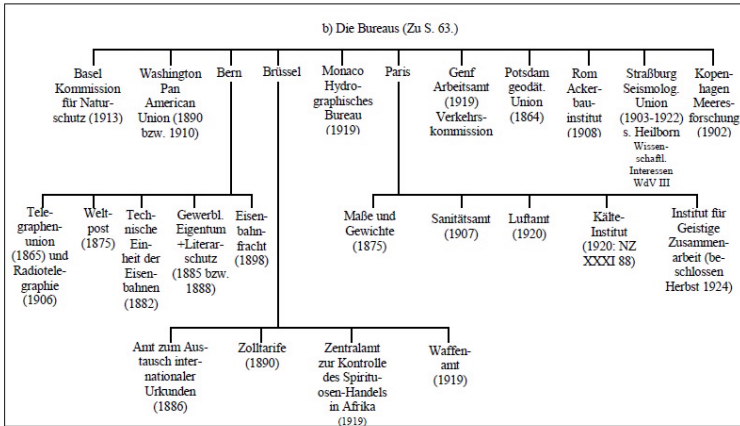


Abbildung 10  
Die Institutionen der Internationalen Gemeinschaft seit der zweiten Hälfte des 19. Jahrhunderts: Die Übersicht des Völkerrechtlers Karl Strupp von 1925 zeigt ein thematisch fragmentiertes System mit den konsensfähigen Schnittstellen unter den Nationalstaaten.

[Illustration after Vec 2009, p. 163]

- The second example is the *hunger of the emerging industrial society for rules*, which Vec explains as follows:

Many challenges presented themselves from the very outset of the industrialization process: international trade and communication had to be coordinated, the risks and opportunities of industrialization – only to mention boiler explosions, machine accidents, and the dangers of the mysterious, invisible, silent and odourless electricity – called for a new regulatory framework. The fight against crime was revolutionized by new scientific and technical methods of investigation, which led to modern forensics. Inventors and enterprises wanted patent protection; urbanisation required new forms of public services, transnational companies sought to protect themselves against risks and drafted standard forms with which they presented their customers.

The actor was thus not only the state, and not only statutory law was made. *The modern age gave rise to a new normative pluralism, for instance in the form of technical rules.* There had been technical rules and standards long before the nineteenth century, but the need for them now became urgent with the advent of industrial mass production. Without a high measure of uniformity, such production would hardly have been possible; but the content and procedures of standardisation still had to be developed – at that time there were still no central standards institute like the DIN, let alone any international body.



*There was accordingly a plurality of norm-making actors. Even in the nineteenth century there was an international community with established institutions ...* Here, too, industrialization played a crucial role. It gave international law new topics and perspectives. Instead of negotiating about war and peace, economic and technical matters now had to be dealt with. Telegraphy, weights and measures, postal services, and freight traffic confronted international law and its attendant science with new tasks. Where industry and transport concentrated, a regulatory framework was needed, particularly at the international level. Rule-making at the international level and the intensification of exchanges were thus closely interrelated and gave birth to an international community (Vec 2009, p. 162 f. Transl. R.B.).

Miloš Vec's concluding remarks apply fully to our key concept of normative plurality:

What do the two seemingly quite disparate topic areas have in common? Three points in conclusion:

First, our examples show that we do justice to neither the pre-modern age nor to the nineteenth and twentieth centuries if we operate with too narrow concepts such as constitution, law, and state. Everywhere in history we come across conceptions of statehood that cannot be accommodated by the limited repertoire of forms handed down by the history of law – be it the major fields of societal rule-making in the nineteenth century or the pre-modern orderings of the seventeenth and eighteenth centuries.

Second, we see that basic research in law, as I conceive of it, can break new ground particularly if as a discipline it devotes itself to integrating law into society. It gains from cooperation with other disciplines and from careful attention to detail.

Third, we see how the normativity of law competes and cooperates with other normativities: this goes far beyond the – in my view overestimated – dichotomy between law and morality. Laws interact with social rules, such as precepts of courtesy or principles of politics. Legal norms coexist with technical standards and religious imperatives. There are often no rules for settling conflicts with binding force between the bodies of norms.

Relations between these forms are as complex and variable as the heterogeneous societies that have produced them. This is to some degree apparent from the two examples from pre-modernity and industrial modernity. Further research into the question presents an interesting challenge in the age of globalisation, which is characterized by so many pluralisms and transfers. This challenge, allow me to say in conclusion, can be summed up in one word: multinormativity (Vec 2009, p. 165. Transl. R.B.).

## 2. The Key Concept Governance

On the lookout for concepts permitting a view of the *world of rules* that does not centre on the state, ‘governance’ comes to mind for two reasons: the concept (which we shall be defining shortly with reference to what we have published elsewhere, Schuppert 2011a, p. 32 f.) *relativizes the state*, and offers us the notion of *regulatory structures*, which deliberately leaves open a question that is always looming in the background: ‘law or not law?’

### a) *Governance as a Concept Relativizing The State*

In political science, the temptation has always been great to eliminate ‘the state’ – a term generally used as an abbreviation for hierarchical, governmental authority – if not in open battle then at least semantically. But ‘state’ having apparently escaped unscathed from all such attempts at semantic disregard – one need only recall the replacement of the concept by that of ‘political system’ – the governance concept seems to offer a second opportunity: it arrives, so to speak, ‘state-free,’ as if the state had disappeared in a *semantic coup* – by sleight of hand – from the scene, thenceforth dominated if not commanded by the governance concept. But things are not as simple as that.

Even though ‘state’ is not entirely eliminated by such a semantic coup, there is perhaps a more subtle way to tailor the governance concept more closely to trim away what one does not like about ‘state.’ For the substance of the state in the governance approach diminishes the more narrowly the underlying concept of governance is defined. If we reduce governance to only non-hierarchical forms – keeping the hierarchy = state equation always in mind – governance clearly seeks a *perspective other than that of the state*; this deliberate selectivity of the governance viewpoint could – to quote Arthur Benz – “be justified by the fact that it allows us to better understand special forms of politics, of collective action in modern society than do, for instance, the concepts of state or system of government” (Benz 2004, p. 20. Transl. R.B.). An understanding of governance in this narrower sense as a counter-concept to hierarchical control nevertheless does not do away with the state as an actor in governance; but it is then ‘only’ one among others, integrated not in hierarchical regulatory structures but in structures designed for cooperation with non-state actors.

The following comparison of the *state-focused concept of government with a governance approach that tends to be shy of the state* clearly shows the differences between the two concepts in relation to the state (Benz 2004, p. 21):

### Government and Governance

	Government <i>State vs. market or society</i>	Governance <i>State, market, and networks as complementary forms of control</i>
<i>Polity</i>	<ul style="list-style-type: none"> <li>• Focus on the state</li> <li>• Majoritarian democracy and hierarchy as the most important institutions</li> </ul>	<ul style="list-style-type: none"> <li>• Institutional structure linking the elements of hierarchy, negotiation systems, and competition mechanisms</li> </ul>
<i>Politics</i>	<ul style="list-style-type: none"> <li>• Competition between parties for power and between interest groups for influence</li> <li>• Conflict management through decisions of the competent state institutions and enforcement of state decisions</li> </ul>	<ul style="list-style-type: none"> <li>• Conflicts between governing/leading and governed/affected actors</li> <li>• Control and coordination in the context of institutional rule systems</li> <li>• Negotiations between state and/or societal actors</li> <li>• Adaptation of institutional rule systems</li> </ul>
<i>Policy</i>	<ul style="list-style-type: none"> <li>• Legislation (commands and prohibitions)</li> <li>• Distribution of public services</li> </ul>	<ul style="list-style-type: none"> <li>• Autonomization (in networks and communities), compromises, exchanges</li> <li>• Coproduction of collective goods</li> <li>• Network management</li> <li>• Institutional policy (management of institutional change)</li> </ul>

But the more subtle approach of *paring down the state by narrowing the concept* is also unlikely to succeed; there is meanwhile something in the way of consensus in governance research that a broader governance concept is preferable (see, among others, Zürn 2008) that would embrace the entire range of governance forms. Our full approval must therefore go to Renate Mayntz’s definition of governance as “the totality of all coexisting forms of collective regulation of societal matters from institutionalised civil-society self-regulation and various forms of collaboration between state and private actors to the sovereign action of state actors” (Mayntz 2005, p. 13. Transl. R.B.). It should be added that it would indeed be a difficult to understand simplification of the governance concept to ignore the most successful

governance structure in history: the organizational principle of hierarchy and the institution of bureaucracy.

In other words, *the governance approach is a concept that relativizes the state but does not ignore it*, and playing the state and governance off against one another would therefore not be very helpful. But the governance concept broadens the perspective – and for this reason is rightly so successful – and *avoids the danger of tunnel vision inherent in all state-centricity*.

In the knowledge of what the governance concept offers, we now cast a brief look at regulatory structures, a key concept we have also addressed elsewhere (Schuppert 2011d).

### *b) Governance In and Through Regulatory Structures*

The central concept in governance is regulatory structures; it is used in both legal science and the social sciences and can therefore throw a bridge between the discourses of these two disciplines. At the heart of the concept are not single legal provisions or questions of good law-making. Regulatory structures are rather to be seen as task-related institutional arrangements embracing the authorities, criteria, forms, and tools most important for regulating a given matter, so that the concept provides an analytic framework for addressing interactional, substitutional, and complementary relations between criteria for action, actors, and tools.

The meteoric career of the bridging concept regulatory structures owes much to three factors:

- First, it directs attention to the whole control context within which a function is performed in that the regulatory structures perspective does not operate in terms of boxes and demarcations but overcomes such differentiation, for instance between state and non-state actors, private and public law, formal and informal. Particularly important is its focus on the functional connection between the differences in action rationalities (and legal regimens) between state and private actors for attaining control goals in the given policy areas. Regulatory structures are also coordination structures and therefore eminently suitable for organizing and institutionalizing collaboration between state and private action competence – one of the key functions of the modern administrative state.

- Second, the regulatory structures perspective sharpens perception of the interplay between societal self-regulation and state control, for processes political science has called “the new interplay between the state, business, and civil society.” Thus regulatory structures not only coordinate; they also couple the different action logics of state and non-state actors by creating structures within which the state regulates and supervises private service delivery in the public interest (regulatory responsibility), while providing a framework for setting free and channelling the self-regulatory potential of the economy and civil society (‘regulated self-regulation’).
- This brings us, third, to the crucial circumstance that the regulatory structure perspective has established itself in the recent debate on changes in statehood. In this discussion, as the catchword ‘regulated self-regulation,’ control concept of the ‘ensuring state,’ has shown, the governance and regulatory structures of a given type of state or conception of the state (for example: the interventionist state, the prevention state, the ensuring state) are particularly under scrutiny.

Having clarified the concept of regulatory structures, it is now time to take a somewhat more fundamental step and present our concept of a science of regulation.

### 3. The Key Concept ‘Science of Regulation’ (Regelungswissenschaft)

If we have been right so far, we need to go one step further conceptually. If multinormativity is normal in every society ordered by rules, and if regulatory structures – whether legally binding or not, whether in the form of laws or of internalized social norms – affect behaviour, enabling and/or constraining actors’ conduct, a *wide-angle lens is needed* to capture the diversity and interplay of the norms that control behaviour. This wide-angle lens is the *science of regulation*, which – overcoming the fixation on positive state-made law – addresses the control of behaviour through rules of all sorts, which neither means doing away with ‘law’ in the sense of ‘binding norms’ backed by sanctions nor obviating the question of how we wish to define law. But this is only the second step; our first concern – in the methodo-

logical sense of a *sociology of regulation avant la lettre* – is to describe and analyse the *processes of making, applying, and enforcing rules*.

This being the case, it is perhaps not surprising that in a study on the *sociology of lawmaking* we find first reflections on expanding the theory of legislation (or ‘legisprudence’) into a theory of lawmaking in a broader sense; Helmuth Schulze-Fielitz convincingly remarks:

A growing number of problems have been posed by the need to take account of the multitude of legal sources and levels of regulation in interaction. The point of departure must be ‘regulatory structure’ in the sense of all regulatory authorities and regulatory tools important for the regulation of a subject matter and a public function. Traditionally, the empirical sociology of legislation is oriented on the genesis of single laws, norms, or legal institutions. The differentiation of law into an abundance of complementary or mutually compensating rules, regulatory authorities, and regulatory instruments, requires careful attention to be paid to the mutual impact of and interaction between the levels of state regulation from European lawmaking to the materialization of the law in statutes or administrative provisions, as well as the connections between state and private lawmaking. Simple causal notions about the consequences of single norms in parliamentary legislation in the sense of linear effects of given normative imperatives miss the mark. The sociology of law and legal dogmatics had addressed the growth of complexity from an early date with concepts such as ‘reflexive law’ or ‘context control.’ For a theory of lawmaking that takes a pragmatic (prescriptive) view of legislation, it follows that a theory of legislation oriented on parliamentary legislation needs to extend the ambit of its inquiry to a *theory of lawmaking in a broad sense of the term*; a sociology of parliamentary legislation alone can provide only subcomplex answers to norm-setting problems in the modern state. For example, the now widespread practice in environmental law of norm-setting voluntary undertakings needs to be examined with respect to social selectivity in the influence of the interests and interest groups involved, and with respect to the controllability and sanctionability of such undertakings (Schulze-Fielitz 2000, pp. 170 f. Transl. R.B.).

A year later we made a programmatic contribution to the debate by suggesting that jurisprudence should be understood as a science of regulation (Schuppert 2001) and, some time later ventured to publish a book on *fundamental questions of a modern science of regulation* (*Grundfragen einer modernen Regelungswissenschaft*, Schuppert 2011c). Not only do we still consider this concept to be right and to point the way forward as indicated by the above reflections on the function of key concepts. We see our approach confirmed in two ways:

(1) First, a number of authors arguing from wide ranging perspectives think along similar lines. Apart from Claudio Franzius, who, writing about the function of regulatory structures, has explicitly pointed out that they are

“open to non-state and non-law forms of regulation” (Franzius 2006, p. 205), we should mention our colleague of many years, Wolfgang Hoffmann-Riem, whom we call to the witness stand not once but twice:

Writing about openness to innovation and responsibility for innovation through law (“Innovationsoffenheit und Innovationsverantwortung durch Recht,” 2006), he lists ten points for innovative re-orientation of which we shall take the five that give particularly clear expression to the transformation of jurisprudence from a science of interpretation into a ‘*problem-solving oriented science of regulation*’. The five points are as follows:

- Keeping historical developments in mind, it is also important to conceive of the law as the boundary to state action; but it is also a commission to shape and optimize within the bounds of the legally permissible; the law is accordingly to be established primarily as a *normative means of ensuring the quality of action determined by law*.
- To better capture the action and effect aspect of law, new administrative jurisprudence also understands itself as a *science of control*. However, it does not embrace any particular control theory. With pragmatic intent it adopts a normatively oriented concept of control, addressing the contribution of law to producing normatively desirable consequences and avoiding normatively undesirable ones.
- Forms of action, modes of control, and regulatory strategies in law are multiplying. *Imperative law* (also Ordnungsrecht or regulatory law), often the focus of attention and operating with commands and prohibitions, is *supplemented by, for instance, ‘enabling law’* (freisetzendes Recht) which is particularly incentive oriented.
- At the same time, jurisprudential analysis turns away from its concentration on the more hierarchical fulfilment of functions to take greater account of decentralised, more or less autonomous performance and actor networking. Particular attention is paid to problem solving through *societal self-regulation*, for which, however, the law sets a framework, provides structures (e. g., the market), and draws up *rules of the game* (regulated self-regulation).
- Doubts about the strict distinguishability of law from non-law and insight into the dovetailing of legal-normative and social-normative orientations change perceptions of legally recognized criteria for action. More intensive account is taken of administrative action directed only by the law, but also of administrative action that is marked by a *non-law prescriptive orientation*. Although ‘soft goals’ such as effectiveness, efficiency, acceptability, and implementability are also anchored in the legal system, they are not limited to the legal dimension. In their broad conception they are important for socially acceptable control (Hoffmann-Riem 2006, p. 263 f. Transl. R.B.).

These reflections by Hoffmann-Riem also bring us away from the notion of law as an ensemble of imperative precepts, broadening our view to include

the many modes of legal action, the diversity of regulatory strategies, and the mixture of law and non-law regulatory structures. All this calls for systematized attention from a science of regulation still to be developed.

Hoffmann-Riem's second contribution is about "alterations to the house of the law in the light of changes in statehood" ("Umbauten im Hause des Rechts angesichts des Wandels von Staatlichkeit," Hoffmann-Riem 2013). The author addresses "our science of regulation" under the heading "*sources of law*." He shares our view that sources of law and rule-makers have proliferated:

The present day is marked by a vast *proliferation of sources of law* on various levels, such as in national law, in the European multi-level system, and in transnational and international legal relations. This multiplication of sources also point to a *proliferation of rule-setters*, namely those operating in national law (such as legislature, administration, local authorities, the states, and the federation) and in the European field (such as the EU Commission and European Parliament), as well as various actors in the transnational and international sphere (such as the WTO and the World Bank). There are sovereign rule-setters and those legitimated by sovereign authorities; but there are also purely private ones. Characteristic is also the multiplication of types of source – in the performance of public-sector functions, for instance through the use of public-law, private-law and hybrid norms, and through recourse to formal and informal rules. This means that the interfaces between formal and informal rules and, where necessary, the interchangeability between them need to be taken into account (Hoffmann-Riem 2013, p. 355. Transl. R.B.).

In view of this diversity – he continues – differences in the "degrees of hardness" of law can be drawn:

Characteristic are also the different 'degrees of hardness' of law, which become apparent when one examines standards, rules of conduct, guidelines, or recommendations as to whether they are recognized as law, whether they are to be classified as hard law or soft law, or whether they are merely de facto rules. The different degrees of hardness can be determined particularly in terms of the concepts 'binding' and 'backed by sanctions' and classified on the basis of the following combinations:

- legally binding and backed by sanctions;
- legally binding, but not backed by sanctions in the legal system, even though possibly subject to de facto sanctions;
- not legally binding, but de facto binding because backed by de facto sanctions (for instance, the risk of losing future business relations or ostracism in the community);
- not legally binding and also not backed de facto sanctions (Hoffmann-Riem 2013, p. 355. Transl. R.B.).

But then comes the third step, the unavoidable and critical question of what is to count as 'law':



Particularly interesting is the question of what raises a rule – in the sense of an abstract-general principle of conduct – to the rank of ‘law’: to be a law, must the rule-setter to be a sovereign authority or is it enough if, as for example in the field of standard setting, private institutions draw up codes of conduct and other such rules to govern behaviour? How important is the power to impose sanctions, again depending on whether imposed by sovereign authorities wielding special instruments of sovereign law enforcement or whether factually effective sanctions suffice? All this brings us to the particularly topical discussion, to which GFS has often contributed, on ‘soft law’. If soft law is to be included in the remit of legal science or recognized as the functional equivalent of state law, does it need to be ‘hardened’? Do private standards have to be incorporated into the legal system and so forth? ... Clearly, the storehouses of the world of rules abound with open questions. Among them is whether, given the wide range of rules and the location of some of them in the *marginal zones of law*, jurisprudence can still handle this taxonomic diversity or even whether the autonomy of law and legal science is not at risk (Hoffmann-Riem 2013, pp. 356 f. Transl. R.B.).

We, too, cannot and do not wish to elude this critical question and have a suggestion to make on how this qualification problem can be dealt with.

(2) Furthermore, we would be understood by a variety of so-called *general jurisprudence*, represented notably by Brian Z. Tamanaha in his book *A General Jurisprudence of Law and Society* (2001) and by William Twining in what has now become a standard work *General Jurisprudence. Understanding Law from a Global Perspective* (2009). For a better understanding of the sort of general jurisprudence we consider right, we need to distinguish it from a variety that Tamanaha in his essay “What is Jurisprudence?” (2012) describes as “essentialistic”, because it seeks to make statements about the true “nature of law” that claim validity everywhere in the world and regardless of cultural differences between legal systems; a cogent example is furnished by Scott Shapiro (2011). Tamanaha describes his position as follows:

To supplement his intuition about law, Shapiro assembles a list of truisms about law. Truisms, he says, ‘are not merely true, but *self-evidently* so.’ These truths are ‘so unobjectionable that they hardly need mentioning.’ Among his proffered truisms, Shapiro asserts that all legal systems have judges who interpret the law, all legal systems have mechanisms to change the law, legal authority is conferred by legal rules, some laws impose obligations, in every legal system some person or institution has supreme authority to make certain laws, there are right answers to some legal questions, and so forth. His truisms are obviously taken from the common *institutional arrangement of contemporary Western state legal systems* (Tamanaha 2012, p. 8).

Quite different – and preferable, according to Tamanaha – is the non-essentialistic approach adopted by a second type of general jurisprudence:

The second type of general jurisprudence does not focus on a theory of the nature of law [...] but rather on constructing a theoretical framework that addresses various manifestations of law around the globe. It brings within its compass state law, international law, transnational law, religious law, human rights law, customary law, and other instantiations of law. William Twining's recent book, *General Jurisprudence*, is an example of this version.

These two types of general jurisprudence both claim to be *about law in general*, as H. L. A. Hart put it, 'in the sense that it is not tied to any particular legal system or legal culture.' (Work that focuses on a particular legal system is local, particular, or parochial jurisprudence.) But they mean this in quite different senses. The first type claims to produce essential truths about law that apply across the universe, for all times and places and all legal systems, existent and non-existent; while the second type claims to bring within its purview forms of law around the globe as they actually exist (Tamanaha 2012, p. 2 f.).

This position could be our own; in the following comparison between Shapiro and Twining, we would opt for the latter without reservation:

The second difference relates to the status of Twining's formulation of law. While Shapiro claims to have produced eternal truths about the nature of law, Twining assumes a more modest stance: Although it takes the form of a definition *per genus et differentiam*, this is not "Twining's conception (or definition) of law." *I use different conceptions of law for different purposes in other contexts.* Here the purpose is to provide some conceptual tools for viewing law from a global perspective, first in respect of constructing a broad overview or mental map of legal phenomena and, second, for describing, interpreting, analyzing, explaining, and comparing legal phenomena (Tamanaha 2012, p. 12).

Now it is time to present our last key concept.

#### 4. The Key Concept "Law as Communication"

Norms, especially statutes, are 'enacted' and then 'promulgated' – in Germany in the Federal Law Gazette (Bundesgesetzblatt). Lawyers tend to speak of *the* lawgiver as a special actor, who after weighing up the pros and cons, makes a decision in the public interest; every law student in an examination required to consider the constitutionality, and that means above all the proportionality, of the resulting legislation, asks first of all about the purpose of the law, in other words about what the lawgiver had wanted to achieve with this legislation. Now, every observer of the political process knows very well that the lawgiver as a political decision-making authority that knows what it wants and considers what needs to be considered and sovereignly enacts the resulting legislation does not exist in political reality. Legislating is

a political process that involves many actors that exert influence on the drafting of the law to be adopted. They include not only the ministerial bureaucracy that prepares the legislation but also non-state actors such as organized interests, which, through their associations formally participate in the legislative process under the Joint Rules of Procedure of the Federal Ministries (GGO). The web of relationships between the various actors – whether formal or informal – can be captured by describing legislation as a network-like decision-making structure (Beyme 1997), a network whose participants communicate intensively and incessantly with one another. The realization, which we owe in particular to Klaus von Beyme, that legislation involves a networked communication structure, incites us to take a somewhat closer look, focusing from the communication perspective on the production, application, and enforcement of law.

a) *The Communicative Production of Law*

Two examples will demonstrate that the production of law (as we shall be seeing in chapter 3) can and must be seen as a communicative process: local lawmaking and *common law*.

(1) Local law production is an obvious example to choose, because from a historical point of view law has always been above all local law and was ‘caesarized’ or nationalised only in the course of centralization processes, a fact that, given our tradition of thinking in terms of the nation-state, is all too easily lost sight of. In his far-reaching study *From European Legal History to a Legal History of Europe from A Global History Perspective (Von der europäischen Rechtsgeschichte zur einer Rechtsgeschichte Europas in globalhistorischer Perspektive)*, Thomas Duve has this to say about local law production about the “Empirical Concept of Law and the Prioritization of the Local”:

If we take the empirical concept of law as our point of departure – anything else is even epistemologically impossible – ... ‘law’ is not a somehow given ordering; this may exist or not, but, like historical concepts of law, it is of importance only as an element in the thinking of actors. The subject matter of analysis by legal historians can be only the communication among those involved about what is to be seen as right or not. The object of our historical observation, ‘law’, thus consists more precisely but nevertheless in deliberately vague formulation, in regulatory patterns, ‘whose claim to binding force is more or less recognized, which are more or less competently put into effect in legal institutional contexts, and with which one has to live within the framework of the contingencies of the social world.’ Legal history is therefore, to quote Michael Stolleis, a ‘succession of linguistically documented

states of consciousness of a communication community of those who are involved in the law and constitution’ – a definition that helps overcome the dichotomy of thought and action, and ultimately that of institution and person (Duve 2012, p. 50. Transl. R.B.).

(2) As far as the concept of *common law* is concerned, this imposes itself, because this is a legal regime that cannot be captured by the formula ‘ordered, adjudged and decreed’ familiar to every lawyer, but which has come into being step by step in the process of applying the law.

In this connection, we find it particularly instructive how the development of common law since the thirteenth century is described in the Encyclopaedia Britannica.

As the legal profession grew, the more experienced barristers were admitted to the dignity of serjeant-at-law and later banded together with the judges, who were appointed from their ranks, at Serjeants’ Inns in London. There, burning legal problems were *informally discussed*, and guidance was given to all concerning the decisions of actual or likely cases. The four Inns of Court (Gray’s Inn, Lincoln’s Inn, Inner Temple, and Middle Temple) evolved from the residential halls of junior barristers to become the bodies officially recognized as having the right to admit persons to the bar. Education consisted of attending court, participating in *simulated legal disputes* (moots), and attending lectures (readings) given by senior lawyers (Encyclopedia Britannica 2014).

Since it was a matter of learning how to argue in court, legal training required accounts of the debates on the formulation by judge and counsel on the points in issue, compiled in so-called ‘Year Books’.

Bar students therefore had to *make notes in court of actual legal arguments* in order to keep abreast of current law practices. These notes varied widely in quality, depending on the ability of the notetaker and the regularity of his attendance, and starting in about 1280 they seem to have been copied and circulated. In the 16th century they began to be printed and arranged by regnal year, coming to be referred to as the Year Books.

The Year Book reports were usually written in highly abbreviated law French. They did not always distinguish between the judges and barristers and often simply referred to them by name. The actual judgment also was often omitted, the interest centering rather upon the *arguments presented by barristers in court*. Although previous decisions were not generally binding, great attention was paid to them, and it appears that the judges and barristers referred to earlier Year Books in preparing their cases. Thus, case law became the typical form of English common law (Encyclopedia Britannica 2014).

Law was learned not from legal codes but by *learning to argue* and plead and in so doing to take similar cases as point of reference; in Günter Hager’s

treatment of “Legal Methods in Europe” he describes the roots of the system of precedents characteristic of the *common law* as follows:

Following precedent is inseparably bound up with the invention of printing. It was only thanks to printing that preceding decisions were available at all. The Year Books, the first of which appeared in the late thirteenth century, had a decisive influence on how precedent was handled. They contained *accounts of proceedings in the court of common pleas*. They served initially to learn the *technique of pleading*. Indirectly they revealed the law as practiced. Reference to preceding cases was rare but where it occurred it carried weight. However, a precedent was not binding. The law of nature and justice stood above everything else. ... Step by step the law reports improved. And the intellectual climate changed. Printing had not only created the actual possibility of drawing on precedent. With it rationalism arose. Printing and the Enlightenment go together. *The application of the law became scientific and text-related*. To a growing degree, parties and judges took reference to decided cases. Precedents were cited as authorities (Hager 2009, p. 87. Transl. R.B.).

b) *Interpretation of the Law as a Communication Process*

That law generally has to be interpreted is a truism and that special authority is vested in those who interpret it is shown not only by the example of the Federal Constitutional Court; this link between the authority of texts and the authority of the interpreters of texts is particularly evident in the field of divine, revealed law that holds for eternity and cannot – like constitutions – be amended by a qualified majority to adapt it to new societal realities. To anchor religious, especially divine law ‘in time’ is, as many historical examples have shown, generally the task of a functionally differentiated caste of interpreters with a carefully cultivated claim to authority. A prime example is the rabbi, who plays such a key role in Jewish law; we will take a brief look at their methods of decision making.

(1) *Discursivity as a Method for Making Decisions: The Role of the Rabbis*

As Ronen Reichman of the Heidelberg Institute of Jewish Studies explains, Jewish religious law is not, like German law, dominated by deductive reasoning, that is to say the deductive derivation of a finding through subsumption of the given case under a statutory definition, but by an abductive mode of thinking, which involves searching for the case that can be assumed to reflect the circumstances under which the old established norm arose (Reichman 2006); this procedure for applying the law is a discursive one, which Reichman describes as follows:

The discursive honouring of claims to validity that comes to bear in Talmudic legal hermeneutics as demonstrated by abductive argumentation combines with the plausible idea advanced by discourse theory that the *discursive exchange of arguments* on a legal question to be decided is the condition for the possibility of their being right. In a legal culture that is devoted to the normative establishment of the truth, legal-cultural and institutional support for discursivity at the academic level of developing the law and in the practical application of the law is crucially important.

In their thinking, rabbis have cultivated a dialectical style taking the form of a *regulated discussion* with clearly defined question and answer roles, a special form of discourse, namely an appraising discourse, an examinative dialogue. Their literary oeuvre offers the best testimony of what finds expression above all in the Babylonian Talmud, a work in which subtle legal discussions were, so to speak, recorded in compact form as dialectical thesis statements (Reichman 2013, pp. 145 f. Transl. R.B.).

This still sounds relatively abstract; the following passage becomes progressively clearer with each sentence:

For the rabbis the interpretation and development of the law go hand in hand – and they are aware of this. The rabbis are fully aware that the legally differentiated meaning of biblical precepts is not determined by their being fixed in writing in the sense that all the scribes had to do was to discover this meaning. Their task is rather to elaborate this meaning. Rabbis express this idea as follows: *‘When God, praise be to Him, gave Israel the Torah, it was given to them like wheat for them to make flour thereof and like flax to make raiment thereof’ ... Only in discourse does the normative content of the traditional precepts unfold.* Only in the rabbinical workshop is the raiment made by human hand. The interpretation of the laws takes place in this workshop. This involves essentially the culture of debate and the associated *acknowledgement of diverging interpretations*, expressed in the words: *‘These (words) and those (words) are words of the living God’* (bEr 13b). A legal culture that discloses its premises in this fashion commits itself to a rational legal ethos that places *the communicative reason of the discursive procedure* at its centre (Reichman 2013, pp. 146 f. Transl. R.B.).

Even if this example appears at first glance to be very particular, it nevertheless addresses a key point for every interpretation of law.

## (2) *Legal Communication as the Communication of Method*

That for every scientific discipline the very elementary issue of methodology has a communicative dimension has rightly been stressed by the Science Council commenting on the prospects for jurisprudence in Germany:

The method of the dogmatic disciplines is directed towards rationality in knowledge of the law and correctness in application of the law. Especially because of its relation

to application, the juridical interpretation method is not identical with the text interpretation of other disciplines, for example literary studies. Legal dogmatics as the conceptual-systematic processing of the law *creates a common communication space for science and practice* (Wissenschaftsrat 2012, p. 31. Transl. R.B.).

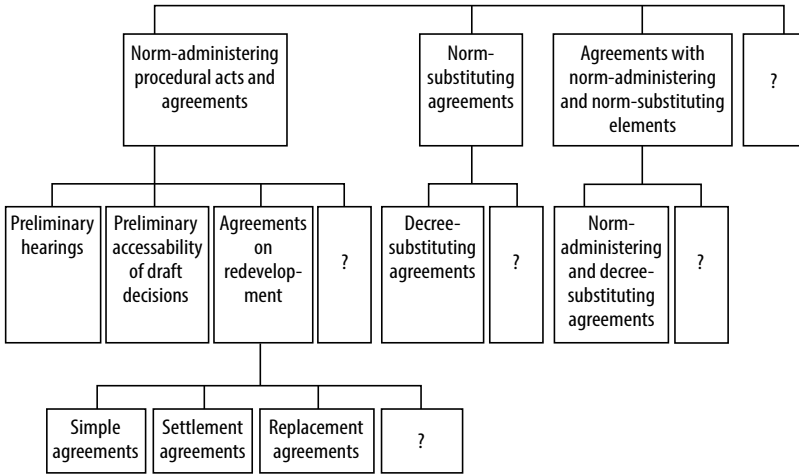
In a paper presented at the VDStRL Conference on 5 October 2014 in Düsseldorf, Andreas von Arnould argued in quite similar vein; he, too, stressed that the search for the “right method” takes place in the *discourse of the interpreter community*:

Method is not merely a toolbox but a social practice. As such it cannot be isolated from the actors and institutions through which and in which it is ‘applied’. *It constitutes itself in discursive processes* of a (not quite) ‘open society of interpreters of the law and constitution.’ The content and tenets of a methodology are therefore generally not decreed; they need the approbation of legal science and legal practice. Legal methodology gains stability as collective, shared knowledge derived from practical experience and generalizable propositions. As a body of secondary rules – of rules on the application of rules – the method is legitimated by the expertise of discourse participants and the stabilizing reasonableness of practice anchored in tradition and origins. Nevertheless: methodology is not the firm bulwark it may sometimes appear to be. It owes its ultimately consensual-pragmatic basis to the fact that its rules can be changed ‘as we go along’ (Arnould 2015, pp. 72 f. Transl. R.B.).

c) *Communicative Law Enforcement*

That norms cannot be imposed simply by sovereign authorities issuing directives to be enforced by compulsion is particularly apparent in the field of informal administrative action (overview in Schuppert 2000, pp. 236 ff.), which plays a key role in law enforcement (Bohne 1988). The example usually cited is environmental protection, which often involves the enforceability of environmental provisions vis-à-vis private sector operators; instead of engaging in lengthy legal action, it is often easier to settle matters by mutual agreement (see Schulze-Fielitz 1992) by means of consultation between state authorities and the private companies that may be concerned not only with avoiding particular obligations but also with warding off pending ordinances and the like. One of the leading authorities on such informal administrative practices, Eberhard Bohne, has developed a typology of such agreements, which we wish to present in brief (the question marks indicate that the typology is not exhaustive and may extend to further informal governmental and administrative practices; Transl. Roland Römhildt):

## Informal Practices by Government and Administration



This brings to an end the presentation of our four key concepts of a non-state-centric perspective on law. Before continuing with an overview of the chapters to come and the promised foray into the diversity of normative orderings, we shall take brief stock.

### E. On Reflection

The aim of this introductory chapter has been to explain to the reader what induced us to undertake this book project and what we hope to achieve with it.

The point of departure was the finding – which we shall be dealing with in chapter two – that we live in a world of plural normative orderings and that this normative universe has yet to be adequately explored. The first step is therefore, as the subtitle indicates, to survey it thoroughly, to measure the terrain. This measurement, a preliminary stage in a prospective sociology of regulation, requires survey markers if we are not to lose our bearings in the vast expanses of the normative taiga. One, if not the central marker is the insight that a statist concept of law gets us nowhere and the seemingly so



constant equation *law = state* ought to be laid to rest in the vaults of legal history. A compass not oriented on the state is therefore needed.

An obvious way to overcome the deep-seated state-centricity of our thinking is to speak in future of normative plurality instead of *legal pluralism*, thus taking adequate account of this plurality. Although this would be a step in the right direction, it would mean stopping halfway. What is therefore needed is a conceptual framework for our thinking about the plurality of normative orderings and the consequences for law and legal science. The elements in such a conceptual framework that we propose are four key concepts:

- multinormativity
- governance
- science of regulation
- law as communication.

Equipped with these four key concepts, we will, hopefully, not only make progress in our surveying but also produce plausible results. The four concepts are not to be understood as tailor-made keys that now unlock all doors with ease but rather as a focus of orientation for our reflection on the *world of rules*; to be always kept in mind and if need be brought up to date.

Thus equipped, we shall now set to work on the real task.

As far as the sequence of chapters is concerned, we follow – unbeknown to us at the time of writing this book – in the footsteps of the Science Council, who in their report on the prospects of jurisprudence in Germany had called research to shift its focus to gaining “a better understanding of novel forms of law, the processes of law formation, and types of law enforcement” (Wissenschaftsrat 2012, p. 37. Transl. R.B.). Precisely this is our theme: chapters two and three address processes of law formation and the novel forms of law they produce; chapter four tackles the plurality of law enforcement regimes, and chapter five the redefinition of the concept of law also demanded by the Science Council. The sixth and final chapter looks, at least briefly, at the function of law – which the Science Council stresses – to actualize guiding principles, such as justice. But now to the individual chapters.

Chapter two offers a first exploration of the *world of rules*. And to avoid losing our way in the vastnesses of the terrain, our exploration needs a compass for guidance: in this chapter the compass is group sociology and governance theory. Our starting point is that governance collectives, frequently in the group form, generally act as regulatory communities; that

is to say, they give themselves rules to gain internal stability and mark themselves off externally. These governance collectives can be of various origin, ranging from professions such as the Prussian officer corps to ethnically defined tribal communities and religious communities such as the Catholic Church and Islam, which had played an important role on the world stage long before term ‘globalization’ was coined; gangs of thieves also have governance structures, that is to say, rules that have to be obeyed, even if only in sharing out the booty. Because of this close connection between community formation and rule-making, we have preceded the second chapter by a section entitled “Housed in Belongingness,” which examines the need of collective human enterprises for regulation from the perspective of a range of disciplines.

In chapter three we take a close look at the present “vast proliferation of sources of law ... and rule-makers” noted by Wolfgang Hoffmann-Riem (Hoffmann-Riem 2013, p. 355. Transl. R.B.). We shall be dealing with other sorts of law, above all novel ones, than in chapter one. We will discover that there is, for example, a *world of standards* in the *world of rules*, and explore what it means if we distinguish between different ‘degrees of hardness’ in law and how *hard law* relates to *soft law*.

And the perspective taken in this third chapter also differs from that prevailing in chapter two. Whereas chapter two deals with governance collectives in the sense of regulatory communities, chapter three is concerned with actors and institutions that could possibly satisfy the seemingly insatiable hunger of a socially differentiated, division-of-labour, economically liberal, and increasingly globalized society for regulation. Good examples are industrial society’s ‘hunger for norms’ and the steady demand for regulation of a transnational economic society. We can hence speak of a supply side and a demand side in ‘law production.’

In chapter four, we once again shift our perspective. This time we address not law as a product but the enforcement dimension of every normative ordering. And closer examination reveals a multitude of what we call norm enforcement regimes; they range from the enforcement of law by state judicial authorities to *governance by reputation* and *compliance regimes* and the sanctioning effect of social contempt (*political correctness*). An important aspect is also the relationship between legal protection by the state and *non-state justice institutions* like *customary courts* in many parts of Africa and Asia.

Chapter five discusses the problem of what the multiplicity of normative orderings, the proliferation of rule-makers, and the plurality of norm enforcement regimes actually mean for the concept of law. Are the multiplying non-state sets of norms also law, but of another type and origin? Do they “lodge” in the “grey zones” of law (concept in Hoffmann-Riem 2013) or are they law “only” in a sociological sense? As we learn from the rich literature on *legal pluralism*, we appear to face the not very helpful alternative between declaring state law alone to be law – perhaps tolerating other sources of law such as custom and religion – and defining everything as law that “looks like law and functions like law.” We hold this either-or to be insurmountable and suggest operating with a continuum or *sliding scale approach*, enabling us to locate norms on a scale ranging from ‘law’ to ‘non-law’. This is done on the basis of a criteria catalogue we have developed and which can in our view be useful in reshaping the concept of law.

In the final chapter we set out in search of justice. Once again we can turn to the Science Council report, which identifies three functions of law, namely conflict management, behaviour control, and the actualization of guiding principles such as justice, freedom, human dignity, and solidarity:

In modern basic rights democracies, law performs a supportive, stabilizing, and above all structuring function in the societal change of guiding principles. Today, law has the task of safeguarding an order that serves to realize claims to justice in a democratic constitutional state, the greatest possible, legally regulated freedom, human dignity, and humane solidarity (Wissenschaftsrat 2012, p. 26. Transl. R.B.).

In our quest for justice – coming back to chapter two – we have identified governance collectives not only as regulatory communities but also as communities of justice, which differ one from the other in their specific notions of justice (participant justice, recognition justice, compensation, even retribution). There is therefore not only a multitude of normative orderings and norm producers and a considerable variety of norm enforcement regimes, but also a plurality of notions about justice: this closes the circle, so to speak, and it will be the task of a jurisprudence fit for the future to deal adequately with these pluralities.



## Chapter Two

### The Plurality of Normative Orders. An Exploration

#### A. Every Group Gives Itself Rules: A Group-Sociological Perspective

In what follows, we call all groups that give themselves rules *regulatory collectives*. They include groups and associations of persons, as well as organizationally consolidated institutions with *regulatory regimes* specific to the group, association, or institution, and which the collective has either given itself or which goes back to a norm-giver recognized by it. A look at some such regulatory collectives from the perspective of group sociology will show us what lies behind this abstract definition.

#### I. Examples of Group-Specific Rule-Setting

An ideal introduction to this subject matter is offered by Uwe Schimank in Hans Joas's sociology textbook (Schimank 2003). Schimank transports us into the world of William Golding's novel *Lord of the Flies* (2008), which tells of a group of schoolboys stranded on an uninhabited tropical island after a plane crash who have to learn to deal with the situation:

A place carrying a group of six to twelve-year-old English schoolboys has crashed. All the adults are been killed. When it comes to *establishing order* and thinking about being saved, the boys are on their own. Not everything works out as they initially hoped. ...

After the crash, the first to emerge from the jungle are a fat intellectual boy by the name of Piggy, who has had too sheltered an upbringing, and a blond, athletic boy called Ralph. Piggy suggests to Ralph that they summon the other survivors by blowing on a large conch. In their torn school uniforms, the little boys find their way through the jungle to the beach. These boys do not yet constitute a social group. At the outset, they are simply a mass of individuals who happen to be in the same place at the same time – like passers-by in the street or passengers on a bus. *But the boys soon become a group by interacting; they develop an informal structure, agree on*

*norms as guidelines for their behaviour, and develop a we-sentiment* (Schimank 2003, p. 201. Transl. R.B.).

For this process of group formation – and this is the important point – rule-making by those involved is crucial. Schimank:

To begin with, the boys in *Lord of the Flies* form a harmonious group, which adopts the norms familiar from school and the adult world. At one of the first meetings, Ralph admonishes the others:

... “We can’t have everybody talking at once. We’ll have to have ‘Hands up’ like at school. ... Then I’ll give him the conch.”

“Conch?”

“That’s what this shell’s called. I’ll give the conch to the next person to speak. He can hold it when he’s speaking.”...

Jack was on his feet.

“We’ll have rules!” he cried excitedly. “Lots of rules!”...

The *boys agree on rules* on where the signal fire is to be set up and who is to maintain it, how food and water are to be gathered, and so forth. *The acceptance of such common norms contributes to the internal cohesion of a group.* The norms stipulate how members of the group are to behave and work for group goals. If a group has norms, it can exert pressure on its members to conform (Schimank 2003, p. 203 f. Transl. R.B.).

But this is not the end of the story; the boys experience a power struggle as a group-dynamic process between the rule-conscious Ralph and the more violence-oriented Jack, who finally gets the upper hand and thus destroys the *pre-existing rule-based order*:

Consensus and conformity rapidly collapse. Jack, who had been given responsibility for the fire, entices the fire guards away from their task to help him hunt wild pigs. The boys also begin to neglect the construction of their huts and the collection of food and drinking water. Soon their ordered lives are without goal or plan. Jack asserts himself more and more in his aggressive and tyrannical manner. *Rule-based conformity and consensus give way to control by violence.* In a scene that marks this transition, Jack calls the group rule into question that only the person holding the conch can speak:

Piggy had settled himself in a space between two rocks, and sat with the conch on his knees. ...

“I got the conch,” said Piggy indignantly.

“You let me speak!”

“The conch doesn’t count on top of the mountain,” said Jack, “so you shut up!”...

“I got the conch –”

Jack turned fiercely. “You shut up!”

This threat of violence does not fail to have an effect, because Jack is physically stronger than the others. He later consolidates his rule by destroying the conch – and thus the last vestige of authority that Ralph still had. *Without the conch as symbol of group consensus and the common norms, power passes to the spears and stones* (Schmank 2003, p. 204. Transl. R.B.).

- The second example is from the book by Heinrich Popitz (1992) on *phenomena of power*; Popitz presents three *cases of power formation within a group*, namely power formation processes on a ship, in a prison camp, and in a reformatory, thus all – as Harmut Esser stresses – “total institutions with no exit option” (Esser 2000, p. 309. Transl. R.B.). Popitz is concerned with *power formation processes within a group*, i. e., with how the power of the few over the many can be adequately explained. We are interested less in power formation than, more generally, in the *aspect of order formation* and what Popitz calls the *ordering value of order*; but let us turn first to the example of the reformatory:

The story could be taken from the literature of cadet novels or from a film about reformatories. In this institution, a group of 14 to 15 year-old boys, who were to be resocialized, had been granted relative independence in reliance on the blessings of autonomy and the healing powers of comradely education. Organizationally and spatially, the group was separated off from the rest of institution. At the point in time that interests us, a centre of power had developed among the thirteen boys, which issued directives. This centre comprised four boys. One of the four, the ‘boss’ had the last word in cases of doubt. A second group of three boys serves as reserves and where necessary as task force. The remaining six were ordered around at will and exploited (Popitz 1992, p. 216. Transl. R.B.).

The exploited six boys had to surrender a portion of their bread ration, do the most unpleasant chores, and serve as scapegoats:

If one of them rebelled, punishments were imposed – e. g., his blanket was confiscated – and in serious cases the task force took immediate action, and in extreme cases of open and repeated insubordination, punishment was deferred to night-time and all the others were forced to take part (Popitz 1992, p. 217. Transl. R.B.).

What is interesting about the whole thing is that after a certain time, the oppressed subgroup came to accept the prevailing power and ordering structures as the “coexistence constitution”:

It is possible – as we know from experience – that the six boys who surrendered their bread ration, did nasty chores, and were used as scapegoats came in time to *accept* precisely this order, this distribution of rights and duties as a *binding constitution of coexistence*; that they not only bowed to it but served it; that they not only feared the *norms* of this order but *internalized* them; that they did their duty not only from supine habit but willingly and obediently ... (Popitz 1992, p. 221. Transl. R.B.).

The explanation Heinrich Popitz offers for this *unjust group constitution* is an effect that – with reference to the familiar concept of legal certainty (see von Arnould 2006) – he calls order certainty; under the heading “*the ordering value of order as basic legitimacy*” he comments:

The power system of our reformatory group will be recognized if over a longer span of time it offers order, or more precisely, if duration and order gain fundamental importance in the formation of consciousness. In this context, this means that order offers primarily *certainty of order*. Participants are certain of order if they have the secure knowledge of what they and other may and must do; if they can develop certainty that everyone involved will really behave with some degree of reliability as expected; if they *can rely on* contraventions being punished as a rule; if they can foresee what they have to do to gain advantages, to win recognition. *In a word, one must know where one is*. Certainty of order in this sense can clearly also develop under a despotic regime. It is wonderfully compatible with oppression and exploitation. The credit of strong, omnipresent power centres usually depends precisely on their having established and maintained order (Popitz 1992, p. 223. Transl. R.B.).

- We owe our third example to the developmental sociologist Dieter Neubert, who has identified what he calls “islands of order” in spaces of limited statehood such as crisis areas in Africa (Neubert 2009, p. 35 ff.). Such “islands of order” are, for instance, large, relatively permanent *refugee camps* managed by the UNHCR, which means in simple terms that the UN refugee agency safeguards “public order” in these camps in “co-production” with the refugees themselves, and for this purpose draws up the necessary rules. Neubert:

Humanitarian aid and refugee organisations often are active in areas of weak state presence or where the state is actually absent. Usually, they come in when the state is no longer able to take care of its citizens, displaced persons or refugees. Especially in the case of displaced persons and refugees, aid organisations set up special camps. Usually, they need permission from the government, but aid organisations run the camps by themselves. In most cases, the camps are used for months at least – sometimes, however, for years. Refugee camps and sometimes also camps for internally displaced persons are under the authority of the UNHCR (United Nations High Commissioner for Refugees). *The UNHCR regulates life government-like in the camps*. This includes all questions of security, jurisdiction, political functions includ-



ing *setting the rules for self-representation of the inhabitants*, and service provision like the care for basic needs (food, water, housing, medical treatment, sanitation, schools etc.). Functions of service delivery may partly or completely be delegated to NGOs. With these functions UNCHR and its co-operating partners *gain far-reaching authority, which makes them the main standard setters in these camps*. In many cases, aid organisations put some participatory structures in place for representation of camp-dwellers. These spokespeople may or may not be elected. However, aid organisations have space for taking their own decisions and for making their rules. (Neubert 2009, p. 47).

The refugee organization, as organizer and “operator” of the given camp necessarily become an *authoritative non-state rulemaker*:

*Under these circumstances aid organisations acquire a quasi-state function*. This is not intended and it puts an extra burden on their work. But their ability to provide for basic needs, the need to organise the day-to-day life in the camp and the need to decide who gets support under what conditions, put them in this powerful position. ... *aid organisations establish a new order, which includes a set of norms and regulations*. The norms themselves draw from human rights regulations and from practical needs and experience (Neubert 2009, p. 47).

In sum, it can therefore be said that widely differing social groups develop internal systems of rules that determine how members of the group live together and how the group behaves towards the outside world. It appears to be natural for people to give themselves a normative order in collaboration with others and then largely to submit to this order. In what follows, we shall be looking at this propensity of humans for making and accepting rules.

## II. Encased in Belongingness: Normative Orders and Group Membership

Under this heading (“Im Gehäuse der Zugehörigkeit”) borrowed from the book by Agathe Bienfait (2006), we first explore the extent to which social groups provided such “encasement,” whose architecture and statics generally including a normative order that provides group members with guidance while marking the group off from other, competing groups. In the course of this book, we will often be coming across this crucial *double function of every group order* – internal consolidation, external differentiation – not least in the key chapter on governance collectives as communities of justice.

In the course of this chapter it will become clear why in every social community more or less spontaneous norms and systems of norms arise,

why they are natural to homo sapiens, and what functions they perform in the life of society. If we remember that every community necessarily needs a system of regulation, it is evident why in a society with different levels of communal relationships or community formation there must always be a plurality of normative orders. We now turn to this question.

## 1. The Evolutionary Biology Perspective or the Social Conquest of Earth

In “*The Social Conquest of Earth*” (2012), the famous evolutionary biologist and ant expert Edward Osborn Wilson has described this process in a both fascinating and plausible manner. The social conquest of Earth can be seen – which is why this book so impressed us – as a *process of group selection*: the vital point of reference for evolution is not the individual or kin, but *the social group*.

To see social groups as the decisive entities in the evolution of mankind is particularly plausible if it can be shown that *group formation brings advantages*. Wilson posits that the evolution of *homo sapiens* from nomad to sedentary hunter and gatherer made *group work and social intelligence* decisive evolutionary advantages:

Carnivores at campsites are forced to behave in ways not needed by wanderers in the field. They must divide labor: some forage and hunt, others guard the campsite and young. They must share food, both vegetable and animal, in ways that are acceptable to all. Otherwise, the bonds that bind them will weaken. Further, the group members inevitably compete with one another, for status of a larger share of food, for access to an available mate, and for a comfortable sleeping place. All of these pressures confer an advantage on those able to read the intention of others, grow in the ability to gain trust and alliance, and manage rivals. Social intelligence was therefore always at a high premium. A sharp sense of empathy can make a huge difference, and with it an ability to manipulate, to gain cooperation, and to deceive. To put the matter as simply as possible, it pays to be socially smart. Without doubt, a group of smart prehumans could defeat and displace a group of dumb, ignorant prehumans, as true then as it is today for armies, corporations, and football teams (Wilson 2012, p. 43 f.).

But if this is the case, Wilson’s thesis that the crucial driving force in the evolution of humanity must be *group selection* is not surprising:

What was the driving force that led to the threshold of complex culture? It appears to have been group selection. A group with members who could read intentions and cooperate among themselves while predicting the actions of competing groups, would have an enormous advantage over others less gifted. There was undoubtedly

competition among group members, leading to natural selection of traits that gave advantage of one individual over another. But more important for a species entering new environments and competing with powerful rivals were unity and cooperation within the group. Morality, conformity, religious fervor, and fighting ability combined with imagination and memory to produce the winner (Wilson 2012, p. 224).

Wilson's argument culminates – which brings us to the topic of “emergence of normative orders” – in the thesis that group selection tends to favour the *development of morality and altruistic behaviour*:

The dilemma of good and evil was created by multilevel selection, in which individual selection and group selection act together on the same individual but largely in opposition to each other. *Individual selection* is the result of competition for survival and reproduction among members of the same group. It shapes instincts in each member that are *fundamentally selfish* with reference to other members. In contrast, *group selection* consists of competition between societies, through both direct conflict and differential competence in exploiting the environment. Group selection shapes instinct *that tend to make individuals altruistic* toward one another (but not toward members of other groups). ...

Individual selection, defined precisely, is the differential longevity and fertility of individuals in competition with other members of the group. Group selection is differential longevity and lifetime fertility of those genes that prescribe traits of interaction among members of the group, having arisen during competition with other groups. ...

Authentic altruism is based on a biological instinct for the common good of the tribe, put in place by group election, wherein groups of altruists in prehistoric time prevailed over groups on individuals in selfish disarray. Our species is *not Homo oeconomicus* (Wilson, 2012, p. 241 ff.).

## 2. Morality and Honour: Guarantees for Compliance with Norms

If codes of conduct are internalized by group members, this ensures compliance even in extreme situations. External incentives to cooperate like social recognition or the threat of punishment in the event of violation – can fail if it is a matter of life or death or no social control is possible. The individual feels moral rules and notions of honour, in contrast, to be unconditional commands, which can be contravened only at the cost of conflict with one's own self-image.

- One example of effective internalization of moral precepts is military honour, which now as in early human history ensures defence of one's own group. Writing of modern times, Kwame Anthony Appiah remarks:

Consider the code of military honor. It calls on people as soldiers (or as marines, or officers, ... there is a variety of relevant identities) and, of course, we now know, as Americans or Englishmen or Pakistanis; and while soldiers may feel shame or pride when their regiment or their platoon does badly or well, fundamentally it matters to them that they themselves should follow the military's code of honor.

It is worth asking why it is that honor is needed here. We could, after all, use the law all by itself to guide our armies; military discipline makes easy use of all sorts of punishments. And mercenaries can be motivated by money. So, why aren't these ordinary forms of social regulation – the market and the law – enough to manage an army, as they are enough to manage, say, such other state functions as the maintenance of the highways? Well, first of all, both these other forms of regulation require surveillance. If we are to be able to pay you your bonus or punish you for your offenses, someone has to be able to find out what you have done. But when the battle is hardest, everything is obscured by the fog of war. If the aim of a soldier were just to get his bonus or escape the brig, he would have no incentive to behave well at the very moment when we most require it. Of course, we could devote large amounts of expensive effort to this sort of surveillance – we could equip each soldier with a device that monitored his every act – but that would have psychological and moral costs as well as significant financial ones. By contrast, honor, which is grounded in the individual soldier's own sense of honor (and that of his or her peers), can be effective without extensive surveillance; and, unlike a system of law or a market contract, anyone who is around and belongs to the honor world will be an effective enforcer of it, so that the cost of enforcement of honor is actually quite low, and ... we won't have to worry about guarding its guardians (Appiah 2010, p. 192 f.).

- Even if community norms are internalized in the form of moral precepts, they nevertheless have to hold their own every time against the selfishness also innate in human nature. Which drive wins depends entirely on the given situation, as Bruno S. Frey, David A. Savage, Sascha L. Schmidt, and Benno Torgler have shown in an impressive study of the behaviour of people in maritime disasters. As reference cases they take the sinking of the Titanic and the torpedoing of the Lusitania in 1915 (Frey et al. 2011). From the perspective of behavioural economics, they look at the role physical strength and financial power on the one hand and social norms on the other played for survival. The two disasters display many similarities, but also a decisive difference:

... The circumstances and conditions under which the last voyage of the Titanic and that of the Lusitania took place have much in common. Both ships were crossing the Atlantic and their passengers represented a cross-section of the population of Western and Central Europe and the United States. The passengers of both ships were divided into three classes – from multimillionaire to penniless emigrant. Further, there were too few lifeboats on both ships. Since the disasters took place within the span of three years, the behaviour of passengers and crews on the two ships can be regarded as products of the same social norms and values. ...

The available data point to only one fundamental difference between the two shipping disasters: whereas the Lusitania sank within only eighteen minutes, the Titanic took 2 hours and 40 minutes from hitting the iceberg to disappearing beneath the waves (Frey et al. 2011, p. 240 f. Transl. R.B.).

The conclusion is obvious. Whereas the fast sinking of the Lusitania enabled the strongest to impose their will – under the motto “survival of the fittest” – things were “more civilized” during the long death of the Titanic:

This assessment is to be found particularly in reports on the Titanic disaster. There are no accounts of scenes in which passengers fought with brute force over the few places in the lifeboats. Instead, there reports of husbands staying aboard while putting their wives and children in the lifeboats, and of musicians giving a last serenade to those condemned to die (Frey et al. 2011, p. 243. Transl. R.B.).

In search of an explanation for the differences in the course of the two sinkings, the authors stress that in the case of the Titanic *a social norm quite clearly came into play, namely ‘women and children first,’* a norm that is nowhere legally binding but to which the male passengers of the Titanic were nevertheless committed.

*A key social norm under life and death conditions is that women and children are to be saved first.* Interestingly, no international maritime law requires that women and children be rescued first. Humanitarian agencies often evacuate “vulnerable” and “innocent” civilians, such as women, children, and elderly people first. The Geneva Convention provides special protection and evacuation priority for pregnant women and mothers of young children (Carpenter, 2003) (Frey et al. 2011, p. 244. Transl. R.B.).

But that this social norm came to bear at all on the Titanic was quite obviously due to the longer time the ship took to sink compared to the Lusitania, which enabled people to overcome their short-run flight impulse in favour of an internalized *behaviour pattern of chivalrous manliness.*

Comparing the empirical findings on the two sinkings, it appears that the chance of survival was overall equal on the two ships, but depended on different factors. Whereas on the Titanic social norms, such as “women and children first” held sway, physical strength dominated on the Lusitania. A plausible explanation for this big difference is likely to be found to the markedly different time the two ships took to sink. ...

In life-or-death situations it can be assumed that instinctive behaviour initially determines how people act. In such situations people react with an impulse for self-preservation, ... which triggers an immediate impulse to fight or flee. This phase can last some minutes ... As soon as it has exhausted itself, individual behaviour changes for reasons of self-knowledge and complex social interactions ... This context could explain the differences in people’s behaviour on the Titanic and the Lusitania. The relative slow sinking of the Titanic afforded a certain *cooling-down phase*. Through the much greater span of time, social norms like “women and children first” became more important for human behaviour on board. Unlike on the Lusitania, the people who dominated on board the Titanic owing to their physical strength apparently renounced some of their competitive advantage. This appears to be especially true for men, who activated a *protective mechanism particularly for women...* (Frey et al. 2011, p. 248. Transl. R.B.).

After this example of human behaviour in an extreme situation such as the sinking of a ship presented by representatives of behavioural economics, we turn again to the community-forming efficacy of codes of honour, a phenomenon we shall be addressing repeatedly in the course of this book.

- Duels enjoyed a boom in the eighteenth and nineteenth centuries. They were fought by members of the upper social classes to settle questions of honour. Kwame Anthony Appiah in “The Honor Code. How Moral Revolutions Happen” (2010) looks at the duel through the eyes of moral psychology. At the outset, he raises the question of why he is interested in the subject of honour at all; the answer is pertinent to our discussion:

I have spent a good deal of my scholarly life trying to get my fellow philosophers to recognize both the theoretical and the practical importance of things that they may have taken too little notice of: race and ethnicity, gender and sexuality, nationality and religion ... all of the rich social identities with which we make our lives. Honor, as it turns out, is another crucial topic modern moral philosophy has neglected. And one reason why it is crucial is that like our social identities, it connects our lives together. Attending to honor, too, like noticing the importance of our social identities, can help us both to treat others as we should and to make the best of our own lives (Appiah 2010, p. xv).

A common concept of honour therefore enables societal groups to create community and mark themselves off from others. As a code for men of honour, the duel hence also served to distinguish one's own social stratum from others. This is also demonstrated by the decline of duelling, which set in precisely when it could no longer perform this distinguishing function. Appiah cites Francis Bacon as prophet of this decline:

Francis Bacon anticipated the mechanism of the duel's demise, when the modern duel was just beginning, in his address to the court in "Charge Touching Duels": "I should think (my Lords) that men of birth and quality will leave the practice, when it begins to ... come so low as to barber-surgeons and butchers, and such base mechanical persons". A duel was an affair of honor. It depended on the existence of a powerful class whose members could establish their status by getting away with a practice contrary to law that others could not. It was a further sign of the diminishing status of that class when, in the first decades of the nineteenth century, duels began to take place more frequently between people who, if they were gentlemen at all, were so by virtue of their membership in the professions or their success in trade. Once "base mechanical" persons could contemplate engaging in it, the duel's capacity to bring distinction was exhausted (Appiah 2010, p. 46).

This shows that a normative order can vanish if it has lost its social function. Because the upper stratum of society could no longer distinguish itself from the masses by duelling, it dropped the practice. Becoming consequently less interesting for the remaining population, duelling from the mid-nineteenth century went increasingly out of fashion.

### 3. The Theory of Society Perspective: Or How Much Community Does Humanity Need?

As long ago as 1997, we had explored the "place of the organized person in democracy theory" in an article entitled "Associative Democracy" ("Assoziative Demokratie", Schuppert 1997). The underlying assumption was that the human being has an associational gene – constitutionally protected (Art. 9 of the Basic Law: "All Germans have the right to form associations, partnerships and corporations") – which Alexis de Tocqueville in "Democracy in America" identified as typically American:

Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile,

general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association (Tocqueville 1963, p. 129).

And the “inventors” of the concept “political culture” – Gabriel A. Almond and Sidney Verba – even go so far as to declare that associations are the elixir of life for the democratic state: “The existence of voluntary association increases the democratic potential of society” (Almond and Verba 1965, p. 262).

Larger societies are accordingly interwoven with a multitude of diverse, mainly voluntary associations that connect individuals in specific fields. Beyond the state there is therefore a *civil society* structured by more or less binding associations of people, which Jürgen Habermas has described as the “*associative society*.”

... its institutional core comprises those nongovernmental and non-economic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld. Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres (Habermas 1996, p. 366 f.).

As we have shown, these social communities integrate and differentiate themselves externally by developing their own normative systems. In his review of communitarian theories of society, Michael Haus notes:

[Communities are] contexts of interaction in which comparatively close-knit mutual obligations can be entered into between members. Communities provide common practices, symbols, and norms for this purpose. They also represent, as it were, the historical outcome of entering into such mutual obligations.

Communities as forums or arenas for the interpretation of shared commitments. Moral obligations have to be articulated and interpreted in dialogue. On the one hand, communities as viable organizations can effectively articulate moral convictions; on the other moral demands can usually not be interpreted in isolation from the communal practices within which they have been generated. But even if the moral principles of the community transcend its own boundaries (e. g., with regard to the universality of human dignity), communities are the forums in which uni-



versalistic learning processes are set in motion, for instance where encounters with other communities are translated into a coherent language of morality (Haus 2003, p. 109. Transl. R.B.).

Also in modern societies, social groups are hence the places where common norms and moral convictions are produced and practised. And since societies as associative societies are also regulatory collectivities, they produce many parallel normative orders.

### III. Group Sociology: An Interim Review

We have seen how *closely group formation and rule-making are related*. The existence of social relations within a group of people is the condition for rule systems to develop. Social groups themselves arise only where people communicate with one another. Uwe Schimank identifies four key properties of a social group, noting that “individuals who do not communicate with one another ... form an amorphous mass, not social groups” (2003, p. 201 f. Transl. R.B.).

He sees communicative relations between group members as making the second property of social groups possible: the *development of specific roles for members*. This aspect is important for us because the assumption of several roles by a single person is generally also associated with *membership in several normative orders*, a matter we shall be examining later; Schimank comments:

Second, *structured interactions* between group members are characteristic of a social group. Individuals in a group do not interact haphazardly or indiscriminately. *Each individual typically has a certain status and assumes a certain role*. These status positions and roles are not created officially as happens in formal organizations. They usually develop informally and are renegotiated if the individuals concerned rethink their situation and enter into social interaction. Nevertheless, relations in a group are structured in some way or another (Schimank 2003, p. 201 f. Transl. R.B.).

Particularly important is the third property of social groups, namely *rule-making*. Schimank:

Third, *agreement on common norms, goals, and values* is essential for a social group. An aggregation of individuals with conflicting goals hardly constitutes a group. When the surviving boys [in *Lord of the Flies*, G. F. S.] first recognize how necessary rules are and how important rescue is for them, they are more of a group than later when this consensus crumbles away. The norms, goals, and values of a group do not need to be explicitly formulated; they often apply tacitly, or are held to be self-evident. Nevertheless, even tacit agreements can strongly bind groups together (Schimank 2003, p. 202. Transl. R.B.).

What such systems of norms contain and how they can arise is explored by Dieter Neubert, whom we have already quoted, this time in an article that sets somewhat other accents, addressing above all the *link between social order and rule-making* (Neubert 2012). He defines *social order*, stressing the crucial importance of rules:

A social order organizes how a larger group of people live together over a longer period. A social order:

- Sets norms and values that establish permitted and prohibited behaviour and hence lay down the rules for life in the community
- Contains rules about disposition over and exchange of material goods
- Includes notions of authority and willingness to comply
- As well as rules and institutions for settling conflicts
- Claims validity for a given social and/or physical space
- And implies temporal stability with a certain framework (Neubert 2012, p. 535. Transl. R.B.).

Neubert goes on to look at *types of rule-making*, of which he identifies three:

There is a spectrum of different ways to formulate and establish important rules for social life, which in simple terms can be reduced to three:

- Rules can first be made in the form of codified laws. Such laws can be made either in formal procedures with reference to rule-of-law notions, or they can be imposed arbitrarily by powerful actors.
- Rules can, second, be made without fixed codification: they can be formulated either arbitrarily by powerful actors or be the outcome of negotiations.
- Third, rules can be made indirectly and informally through action. One example is the use of violence by merchants of violence, terrorists, rebels, or political activists. Repeated attacks and the use of violence can fundamentally change the perception and evaluation of violence. Especially if those responsible for aggression are neither prosecuted nor punished, a culture of violence can develop in which brutality is commonplace (Neubert 2012, p. 535. Transl. R.B.).

He gives a broad, open definition of order:

*This concept of order is defined in deliberately open terms* and not in relation to normative content, type of rule-making, or legitimacy. It allows for different forms of generating order and *does not require immediate measurement and assessment of an order on the basis of normative prerequisites*. An order is effective when powerfully enforced and/or when there is consensus about compliance with it that is also implemented, or when action within the social group is actually guided by it.

In the first place, effective orders offer the possibility of belonging and thus of recognition; further, they create *spaces of predictability*, as Georg Elwert calls them ... Spaces of predictability make planned action possible because the reactions to and consequences of action become predictable. This provides the certainty that permits normal everyday life (Neubert 2012, p. 535 f. Transl. R.B.).

#### IV. The Science of Regulation: An Aside

So far, we have said little about law or norms and a great deal about *rules*. We have always focused on *order formation and conflict resolution through and in accordance with rules*. The advantage is that the qualifying question – whether we are dealing with “real law” or less binding social norms – can be left unanswered at this stage while account can be taken of the obvious existence of various normative orders, from the informal code of conduct of a group to legally binding or law-like statutes. This suggests it is wise to eschew premature categorization and to opt for a broad analytical approach, the “wide-angle lens” proposed in the introductory chapter; furthermore, we have suggested calling this broad approach the *science of regulation* (Schuppert 2011c) to enable us to explore parallels and differences between normative orders. We feel that the results of our explorations so far bear out this choice of approach.

It is also clear that every individual, who plays many roles – citizen, Christian, doctor, and so forth – belongs to a number of ordering or regulatory collectives. We thus have to do with what Andreas Anter (2004) calls a “*plurality of orders*.” To explain this plurality problem he looks at the duel and what Max Weber has to say about it:

What does the plurality of order mean for Max Weber? For him the problem was particularly important because ‘action by the individual can subjectively very well be meaningfully oriented on several orders, which in terms of conventional ways of thinking are contradictory but can nevertheless ‘apply’ empirically side by side.’ This is the core of the problem. Weber illustrates this case with the duel. *While the legal system in force forbids duelling, it is nevertheless demanded by certain conventions in society.* By engaging in a duel, the individual orients his action according to those conventional orders. But, by concealing this action, he orients it towards the ‘orders instituted by the laws.’ In this case, therefore, the practical effects of the two orders are different. The two orders are extremely dissimilar: *the commands of the state on the one hand and the demands of honour on the other.* Weber was speaking from his own experience. What he describes in sober language was for him a vitally important matter that affected him personally, for he had repeatedly and demonstratively declared himself in favour of duelling (Anter 2004, p. 89. Transl. R.B.).

At this point, the example of Weber is also interesting, because it shows the collision of two normative orders: “posited” or enacted state law and the informal rules of conduct of a certain social class. It is therefore not a question of a simple “plurality of orders” but a considerable range of rules

completely different in nature. On this account, too, the science of regulation approach seems to us to be appropriate.

## V. What We Understand by Normative Orders

Rainer Forst and Klaus Günther (Forst and Günther 2011a) are a considerable help. Their introductory chapter “The Formation of Normative Orderings. The Idea of an Interdisciplinary Research Programme” provides useful exposition of the the notion of normative order (Forst and Günther 2011b). They identify three core elements:

- As we have shown in chapter one, *normative orders are justificatory systems*, i. e., they require justification to legitimate existing or new governance structures. Forst and Günther:

By general definition, ‘norms’ are practical grounds for action that claim binding force and oblige their addressees to adopt these grounds as motives for action. To be subject to ‘normativity’ is, as it were, to be captive without chains – an intelligible phenomenon of considering oneself bound by grounds for behaving in a certain manner. ... unlike natural law determinants or unconscious behavioural programmes, normativity is a conscious mechanism of generalized behaviour control that relies on – however motivated – recognition and acceptance by others. The degree of ‘consciousness’ is to be variously defined. Normativity differs from coercion or violence as compulsion directly impacting people in violation of their autonomy. Precisely because norms cannot in some way or other take hold of people and directly control their behaviour but have to rely on a process of adoption and reflection, they are often combined with the latent or explicit threat of coercion and violence in the event of failure to comply. The fear of sanctions can hence become an additional, perhaps decisive motive for adopting a ground for action. However, norms differ from mere arbitrary compulsion through the threat of coercion (consider the famous question asked by, among others, St. Augustine and H. L. A. Hart about what distinguishes a legal system from a gang of thieves) in that *they derive their binding force from a justification – be it authorization by the persons or institutions who declare a norm to be binding, be it discursive procedures or identity-forming traditions and conventions of a certain way of life* (Forst and Günther 2011b, p. 16. Transl. R.B.).

- As Forst and Günther aptly put it, the vehicle of justificatory legitimation is the *justificatory narrative*, a concept we have met with in the introductory chapter, but which, because of its key importance, will once again be introduced at this point.

For the most part, norms and their *justification are embedded in narratives*, in accounts, actions, or rituals shaped by history and local factors and determined by

the experiential spaces and expectation horizons of those involved, which make the justificatory grounds or a normative ordering appear to be fact, *a state of affairs whose existence one accepts and does not question*. Through such narratives, normative order are so closely interwoven with the life world of the people involved, with the section of knowledge about the objective, subjective, and social world that can be publicly addressed, that their constructive nature, their determination by discursively contestable grounds is hardly perceived. *Explicitly addressing the claim to validity then appears to call into question a whole way of life with the risk of a collective loss of identity* (Forst und Günther 2011b, p. 18. Transl. R.B.).

In what follows, we will often come across such justificatory narratives; already in the coming section we consider, among other things, the code of honour of the military profession and the various narratives justifying it. Since we shall be looking at the normative order of religious communities, however, we will consider the central concept of the *revelation narrative* at this point. Forst and Günther:

Normative orders framed in *narratives* – especially those that are *religious in nature* (divine rights versus natural rights, etc.), that go back to political achievements like revolutions or victories (e.g., in wars of liberation), or to the processing of past collective injustice (e.g., crimes against humanity in the twentieth century) – have *particularly strong binding force and authority*; they gain historical dignity, as well as emotional identificatory force. In extreme instances they generate notions of historical mission; they create bonds through historical reference to successful projects or to future projects. ‘*Big*’ *legitimation narratives* – with Lyotard we could speak of ‘metanarratives’ – call, for example, on religious truths. However, such truths, as modern conflicts about what rights God has given individuals – are themselves the subject of considerable conflict (Forst and Günther 2011b, p. 19. Transl. R.B.).

- The third core element is the insight that normative orders are not identical with legal orders but can and generally do consist of a web of norms of various sorts and origins:

*Finally, normative orders consist not of certain types of norm alone, such as legal norms. As an explicit and conscious mechanism of generalized behaviour control and coordination, normativity is to be found in many different fields of a societal practice that can be described overall as justification – for orienting individual ways of life and for the interpersonal regulation of action conflicts, for the nomos of a community defined by its collective identity, and for conflicts requiring global regulation, for religious ritual, and for procedures of political opinion and will formation. We speak of normative order not least because it is always a matter of a web of legal, economic, moral, ethical and pragmatic, cultural, religious, and world-interpretative norms (or values), as well as social conventions, negotiated compromises, and habitualized ways of life. In some areas, this web is relatively dense (as in human rights); in others it tends to be more loosely woven, full of holes, or torn, and therefore prone to*

developing further ‘norm-producing’ dynamics. This brings us to the central communicative, practical-performative aspect of norms and values: produced and negotiated, practised and consolidated in acts of communication, they are also communicatively negated and revoked (Forst and Günther 2011b, p. 20. Transl. R.B.).

This core element finds our full agreement; the insight that normative order is not to be equated with legal order had induced the author and Matthias Kötter to write not of *legal pluralism* but of *normative plurality* that requires ordering (Kötter and Schuppert 2009).

Having now obtained a certain idea of what normative orders are, we shall take a closer look at a select few. We do not aspire to encyclopaedic exhaustiveness and wish also to avoid putting too much strain on the “usual suspects.” Instead, we have chosen examples that we consider both interesting and instructive.

## B. Governance Collectives and their Normative Orders – A Foray

### I. Regulatory Collectives as Governance Collectives

As we have seen, social groups give themselves normative orders to regulate their internal affairs and to mark themselves off externally. As producers of regulatory regimes, they are hence regulatory collectives and hence governance collectives. By Renate Mayntz’s (2005) “success definition,” governance is the “the totality of all coexisting forms of *collective regulation of societal matters*, from institutionalized civil-society self-regulation and various forms of collaboration between state and private actors to the sovereign action of state actors (Transl. R.B.).” Groups structured through normative orders are accordingly always governance collectives, as well.

In exploring normative orders, it is therefore advisable to classify them in terms of underlying governance collective. The first and obvious step is to adopt two main constitutive criteria: a territory defining the collective and an association of persons comprising it. We begin with a brief look at the territorial collective.

## II. Normative Orders of Territorial Governance Collectives

### 1. Different Forms of Territorial Governance Collectives

The most important instance of the territorially defined governance collective is still the state. *State authority is territorial authority* and therefore both spatially grounded and spatially bounded. The subdivisions of the state, such as municipalities, regions, and provinces or states are also territorially defined, as are associations of states – see the Schengen area – however they may be defined in detail under constitutional law.

When territorial governance collectives are discussed, however, typicalized territories are generally concerned, and governance problems regularly arising in certain types of territory are addressed. This is, for example, what is meant when talking about “local governance,” “metropolitan governance,” “regional governance,” and also “European governance” (see, e. g., Benz 2004; 2007). The territorial frame of reference of these governance categories is somewhat relativized linguistically by the well-established reference to *governance levels* – from “local” to “global” – and by the fact that the European governance space (the EU) is treated and analysed above all from the perspective of “multi-level governance.”

But our concern at this point is not the territorial levels of governance and their normative orders but “early cities” with their interesting combination of territorial and personal elements.

### 2. The Normative Ordering of Urban Communal Relationships: Urban Law

#### a) *The City as a Community of Law*

We begin our tour around the vast range of governance collectives and their normative orders with a look at law of cities, governance collectives with an interesting particularity. Many towns and cities – like those that arose in the Baltic Sea region in the heyday of the Hanseatic League – are *founded cities*, that is to say, they are not just villages that grew but urban communities that were intentionally established, that constituted themselves as *communities of law*. Harold J. Berman:

*The new European cities and towns* of the eleventh and twelfth centuries were also legal associations, in the sense that each was held together by a *common urban legal consciousness* and by distinctive urban legal institutions. In fact, it was by a legal act, usually the granting of a charter, that most of the European cities and towns came into being; *they did not simply emerge but were founded*. Moreover, the charter would almost invariably establish the basic “liberties” of citizens, usually including substantial rights of self-government. Of course, the legal character of the new European cities and towns was closely associated with their religious character. The charters were confirmed by religious oaths, and the oaths, which were renewed with successive installations of officers, included, above all, vows to uphold the municipal laws (Berman 1983, p. 362).

Harold J. Berman sees in this common urban legal consciousness the factor that makes the European city what it is:

Without urban consciousness and a system of urban law, it is hard to imagine European cities and towns coming into existence at all. But even if they had – that is, even if large, densely populated centers of commerce and industry could somehow have been formed in the West without a foundation in urban law – perhaps they would have been, like the ancient Roman cities, merely administrative and military outposts of some central authority (or authorities), or else, like Islamic cities, merely an autonomous, integrated urban community life, or perhaps like something else; but they would not have been cities in the modern Western sense. They would not have had the self-conscious corporate unity and the capacity for organic development that have given the Western city its unique character (Berman 1983, p. 363).

If we note that many cities and towns were newly founded or were settlements raised to the status of city, and thus represented a form of communal relationship by which they constituted themselves above all as communities of law, it is no surprise that, in describing the main characteristics of urban law, Berman stresses its communitarian nature:

Of primary importance in the system of urban law was its communitarian character. *Urban law was the law of a close-knit, integrated community* – one that was often called, in fact a “commune.” *The community, in turn, was based on a covenant, either express or implied*. Many cities and towns were founded by a solemn collective oath, or series of oaths, made by the entire citizenry to adhere to a charter that had been publicly read aloud to them. The charter was, in one sense, a social contract; it must, indeed, have been one of the principal historical sources from which the modern contract theory of government emerged. The urban charters were not, of course, contracts in the modern sense of a bargained exchange between two parties whereby each agrees to perform discrete acts during a given period of time. *Acceptance of the urban charter* was rather an avowal of consent to a permanent relationship. Like the feudal contract of vassalage or the marriage contract, it was an *agreement to enter into a status*, that is, into a relationship whose terms were fixed by law and could not be altered by



the will of the parties. In the case of the founding of a city or town, however, the status that was formed was that of a *corporation (universitas)*, under the prevailing *Romano-canonical theory* that a corporation is a body of people sharing common legal functions and acting as a legal entity. In one sense, therefore, the *promulgation and acceptance of the urban charter* was not a contract at all but a kind of sacrament; it both symbolized and effectuated the formation of the community and the establishment of the community's law (Berman 1983, p. 393.).

b) *The Plurality of Urban Legal Systems:  
An Expression of the Plurality of Law*

Particularly important is a second aspect, the multiplicity of sometimes competing urban law systems, which were “exported” for the founding of new cities and towns. There was therefore not only a *plurality of urban law systems* but also a *plurality of secular, partly overlapping jurisdictions*; here, too, we call Berman into the witness box:

The secular character of urban law was reflected in the fact that *every city had its own variation of urban law* and, further, that urban law was only one of several varieties of secular law, including royal law, feudal law, manorial law, and mercantile law. The coexistence of various types of secular law was inherent in its secular character. No one system of secular law claimed to embrace the whole of the secular jurisdiction. *Each was a particular local system, governing one part of the life of those subject to its jurisdiction.* This, too, distinguishes the law of the European cities of the eleventh and twelfth centuries and thereafter from the law of the cities of ancient Greece and imperial Rome. The Greek city was the sole polity to which its citizens owed allegiance, and its law was the sole law by which they were bound. The Roman city did not have a law of its own; the Roman citizen was governed solely by the Roman law, the non-citizen solely by the *ius gentium*, the law of nations. The unique feature of the law of Western Christendom was *that the individual person lived under a plurality of legal systems*, each of which governed one of the overlapping subcommunities of which he was a member (Berman 1983, p. 395).

### III. Normative Orders of Personal Governance Collectives

The personal governance collective is not the nation, inseparably associated with the territorially defined nation state, but a *non-state association of persons*, which can be extremely “power-intensive.” With reference to the *criteria for securing membership* in such associations of persons, three types of such non-state governance collective and normative order can be identified for a start: ethnic, religious, and occupational.

## 1. Ethnic Governance Collectives and their Normative Orders: The Example of Tribal Law

Ethnic governance collectives continue to play an important role – notably as regulatory collectives – with their own arbitration procedures particularly in developing and newly industrialized countries in Africa, Central and South America, and Asia. The law of so-called indigenous peoples has attracted the attention of legal ethnologists, legal anthropologists, and of legal sociologists, who have conducted intensive research under the heading of “legal pluralism” (Benda-Beckmann 1994), a term whose career has been commented on by Klaus F. Röhl and Hans-Christian Röhl:

Legal sociologists know all about the Nuers and the Trobrianders, the Kapauku Papuans and the Hopi Indians. Even before the Second World War, anthropologists had begun to describe the law of simple tribal societies. Initially they were interested in how social order develops and survives without centralized state power. After the Second World War, researchers swarmed out everywhere to examine what remained of traditional tribal societies. They focused particularly on the post-colonial states in Africa and Asia. They produced many accounts of traditional law that had more or less survived the centralization efforts of the colonial powers. These accounts were – understandably – fired by anti-colonial enthusiasm. The interaction between traditional law and state law was explored above all as a power relation (Röhl and Röhl 2008, p. 208. Transl. R.B.).

The present author has so far mainly taken an interest in the *phenomenon of “normative plurality”* as a problem pertaining in spaces of limited statehood (see Kötter and Schuppert 2009), notably in the *relationship between ethnically based governance collectives and the governance collective of the territorial state*, a relationship can cause great tensions in two regards: first, where the area settled by a tribe – such as the Pashtuns – extends across several states (Pakistan, Afghanistan); second, a much more frequent case, where different ethnic groups compete within the territory of a single state for power and above all for resources (the state as booty). This raises the question of which governance collective is really crucial: the tribe with its traditional governance structures or the modern state with its “institutional offerings.” There is evidence that traditional governance structures are ahead, especially with a traditional and well-established conflict culture.

- Under the heading “How Respondents See the State,” Jan Köhler and Christoph Zürcher (2008), reporting on the roles of different governance actors in Afghanistan and how they are perceived by the pop-

ulation, discuss the use made of various institutional facilities for dispute resolution:

*Respondents also judged the capacity of the state to resolve conflicts as very low.* When asked what institutions they would turn to first in the event of a conflict over natural resources, most respondents said they would turn to the elders or the village shura (the traditional village council). Only two per cent would take the problem first to the district authorities. None of the respondents would first approach government authorities at the provincial level (Köhler and Zürcher 2008, p. 10. Transl. R.B.).

The findings of Judith Yilma Mengesha for Ethiopia are in similar vein. For conflict resolution the institutional framework consists of three elements: the arbitrators provided for in the 1960 Civil Code, the so-called social courts set up in the course of land reform in 1975, and the traditional council of elders, which, however, is not a permanent institution: its members are chosen as mediators by the parties for each dispute. This traditional form of arbitration clearly enjoys a high level of trust, which is perhaps plausible when one considers how this council of elders (*šəmagalle*) operates. Judith Mengesha reports:

The methods and techniques of questioning and mediating have remained largely unchanged to this day; in sessions that can last months, the parties and their representatives (for example, the father) and their friends and relatives are questioned individually and separately. The *šəmagalle* does not seek a merely technical settlement for the given conflict. The aim of the proceedings is rather to discover the real causes of the dispute. Only thus, it is asserted, can a lasting solution be found. The meetings with parties and *šəmagalle* offer a platform where hitherto unspoken and latent conflicts can be settled. These sessions – at times almost psycho-analytical in character – do not therefore necessarily end with a decision. Reconciling the feuding spouses or families is already considered a success. For, as many interviews intimate, the *šəmagalle* is *above all interested in upholding social order and peace in the community* (Mengesha 2008, p. 82 f. Transl. R.B.).

a) *The Tense Relationship between Local and State Orders:  
The Example of Sub-Saharan Africa*

Like the rest of the world, Africa is divided into territorial states, which formally are all modern constitutional states governed by the rule of law:

In most of the 54 African countries, the state exists not only formally but is also the determining factor in politics, society, and the economy to which the other actors

have to relate. However, the reach of the state order within the territory of the state varies strongly from one country to the next (Neubert 2012, p. 536. Transl. R.B.).

Although the African world of states, too, has, with the concurrence of much of the population, increasingly come to regard the *modern political model of the plural democratic liberal constitutional state* as appropriate for the national political order (Afrobarometer 2006, 2009), political reality – as Dieter Neubert (2012) explains – is a great deal more complex. In many parts of sub-Saharan Africa, political and societal reality is marked by *coexistence and overlap between state and local orders*. The weight of local orders in rural areas, in particular, should not be underestimated. Neubert describes the coexistence of the two social orders:

These local orders are just as much part of African reality as the notion of the territorial state and the liberal civil-society order, and are by no means mere folkloric vestiges of a fading local culture ... *Local orders and the modern state can exist side by side*. They often act in more or less separate spheres and address different social and often physical spaces, such as those on the periphery of states or in disintegrating states.

Much more interesting are cases in which these social and physical spaces overlap. This is true of towns and cities and of regions where the state is minimally present. *Here actors often move simultaneously or sequentially in different orders*. Local orders are also sometimes supported by the state, or representatives of the local order gain importance as mediators with the state (Neubert 2012, p. 538. Transl. R.B.).

In the autumn of 2011 the present author had an opportunity to gauge the accuracy of this description at a conference organized by the Social Science Research Center Berlin on “Decision-Making on Pluralist Normative Ground” with representatives of local jurisdictions from Pakistan, Ethiopia, South Sudan, and South Africa. A member of the South African delegation reported on his life in two different worlds. During the week he taught South African law at a university and in this capacity belonged to the world of the state; and at the weekend as chief in his home village he was an institution of the local order, that is to say an institution of local law and local arbitration. *This simultaneity of life in two worlds and two normative orders* was extremely impressive. But to return to local orders and local law.

#### aa) *The Function of Local Orders*

In ascertaining the function of local orders, two aspects present themselves whose acquaintance we have made in a somewhat different connection.

The first is the certainty of order, a concept we have been introduced to by Andreas Anter (2004) and Heinrich Popitz (1992). As Neubert puts it, local orders convey “*assessable certainty*”:

Where local orders exist and are not overly threatened, they offer certainty for the organization of everyday life. They also offer often precarious but *assessable certainty*. Social certainty/security is provided through arrangements for mutual aid in the framework of so-called “traditional solidarity.” For the vast majority of the African population, this is a key element in securing their survival. Closely associated with these local political structures are *local defence communities* of young warriors, who protect the group and are accountable to the elders or the chief. In violent local and regional conflicts, these are the fighters involved (Neubert 2012, p. 537f. Transl. R.B.).

We are even more familiar with the second aspect: the local order functions as *group order*, and *group membership* is the decisive, also legally decisive factor. Dieter Neubert:

Neo-traditional local orders root the individual in a descent group and are based on the sentiment of firm, immutable belongingness. They are grounded in supposedly eternal “traditional” values. Rights and duties derive only from group membership, and the focus is on the well-being of the group. As a member of the group, the individual enjoys its protection, embedded in a system of normatively and spiritually secured “traditional solidarity” and bears responsibility for the group ... Local orders are personalized and differentiate in adjudication in terms of role and status, of the parties and their importance for the group. Their aim is therefore not equality. Further, the rules adapt to meet changing power relations ...

Participation in decision making takes place in accordance with these values either in the framework of a system of aristocratic chiefs or of the gerontocracy of male elders. In both cases, access to positions of leadership are possible only for a specific group, while others are excluded by birth. *The resources labour and land are group resources*, over which the given decision-makers can dispose to a considerable extent. As *group resources* they are not freely negotiable but are subject to social control in the absence of a market. In acephalous gerontocracies, capital accumulation is strongly limited by distribution constraints, but possible in the framework of chief-tancy systems, although there, too, it is subject to certain social obligations regarding the use of resources (Neubert 2012, p. 539. Transl. R.B.).

*bb) Land Use Rights: A Key Subject of Regulation under Traditional Local Law*

If, as Neubert describes, land is understood as a group resource, it is obvious that the right to use it must be a key subject of regulation for local group law

and that conflicts will arise if ethnic groups compete for this resource. Dieter Neubert:

Quarrels about land use rights are particularly prone to end in violent and often bloody conflict. Contradictions between local order and new liberal order intensify in some of these disputes. The violent conflicts following elections in Kenya (2007/08) were only partly a protest against the manipulation of election results ... Especially in the rural regions of the Rift Valley, where violence claimed many victims, the form of land law was also at stake. The local order postulates a concept of autochthony under which local resources belong exclusively to the people from the region. This micro-nationalism evokes the traditional rights of the local indigenous population. It finds political expression in a micro-federalism, which, in radical interpretation, grants the regions not only political self-determination but also seeks to *secure control over "their" resources for the local indigenous population*. Extended immigration into the Kenyan Rift Valley (notably by Kikuyu) challenged the land rights legitimized by tradition of the population (largely Kalenjin), who regarded themselves as the autochthonous population. In the elections in late 2007, large ethnic blocs faced one another. The Kalenjin supported the opposition, whereas many of the immigrants, notably the Kikuyu, were seen as supporters of the government. Because of the high level of immigration, autochthonous opposition candidates risked defeat at the polls. To prevent this, immigrants were expelled on a massive scale prior to the elections with an estimated 600 dead and 50,000 expellees. The intention was both to resolve the land question and ensure electoral victory. When, contrary to expectations, the opposition failed to win and doubts arose about the legality of the results, the conflicts between the "autochthonous" and "allochthonous" population escalated under the banner of protest against electoral fraud. This shows that *these notions of social order have direct political consequences. They cause concrete legal claims for a group* that are incompatible with modern liberal law and which are grounded in individualistic notions of state and economic citizenship (Neubert 2012, p. 540. Transl. R.B.).

b) *From Legal Pluralism to Judicial Pluralism*

We have seen in the course of our reflections not only that normative plurality exists but also that it is the normal state of affairs. Important with regard to the dispute-resolution function of law and its enforceability is to consider whether there is also a plurality of justice systems or – in Anglo-Saxon parlance – of *judicial pluralism*. And, indeed, there is.

aa) *The Importance of Non-state, Traditional/Informal Jurisdiction*

Before addressing the importance of non-state arbitration, a brief remark on *terminology* is necessary. We turn to the informative report of the Penal Reform Project on “Access to justice in sub-Saharan Africa”:

The term *traditional justice systems* is used in this publication to refer to non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas. The term *informal justice systems* refers to any non-state justice system. The phrase *traditional and informal justice systems*, therefore, should be understood as meaning traditional and other informal justice systems. There is no satisfactory generic term to describe *non-traditional informal justice systems*. Such systems include what are referred to in this publication as *popular justice forums and alternative dispute resolution forums* run by nongovernmental organizations (NGOs).“ (Penal Reform International 2000, p. 11).

In what follows, we address not the new phenomena of *popular justice forums* and *alternative dispute resolution forums* but *traditional justice systems* as the main instance and core of what is now understood by “*informal justice*”.

As far as the importance of these traditional dispute-resolution mechanisms is concerned, which often go by the name of *customary justice*, they are not a folkloric, marginal phenomenon: in sub-Saharan Africa, above all in rural areas, this system of justice predominates. In their report on “Customary Law and Policy Reform,” Leila Chirayath, Caroline Sage and Michael Woolcock note that:

In many developing countries, *customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution*, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as ‘the rules of law which, by custom, are applicable to particular communities in Sierra Leone’. Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana. Further, *customary justice* differs depending on the locality and local traditions, as well as the political history of a particular country or region. Ethiopia officially recognizes over 100 distinct ‘nations, nationalities, or peoples’ and more than 75 languages spoken within its territorial borders, although many more exist without official recognition. In many of these countries, systems of justice seem to *operate almost completely independently of the official state system*.“ (Chirayath et al. 2005, p. 3).

Interestingly, this independent role of traditional justice continues to exist even when – as under some recent constitutions – it is explicitly recognized and thus given the “*blessing of the state*”:

Some states have tried to integrate traditional systems into wider legal and regulatory frameworks, often with little success. For example, the Constitution of Ethiopia permits the adjudication of personal and family matters by religious or customary laws and South Africa's 1996 democratic constitution explicitly recognizes customary law. Many other countries in sub-Saharan Africa have also made attempts to recognize customary tenure and customary marriage arrangements within their state laws. Efforts to recognize customary land rights have been made in countries in other regions as well, such as Latin America and South East Asia. It is important to note, however, that in countries where customary systems are formally recognized, *in practice these systems generally continue to operate independently of the state system* (and/or in uneasy tensions with prevailing religious legal traditions) (Chirayath et al. 2005, p. 3).

But the great importance of customary justice lies not only in its traditional roots in rural sub-Saharan Africa organized in terms of tribal membership but also in the factual barriers to accessing state justice. The "Penal Reform Report":

*Most proceedings are subject to considerable delays at all stages, mainly as a result of the sheer number of cases being processed through a limited number of courts.*

For most of the population living in rural areas the *distance to the nearest court* may be immense.

The justice administered by the state *seldom involves restorative or compensatory awards or sentences*. In this it is often out of step with the expectations of people whose view of justice is based on traditional justice models.

The law and *procedure practised* in formal courts are *both unfamiliar and complicated* from the perspective of most citizens (Penal Reform International 2000, p. 6).

In somewhat more general terms, one could say that the relatively understaffed state justice system was simply not "suitable" for meeting the dispute resolution needs of rural village communities rooted in tradition.

The vast majority of Africans continue to live in rural villages where access to the formal state justice system is extremely limited.

The *type of justice offered* by the formal courts *may be inappropriate* for the resolution of disputes between people living in rural villages or urban settlements where the breaking of individual social relationships can cause conflict within the community and affect economic co-operation on which the community depends.

State justice systems in most African countries operate with an *extremely limited infrastructure* which does not have the resources to deal with minor disputes in settlements or villages (Penal Reform International 2000, p. 1).

But it is not only the *access to justice* issue that casts a positive light on the role of *customary justice*, and which, among other things, brought the "World



Bank Justice for the Poor Programme” onto the scene; it is also the important role that traditional dispute resolution mechanisms can play in societies ravaged by decades of violence. This is the thought and hope behind the “Non-State Justice-Project” of the United States Institute for Peace, on whose website we read under the heading “The Role of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies”:

This project aims to provide guidance to international and national policymakers on *the potential role of customary justice systems in post-conflict environments*. The project is examining such issues as the potential allocation of jurisdiction between formal and customary systems of justice, approaches to adapting customary practices that may contravene international human rights standards, possible limits and problems in the use of customary justice mechanisms, ramifications for the distribution of political and economic power, and the facilitation of dialogue and *information-sharing between formal and informal systems* (United States Institute for Peace).

Having established the importance – notably from the perspective of our general topic “sedimentations of normative orders” – not only examining normative plurality but also of keeping the enforcement dimension of *judicial pluralism* in mind, we shall conclude this section by reviewing the main features of formal and informal justice.

#### *bb) Formal and Informal Justice Compared*

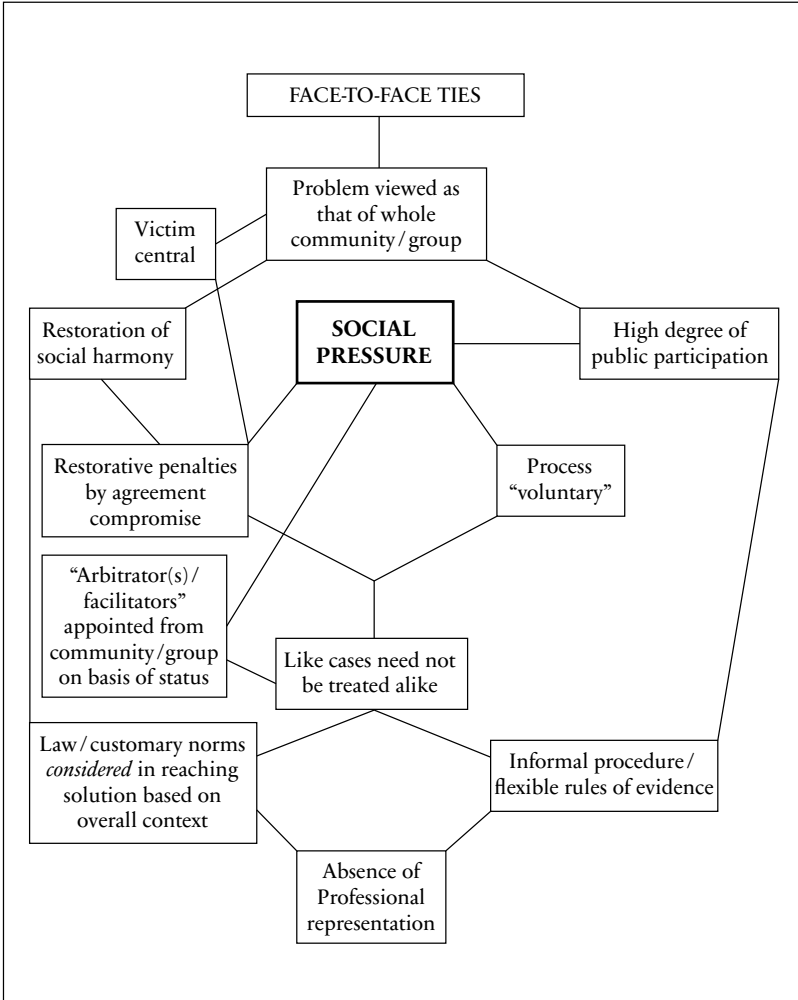
The report of the Penal Reform Project sets out the characteristics of traditional justice systems as follows:

Salient features of traditional justice systems:

- the problem is viewed as that of the whole community or group;
- an emphasis on reconciliation and restoring social harmony;
- traditional arbitrators are appointed from within the community on the basis of status or lineage;
- a high degree of public participation;
- customary law is merely one factor considered in reaching a compromise;
- the rules of evidence and procedures are flexible;
- there is no professional legal representation;
- the process is voluntary and the decision is based on agreement;
- an emphasis on restorative penalties;
- enforcement of decisions secured through social pressure;
- the decision is confirmed through rituals aiming at reintegration;
- like cases need not be treated alike (Penal Reform International 2000, p. 22).

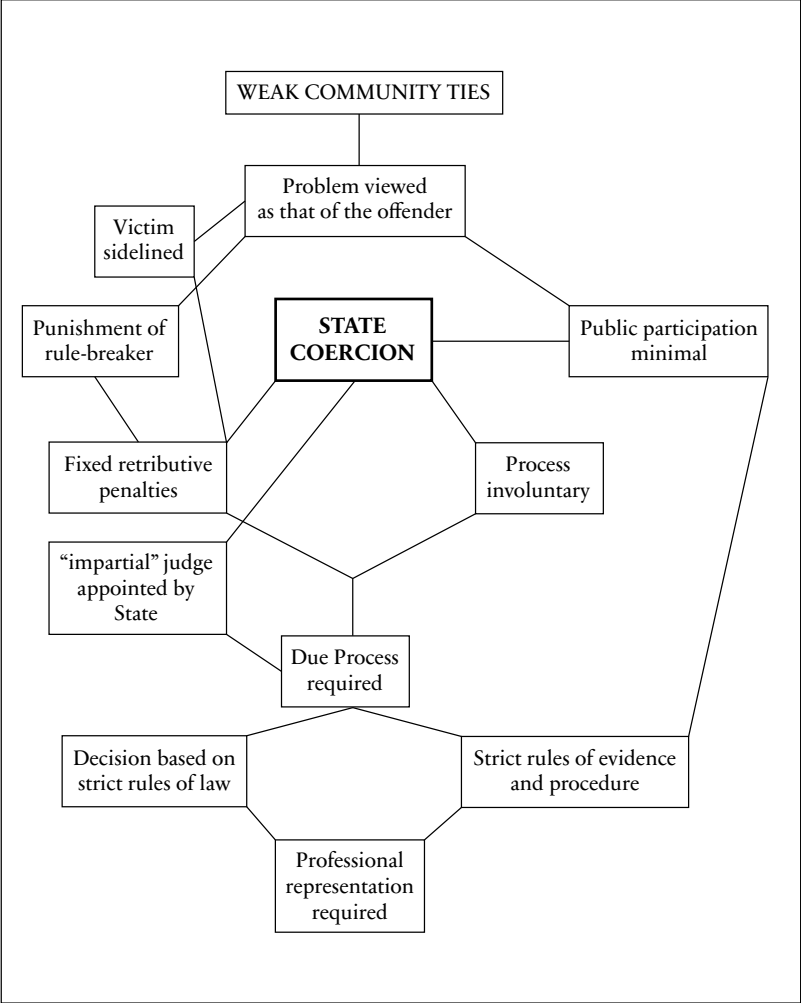
This can be represented thus (Penal Reform International 2000, p. 124):

### INFORMAL SYSTEM



This can be compared with the system of state justice as follows (Penal Reform International 2000, p. 123):

FORMAL STATE SYSTEM



## 2. Religiously Defined Governance Collectives: Divine Law and Ecclesiastical Law

With reference to Max Weber's systematics of religion (see Riesebrodt 2001), religiously defined governance collectives can be defined as religious communal relationships (*Vergemeinschaftungen*) with a degree of organizational consolidation whose members accept a common faith and an internal ordering of their communal life as binding. In this sociological sense, the following three forms of religious sociation can be identified: community cults, churches, and sects.

- As far as *community cults* are concerned, we can, with Max Weber, regard them as the first sociologically relevant type of religious communal relationship; in his treatment of Weber's systematics of religion, Martin Riesebrodt explains:

There are community cults ... at various levels of social aggregation, which then also determine the degree of religious specialization, whether, for example, the father of the house or a priest performs the sacrifice. Community cults address solely the social collective, but are not concerned with "warding off or eliminating evil that affects the individual." This is the job of sorcerers ... (Riesebrodt 2001, p. 106. Transl. R.B.).

Weber describes the priest as follows:

It is more correct for our purpose, in order to do justice to the diverse and mixed manifestations of this phenomenon, to set up as the crucial feature of the priesthood the specialization of a particular group of persons in the continuous operation of a cultic enterprise, permanently associated with particular norms, places and time, and related to specific social groups (Weber 1978, p. 426).

- Max Weber conceptualizes the communal relationship "*church*" in parallel to the state as an institutional ruling organization (*anstaltlicher Herrschaftsverband*). Both state and church are "authoritarian compulsory organizations," which are not joined voluntarily like an association but which one is generally born into and of which one is a compulsory member. Although "church" is in many regards similar to a communal cult, as Riesebrodt explains (Riesebrodt 2001, p. 112) – it is set apart by a number of additional criteria, which Weber describes in his account of the transition from hierocratic organization to church:

Four features characterize the emergence of a church out of a hierocracy: 1. the rise of a professional priesthood removed from the "world," with salaries, promotions,

professional duties, and a distinctive way of life; 2. claims to universal domination; that means, hierocracy must at least have overcome household, sib and tribal ties, and of a church in the full sense of the word we speak only when ethnic and national barriers have been eliminated, hence after the levelling of all non-religious distinctions; 3. dogma and rites (Kultus) must have been rationalized, recorded in holy scriptures, provided with commentaries, and turned into objects of a systematic education, as distinct from mere training in technical skills; 4. all of these features must occur in some kind of compulsory organization. For the decisive fact is the *separation of charisma from the person and its linkage with the institution and, particularly, with the office ...* (Weber 1978, p. 1164).

- Whereas Max Weber conceives of “church” in analogy to the state, he sees “sects” as analogous to associations: “A sect – if it is to be conceptually distinguished from a ‘church’ – is not, like the latter, a compulsory organization but a community of religiously qualified persons, it is the the community of all those called to salvation and only of these” (quoted from Riesebrodt 2001, p. 113). Riesebrodt (ibid.) points out that a sect is not simply any religious community with a small membership or which is persecuted by state or church. The concept includes the *self-conception of members as an exclusive community* of religiously qualified persons. Decisive for cultural development is also the agency of sect religiousness, how goals of salvation and how to attain it are defined, and how the conduct of life is directed. Sectarianism can take many paths.

Having gained an approximate idea of what religious governance collectives are, we now consider them in more detail as *regulatory collectives*.

a) *The Existence of Divine Law*

aa) *Islamic Law as Divine Law*

In his concise and informative presentation of Islam, Heinz Halm begins by asking who and what a Muslim is; the answer is unequivocal:

What all Muslims have in common is the belief in one God and His revelation through a prophet, Mohammed (Muhammad); this revelation is laid down in a book the Koran (Qur’an or Quran). Thus, a *Muslim is someone who recognizes the Koran as the revelation of the one and only God* (Halm 2007, p. 7. Transl. R.B.).

On the five pillars of Islam, he adds:

The five basic duties of Islam are described as its “pillars” (arkan ā-Islam; also arkan al-din, “pillars of religion”). The first pillar, (shahādah) is the profession of faith “There is no god but God and Muhammad is his prophet.” With this two-part declaration, the Muslim professes to absolute monotheism and the prophetic mission of Muhammad; at the same time, the Koran is recognized as *the word of God revealed to Muhammad* (Halm 2007, p. 60. Transl. R.B.).

But this key text, the Koran, is not only a document of faith but also the central *legal document* and the central *source of law* of Islamic law. Its particularity is that *religious and legal content are inseparably interwoven*; Mathias Rohe:

The first and foremost source of law is indisputably the Koran (Qur’an, *the book to be frequently recited*). It commands and teaches justice on its own terms and permits sure decisions. *The Koran is far more than a “legal code”*; most of it presents not legal norms but statements about God and his prophets, articles of faith, commands and prohibitions, didactic narratives, explanations of the world, statements and instructions on historical events and persons from the time of Muhammed, as much more. Some 500 verses *are purported* to be directly legal in content. They include the large number of religious ritual obligations (ibādāt), whereas only a few dozen verses contain civil and criminal law provisions. But legal questions are also answered indirectly through recourse to statements non-legal in substance, such as the question whether analogical inference is permitted (Rohe 2009, p. 48. Transl. R.B.).

The not only central but absolutely dominant role of revealed divine law in the form of the Koran, and in the so-called Sunna (see Rohe 2009, p. 52 ff.) is particularly apparent in the *precedence given revealed divine law over law enacted by the state* in the constitutions of most Islamic states.

In January 2010 the Max Planck Institute for Comparative Public Law and International Law presented a material collection entitled *On the Relation between Islamic Law and Constitutional Law in Selected Countries*. We quote the following regulations from Iran as an instructive example:

Article 1

The form of government of Iran is that of an *Islamic Republic*, endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and Qur’ānic justice, in the referendum of [March 29-30, 1979], through the affirmative vote of majority of 98.2% of eligible voters, held after the victorious Islamic Revolution led by the eminent marji’ al-taqlīd, Āyatullāh al-’Uzmā Imam Khomeynī.

Article 2

The Islamic Republic is a system based on belief in:

1. The One God (as stated in the phrase “There is no god except Allah”), His *exclusive sovereignty and the right to legislate*, and the necessity of submission to His commands;

...

4. The justice of God in creation and legislation;

...

#### Article 4

All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, *and the fuqahā’ of the Guardian Council are judges in this matter.*

#### Article 12

The official religion of Iran is Islam and the Twelver Ja’farī school [in usul al-Din and fiqh], and this principle will remain eternally immutable. *Other Islamic schools, including the Hanafī, Shāfi’ī, Mālikī, Hanbalī, and Zaydī, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.* These schools enjoy official status in matters pertaining to religious education, affairs and personal status (marriage, divorce, inheritance and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools.

#### Article 77

International treaties, protocols, contracts and agreements must be approved by the Islamic Consultative Assembly.

#### Article 167

The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatāwā. ...

#### Article 170

Judges of courts are obliged to refrain from executing statutes and regulations of the government that are in conflict with the laws or the norms of Islam, [...]

#### Article 177.6

The content of the Articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of Islamic Republic of Iran; the democratic character of the government; the wilāyat al-’amr; the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran [Islam] and the school [Twelver Ja’fari] *are unalterable.*

What is interesting here, too, is less the precedence rule as such than two Iranian particularities: first that Article 12 addresses the *problem of normative*

*plurality*, namely the *relationship between the different schools of law and their specific jurisprudence*, and second the mention of the *role of the Guardian Council*, which from an institutional theory point of view would certainly have deserved a section of its own.

*bb) Jewish Law as Divine Law*

The religious, divine character of Jewish law cannot be overlooked; it derives directly and impressively from the history of the Jewish people and the repeated threats to their identity. We quote from the prize-winning thesis of Justus von Daniels on “Religious Law as an Object of Reference. Jewish Law in a Jurisprudential Comparison.” He first addresses the *covenant between God and the people of Israel* concluded on Mount Sinai, a central founding myth of the Jewish faith:

*The covenant between the people and their God established the cultural and religious identity of Judaism. It is the point of departure for a religious community that defines their relationship with their God essentially through scripture and it is the climax of the divine manifestation: God reveals himself to the people of Israel and lays down the conditions on the religion and the relationship between God and Israel fully and finally.*

The act of concluding the covenant itself has a genuinely political dimension, since this act established an order of the Jewish people. *The covenant provided the foundation stone for the societal organization of the Jewish people. The content of the covenant, in turn, is substantially legal in character in the form of commands.* For the most part they are rules of conduct, starting with the Ten Commandments imposed on the community by the covenant. The institutional underpinning of the court is prominently described in detail. One of the main tasks of Moses after delivering the Tables of the Law was to serve as supreme judge of the Jews. The religious scholars of Judaism – *the Rabbis – were and remain judges and jurists*, who over the centuries have conducted written discussions about the correct interpretation of divine revelation, above all of the rules laid down there. These interpretations constitute the major part of what is now referred to as Jewish law, Halacha. This law, embedded in the typical legal institution of the court, accordingly plays a key role in the identity of Judaism, which is thus to be understood as *a religious community that manifests itself through laws*. In this system, the separation of law and morality made in modern legal orders is not allowed for structurally; the two are closely linked and together form a sort of moral order for Jewry (Daniels 2009, p. 1 f. Transl. R.B.).

The second passage from Daniels’ thesis comes under the heading “Specific structural characteristics of Jewish law”:



*Jewish law is a religious legal system* in whose principles the members of the Jewish people believe. This has far-reaching consequences for the justification, systemics, and binding force of this system.

*Religious law is of divine origin; in the case of Judaism it is even constitutive of the religion itself.* The original act of the Jewish religion lies in the revelation of God on Mount Sinai to the Israelites. The rules this revelation contained for the basis for Jewish law, and theonomy and the eternity intrinsic to divinity are thus the cornerstones of this law. Oral law, which forms the basis of the Mishnah, the Talmud, and the subsequent commentaries, is also viewed dogmatically as divine. *Owing to the central role that the law plays for identity formation, the religion is therefore a legal religion,* that is to say, a religion in which law plays a decisive role in determining the relationship with God. For its part, the law is fundamentally religious, since it rests on purely transcendental foundations (Daniels 2009, p. 27 f. Transl. R.B.).

cc) *The Christian Distinction between Ius Divinum and Ius Humanum*

The distinction between divine and human law is not unknown to Christian theology, and the great Church Fathers always stressed and insisted that *ius divinum* was the measure; in *Über göttliche und menschliche Gesetze (On Divine and Human Laws)*, Friedrich Wilhelm Graf has this to say:

For the great traditions of a Christian natural law rooted in God's creative will, not only biblical texts but also the understanding of the *lex divina* developed by the Stoics was definitive, which had shaped the jurisprudence of the Romans since the first century B.C. God's law was given precedence over the *ius humanum* as an all-embracing moral and legal definitional framework, which formed the binding basis for all laws made by men, their *normative criterion*. Church fathers such as Tertullian, Cyprian, Lactantius, and, most prominently Augustine introduced the Stoic distinction between *ius divinum* and *ius humanum* into theology. *Leges humanae*, laws enacted by men, were the concern only of secular authority; their binding force was therefore limited and relative. Laws made by men could easily be questioned and changed by men. If only to enhance their validity, *all leges humanae (positivae) needed to be grounded in divine law.* In the post-Constantinian period, Christian theologians therefore constantly asserted that *ius humanum* was injustice if not in conformity with *ius divinum*. However, this made severe conflicts between theologians and jurists, ecclesiastical and secular authorities inevitable. For who has the right to decide if a human law is in accordance with divine law? How, by what procedures can the order of the polity be assessed for conformity to divine law? (Graf 2006, p. 25 f. Transl. R.B.).

Nevertheless – if we are not mistaken – *ius divinum* has never played as important a role in Christianity as it has in Islam and Judaism, and no separate body of law has developed comparable to the Koran or the Thora. As we see

it, this is because – unlike in “churchless” Islam and Judaism – legal matters of divine origin found a home in canonic law and therefore lost the attribute of independence; and because the papacy managed to secure for itself the *competence to interpret and develop ius divinum*. Friedrich Wilhelm Graf:

Thomas Aquinas, praised by Pope Benedict XVI in his address in front of Cologne Cathedral in August 2005 as the “greatest theologian of the Occident;” declared in “Summa de theologia” that no secular authority, *solely the supreme church authority, that is to say the pope* in Rome is entitled to determine the norms of divine law on the basis of Holy Scripture and Church tradition. Thomas, canonized in 1323 and in 1567 elevated to the rank of Doctor of the Church, ushered in a new age: to this day the Roman Catholic Church defends the triple claim that it has access to revealed knowledge of the norms of divine law, that this eternal law engraved in the heart of every reasoning creature is universal in application, and that only the occupant of the Holy See has binding authority to interpret these norms (Graf 2006, p. 28. Transl. R.B.).

b) *Canon Law as an Autonomous Normative Order*

We shall not be devoting this section to in-depth discussion of canon law, the basis of its validity, and what it has in common with state law and what distinguishes it from that law (see Robbers 1994; Dreier 1997). We shall rather be looking briefly at Catholic canon law in the form of the *Corpus Juris Canonici* (later: *Codex Juris Canonici*) as an example of a global, non-state normative order, because this body of law is not a mere construction of legal theory but a historically effective non-state legal regime.

aa) *Everything Began with Gratian of Bologna*

Catholic canon law, which had enjoyed undisputed validity for centuries, is a slowly growing body of law on whose origins and development every textbook on canon law and church legal history will provide a reliable account (for a particularly useful overview see Wall and Muckel 2009, p. 92 ff.; Link 2010). A few pointers on the genesis and content of classical canon law will therefore suffice.

The *Corpus Juris Canonici* (Corp JC) is the title given the vast compendium of canon law comprising single bodies of law from the period 1140 to 1325. The earliest and largest of such compendiums was the so-called *Decretum Gratiani* of 1140, which was a “private collection of legal texts of the

preceding millennium, systematized in text-book manner by scholastic methods” (Link 2010, p. 97. Transl. R.B.). This *Decretum Gratiani* is generally considered to mark the beginning of a systematic Catholic canon law and the concomitant canonical jurisprudence. Christoph Link sums up the ground-breaking importance of the *Decretum Gratiani*:

The *Decretum Gratiani* was never officially installed by the pope as a legal code, but it was diffused and gained authority throughout Europe. It was only on this basis that a separate canonical jurisprudence (canonistics) – developed alongside the legistics dealing with Roman law, which had regained the attention of occidental scholars in the 11th century. From then on, the two currents shaped legal doctrine and legal practice. *Thus canonistics, too, made an equal contribution to the scientification of law* (Link 2010, p. 38. Transl. R.B.).

The second milestone to be mentioned is the collection of laws that goes by the name of *Liber Extra*, which was compiled at the behest of Pope Gregory IX (1227–1241), and which constituted the first codification of prevailing canon law; Christoph Link:

The *Liber Extra* was published with the papal bull “*Rex pacifus*” in 1234 – as then usual by distribution to the universities – together with the instruction to use it and no other collection in court and class. Decretals not included were thus set aside. This had two highly significant consequences: first, the *idea of codification of a field of law*, i. e., the compilation of legal material in a code to the exclusion of all other rules and the ensuing *claim of the lawgiver to set new law in the place of the old*. What was later to be described as an essential characteristic of the “modern state,” its activity – its competence – to adapt to new situations as they arise by overriding and invalidating prevailing law by making new law was a power claimed by the popes, who no longer felt bound by the laws of their predecessors. *The Liber Extra is therefore an important milestone in the development of European law* (Link 2010, p. 39. Transl. R.B.).

The term *Corpus Juris Canonici* matching the Roman law *Corpus Juris Civilis* had become established as long ago as the 13th century. It became official with the edition of 1582:

This was based on the editorial work of a papal commission of cardinals and canonists set up in 1566, the *Correctores Romani*. Their job was not only to harmonize differing versions of the texts handed down by also to adapt them to a changing understanding of law (Link 2010, p. 41. Transl. R.B.).

This *Corpus Juris Canonici* prevailed in the worldwide Roman Catholic Church until 1981, to be replaced in 1983 by the *Codex Juris Canonici*.

bb) *The Legal Dualism of Roman and Canon Law:  
Characteristic of European Legal History*

Legal historians largely agree that the co-existence of secular, Roman-law civil law and Catholic canon law can be described as characteristic of European legal history. In an article on the influence of canon law on European legal culture, Peter Landau remarks:

The development of Europe into a political unit with shared law, summarized under the heading “European law” once again raises the question for legal historians of whether European legal culture displays particularities that distinguish it from, for example, the Islamic legal culture of East Asian legal cultures. One such particularity is certainly *the existence of two legal systems in occidental Europe from the 12th century, which complemented one another but whose origins and validity derived from different lawmaking authorities: secular civil law and canon law*. Canon law was not subordinated to secular law as the law of a special polity within the state, nor was its validity based on an act of recognition by a supreme secular authority. Its legitimacy derived from the Catholic Church’s undisputed authority. *The fact of this double legal order is a characteristic of our European history that we call to mind all too seldom* (Landau 1991, p. 39. Transl. R.B.).

We have seen that the existence of plural legal orders generally means the existence of plural justice systems. It is therefore hardly surprising that the co-existence of secular and ecclesiastical jurisdiction is also part of the heritage of European legal history. Hans Liermann, writing about canon law as the basis of European legal thought, therefore rightly stresses this duality as a specificity of European legal development:

In addition to the fundamental principles we have hitherto been considering, our shared European legal thought owes a number of achievements to canon law that are more technical in nature.

They include the – now so self-evident – operation of the law with a number of co-existing legal orders and jurisdictions: criminal and civil law, and now highly developed constitutional and administrative law. Since the Christianization of Europe, there have been two co-existing legal orders: canon law and secular state law. Since then there have been co-existing justice systems: ecclesiastical and secular. This raises a complicated legal problem. Even in the High Middle Ages, it had been considered in depth. Philipp de Beaumanoir already distinguished between the exclusive competence of ecclesiastical and secular courts and the possible simultaneous competence of the two systems. He discussed the question of the secular judge being bound by the decisions of the ecclesiastical judge. He knew interlocutory judgments from the domain of the other jurisdiction and sought to weaken their *res judicata* effect (Liermann 1957, p. 44. Transl. R.B.).

The important thing is that secular Roman law and canon law are two, equal legal orders; *canon law was indisputably law – ius* – as Thomas Duve explains:

[Canon law] is as old as the Church itself, which in the Catholic view is constituted as a church of law, since the doctrine of salvation and legal precepts, obedience to the faith and to the law are inseparably linked. Nor, at any rate for more than two thousand years, was its legal character ever called into question. *It was ius*, had the means of enforcement at its disposal, and from the High Middle Ages at the latest possessed a differentiated theory of legal sources – a period when a text-oriented European jurisprudence began to emerge in which the exercise of authority (*potestas iurisdictionis*) and the exercise of the power conferred by holy orders (*potestas ordinis*) begin to separate in the Church. It is no accident that the term “*ius positivum*” comes from the canonistic tradition (Duve 2011, p. 154. Transl. R.B.).

cc) *The Pioneering Role of the Church in Institutions and Legal Culture*

There is no disputing that the institution of the Church with its emphasis on hierarchy and office had a lead in institutionalization over the secular political authority (Weber 1980, p. 615), anticipating and in its institutional culture providing a model for modern statehood. Horst Dreier sums up the situation under the heading “Church as a hierarchical organization with a system of offices”:

In the High Middle Ages, the Church with its hierarchical, bureaucratic structure, its nature as an institution, its system of offices, and the concomitant ethos of objective performance of duty of an organization that exercises power and authority anticipates now self-evident *elements of modern statehood* ... For Max Weber, the Church was the very first institution in the legal sense.

An essential “*institutional precondition*” for such an institutional organization was the *notion of office*. The authority to exercise power “is attached to offices and functions and is not the personal right of the individual exercising this power” (Böckenförde 1986, p. 114.), as had been the case under aristocratic rule in the Middle Ages. Our modern concept of state-made rule, by contrast, is both functional and abstract: *we see the office as such as not tied to a particular person* and regard the persons holding and exercising the office as in principle interchangeable without any change in personnel endangering the system of offices as such. In the organization of the Church in the High Middle Ages, the ecclesiastical office, *officium ecclesiasticum*, was conceived of in precisely these terms and was thus constituted a *pillar of the bureaucratic hierarchical structure of the Church*. (Dreier 2001, p. 145 f. Transl. R.B.).

In his often cited *History of State Authority (Geschichte der Staatsgewalt)*, Wolfgang Reinhard writes of the model provided by the organization of the Church for the development of the modern state:

The fact that the Latin Church became above all a church of law ..., that it realized itself as a hierarchical ruling organization, distinguished it from all other religions, including Orthodox Christianity. ... but the *Roman Church of law* had a lead on the emerging states not only in theory but also in institutional practice. In the Middle Ages, the papal claim to the plenitude of power in both spiritual and temporal affairs (plenitudo potestatis), centralism, administrative apparatus, and the tax system made it a *model for the modern state* (Reinhard 1999, p. 261. Transl. R.B.).

This being so, it is hardly surprising that not only the organizational architecture of the Church but also its law – *Church of law* – served as a model.

We call Peter Landau to the witness box. He has addressed the model function of canon law on more than one occasion (1991; 1996). Writing about the influence of canon law on European legal culture, he notes that:

It is not so much single legal notions or legal institutions that *canon law has presented to temporal law for emulation*. The whole canon law of the Middle Ages, at the latest since 1234 with Pope Gregory IX's famous Liber Extra code, provided a fully developed legal system as a model for the modern secular world. It was of course primarily Roman law whose reception or renaissance in Continental Europe formed the basis for modern legal orders, especially in civil law, and to some extent in public law, as well. Alongside Roman law, handed down to the 12th century essentially as a closed text corpus, there was now in canon law a second text corpus, the Corpus Iuris Canonici, which was constantly supplemented and changed during the 12th and 13th centuries in close but by no means fully recorded interaction between adjudication, legislation, and scholarly interpretation, as well as in generalizing concept formation. Canon law is, for example, in the poor law, for medieval society throughout Europe the *first legal order in history in which the now self-evident factors of law development – legislation, adjudication, and jurisprudence – become reality* ... The Corpus Iuris Canonici like the Corpus Iuris Civilis was received throughout Europe. It is in so far correct to speak of the European reception of canon law ... but the Corpus Iuris Canonici, unlike the Corpus Iuris Civilis was not compiled – from complementary collections of laws – until the High Middle Ages. *It gave Medieval Europe its first experience of legal certainty on the basis of positive law* (Landau 1991, p. 41 f. Transl. R.B.).

dd) *Interim Conclusion: Canon Law as a Global Normative Order in the Shadow of Weak Statehood*

The title of the essay by Thomas Duve (2011, p. 147), addresses two important aspects: the global character of canon law and its claim to global validity and the relationship between “strong Church” and “weak statehood.”

- Hans Liermann offers a plausible argument on the *claim of canon law to global validity*:

... Not only German and French legal sources of the High Middle Ages interlock with canon law and can be understood and appreciated only in connection with it. When Europe began to turn Christian with the conversion of the Germanic and later Slav peoples, a broad current of legal thinking influenced by Christianity and the Church – canon law in the broadest sense – began to spread throughout the continent. It ignored boundaries between nations and states. *Christianity as a universal religion would logically also have to produce universal legal thinking.*

It is the Christian concept of God that produced this supranational effect. The great Jewish prophets had dared to express the powerful religious thought that the God of Israel was the God of all peoples. They had thus transformed the Jewish henotheism contained by national boundaries into universal monotheism. This universal monotheism was adopted and spread by Christianity. It became the cause of universal legal thinking. *Given the close link between law and religion that was a matter of course in early, not yet secularized periods of legal history, legal thinking based on a universal notion of God can essentially have no bounds* (Liermann 1957, p. 38. Transl. R.B.).

- For Thomas Duve, the special quality of the global normative order of canon law is that this legal regime developed its impressive effectiveness “*in the shadow of early modern (weak) statehood:*”

Were there non-state “global systems” in the past, as well, that established “their own legal structures” as we see happening today? – There were indeed, and the focus of this article is a historically significant case of non-state, global law: the law of the Catholic Church, out of which, at a given moment in history, the mid-sixteenth century, *a normative order developed* – in a process some have called the first globalization or “mundialization” – *in the shadow of early modern (weak) statehood.* It was institutionally grounded, but reproduced not least through internalized personal obligation with discursive-theoretical and symbolic-ritual underpinning. For a limited period of time, this normative order was *almost global* not only in theory but also in fact: to the extent that one can speak at all of control efficiency in early modern normative orders, it controlled the behaviour and behavioural expectations of millions of people in many parts of the world from Mexico to Munich and Manila. The span of the Spanish monarchy from the Atlantic to the Pacific, the soteriological approach and claim to universality of this normative order lent it global dimensions (Duve 2011, p. 148. Transl. R.B.).

After this somewhat fundamental overview of the normative orders of religious governance collectives, we turn to a third type of governance collective: occupations.

### 3. Occupational Governance Collectives and their Normative Orders

There are innumerable examples of occupation-specific normative orders and their often rigid enforcement. We shall concentrate on three examples

that make a particularly useful contribution to the general topic of governance collectives and their normative orders.

a) *Non-State Self-Regulation in Micro-Societies or Governance by Reputation: The Example of Diamond Merchants in New York*

Over the past decade, American jurists (see Richman 2004) have been discussing “*private ordering*,” examining the *functional conditions of private normative systems* in groups of social actors. A number of detailed case studies describe how such private normative orders have developed and – the litmus test – how they are enforced. Good examples of the private ordering literature (see overview in Ipsen 2009) are the regulatory regimes of Jewish diamond merchants in New York state law operating in lieu of state law (Richman 2006), of the American cotton trade on the Memphis Cotton Exchange (Bernstein 2001), and dispute resolution among farmers in Shasta County (Ellickson 1991). The focus of these studies is thus not global or transnational but *local* and *occupation-specific*.

For our purposes it will suffice to consider a particularly instructive case. It is that of Jewish diamond merchants in the New York Diamond Dealers Club (DDC), who trade in accordance with rules they set themselves under the aegis of the Club, which provides regular information about the business practices of its members, thus influencing their reputation and – in the event of repeated and significant loss of reputation – threatening them with expulsion. Barak D. Richman writes of “*reputation-based enforcement*” (Richman 2004, p. 2328) of the self-given rules, what can be called *governance by reputation*. To put it simply, such a mode of governance presupposes two things: a functioning *exchange of information* about the *business practices* of certain people (mostly merchants) and the *existence of a social group* or a social network for which the reputation of its members is important; we shall call such social groups *reputation communities*.

As far as the exchange of information is concerned, Nils Ipsen has this to say in his work on *private normative orders as transnational law* (Ipsen 2009):

First of all, the passing on of information and the publicizing of the reputation of the individual has to be ensured. This can happen informally in very small groups, such as among neighbouring ranchers in Shasta County. Larger groups, by contrast, generally need special institutions that offer this service. The New York Diamond Dealers Club (DDC), within which the larger part of diamond dealing in the world



takes place, offers not only a secure trading centre but serves as a trade association. The DDC accordingly sets the rules for the diamond trade and offers a compulsory private arbitration system. In various ways it also assumes the task of exchanging information about the reputation of individual dealers to ensure conformity with its own arbitral decisions.

First, a common trading centre facilitates the exchange of information. In addition, photographs of visitors and newcomers to the exchange are exhibited in the trading hall with indications as to their reputation and personal credentials. Similarly, in a form that recalls the notorious “wanted” posters from the “Wild West,” pictures are put on display of those who have failed to pay their debts. *For every dealer it is therefore relatively easy to find out about the reputation of a potential trading partner.*

Things are similar in the American cotton trade. This takes place essentially at the Memphis Cotton Exchange (MCE). For historical reasons, members of the MCE traditionally have their offices on one street in Memphis, so that here, too, a common trading centre facilitates information exchanges (Ipsen 2009, p. 53 f. Transl. R.B.).

With respect to the *existence of a social network* – which we have called a reputation community – it can concern an occupational group with highly developed professional ethic standards or, as in the case of the Jewish diamond merchants, a *religious community*; the community of Jewish diamond dealers in New York apparently exercises *reputation-based rule enforcement* in this sense, not only towards diamond merchants but also towards diamond workers – whom Richman calls “diamond-studded paupers” – who are in constant temptation to steal diamonds. Ipsen:

Things are different for the workers. Because of their low wages and the ease of theft – owing to the informal contracts – the incentive to break agreements is extraordinarily high. Moreover, the ultra-Orthodox Jews neither want to stay in the business permanently nor do they wish to bequeath it to their descendants. Their ideal is to commit their lives to Thora study. This could theoretically be made possible by breaking rules. However, as ultra-Orthodox Jews, they are also particularly committed to their religious community. *Flight would entail abandoning this community.* Furthermore, the community places great value on its members engaging in desirable behaviour. Failure to do so is sanctioned by a sort of religious arbitration tribunal presided over by a rabbi. In the case of the diamond trade, this bond is so strong that these rabbinical courts can be applied to directly by diamond dealers. Failure to comply with contractual obligations can be sanctioned by the denial of religious honours, temporary exclusion from community celebrations, and in extreme cases excommunication. *Compliance with the secular rules is enforced through entwinement with the rules of the religious community.* This means that breaking the rules has such far-reaching repercussions for the individual member that it is unlikely despite the great incentive to do so. In Richman’s view, this support through a social network makes the private normative order more effective that

the state legal system. It offers a decisive competitive advantage and thus a main reason for the high proportion of Jewish diamond merchants (Ipsen 2009, p. 56 f. Transl. R.B.).

The private ordering literature comes to the general conclusion that, in a functioning non-state normative system, *normative order and network determine one another*:

While the social network ensures compliance with the normative order, the existence of a normative order ensures that conflicts can be resolved without a third party (the state) having to intervene that might resolve it only inadequately and therefore endanger the existence of the social network (Ipsen 2009, p. 58. Transl. R.B.).

If this is the case – and the argument is more than plausible – it raises the question of *how such private regulatory regimes* come into being; they do not appear out of the blue but, so to speak, require the right humus to bring forth norms. Ipsen points to the article by Amitai Aviram (Aviram 2003) on this subject, who convincingly shows that private normative systems do not form “spontaneously,” ex nihilo, as it were; they *build on the institutional infrastructure of an existing social or religious network* – he cites the *Pax dei* movement and the Hanseatic League. He explains how this combination of social/religious network and “*governance by reputation*” operates:

The evolutionary process that results in a private legal system has two stages. First, a network creating a centralized bonding mechanism would form (most likely, not as an end of its own, but as a side effect of some other function the network serves). Then, at stage two, the network would undertake regulating behavior, using its enforcement ability. The most ubiquitous example of a network that facilitates centralized bonding is a social network. Social networks use reputation bonds. I argued earlier that reputation bonds are ineffective when individuals expect the network to fail. Many social networks, however, continue to exist over long periods of time – one’s neighbors, for example, will continue to affect one’s social life indefinitely (this subsection will explain, below, why social networks may spontaneously form, while regulating networks tend to fail if they form spontaneously). By gossiping about each other within the social network, and by reacting to the gossip according to common norms, the social network can align most members’ responses to any member’s deviant behavior. When members of the same social circle are also part of another network that attempts to regulate behavior, *they will care for their reputations*, for while the regulating network cannot in itself harm them, the negative reputation they build will carry on to the social network, and there the centralized bonding mechanism will punish them. There is no need for two separate networks, however – one to regulate and the other to punish deviance. If there is demand for certain regulation and networks are the efficient providers, existing networks that enable

centralized bonding – such as social networks, religious groups, etc. – will evolve to provide the required regulation (Aviram 2003, p. 20).

Aviram posits that such social and /or religious networks initially – in their early stage, so to speak – only perform functions with low enforcement costs, but that the question of costs becomes less important as enforcement mechanisms become more powerful. When regulation is necessary, he concludes, existing networks develop the capacity to provide it. However, the condition for the emergence of such private normative orders is always that a network-like, homogeneous group exists, a *close-knit and like-minded community*.

These groups of social actors show that the coming into being of non-state normative systems generally presupposes the existence of social or religious networks that are enabled by this institutional infrastructure to effectively influence the behaviour of their members through *reputation-based rule enforcement*.

#### b) *From the Strict Regime of the Guilds to Sectoral Codes of Conduct*

##### aa) *Professions as Private Government*

Guilds have been regarded as prime examples of professional private government. Like occupations as a whole, they have been the subject of a great deal of research (Schmitt 1966; Mayer-Tasch 1971). This is particularly interesting from two points of view.

The first is economic; from this perspective, guilds were above all *organizations for regulating competition in the interest of a group* by which mandatory membership prevented unwanted competition. Marek Schmidt has this to say about *competition regulation by occupational organizations*:

The traditional Medieval associations connected with the exercise of crafts, trades, or other occupations were the *guilds*. They developed in the urban economies of the 12th century. The mandatory membership enforced by the authorities and supraregional market sharing agreements with other officially recognized guilds gave them a *market dominating position* in the economic life of the 15th century. The growing *protection of guilds against external competition* made enforcement of the guilds' purpose – the avoidance and regulation of economic conflicts of interests among guild members – the chief concern of guild regimes. In the course of time, the guilds degenerated into service institutions for master families. More and more frequently, conditions for attaining the title of master that had nothing to do with performance were set that were *safeguarded by mandatory membership* (Schmidt 1993, p. 23. Transl. R.B.).

*The second perspective*, which the present author had explored in his habilitation thesis (Schuppert 1981) is that of administration science. It throws light on professions, especially in the form of guilds, in their function as potential administrative units (ibid., p. 100 f.).

In a society based on the division of labour, professions are available as socially prestructured units – be it in the form of estates, of self-governing corporations, or of members of an economic council or a second chamber, to serve as *elements of state organization*. Occupational associations appear to be something in the way of “administrative units in reserve,” which the state can use when need be to “discipline” areas of society. This phenomenon can be explained if we consider the specific functions of associations of people engaged in a particular occupation.

In *Men and their Work*, Hughes defines the criteria that go to constitute an occupation:

An occupation consists, in part, of a successful claim of some people to a licence to carry out certain activities which others may not, and to do so in exchange for money, goods or services. Those who have such licence will, if they have any sense of self-consciousness and solidarity, also claim a mandate to define what is proper conduct of others toward the matters concerned with their work (Hughes 1958, p. 78).

And it can indeed be regarded as characteristic of every occupation that it seeks first to regulate or at least regulate access to the occupation itself, and second to formulate professional standards, and third to have the competence to sanction non-compliance with occupational discipline. J. A. C. Grant (Grant 1942) and Priscilla De Lancy in *The Licensing of Professions in West Virginia* (De Lancy 1938) address efforts to influence recruitment to occupations, also as regards possible forms of organization.

Apart from protection against unqualified competition and outsiders unwilling to comply with professional norms, one of the most important reasons for *guild-type tendencies* is the relationship between the profession and its clients. In occupations with necessarily higher qualifications, the so-called “liberal professions,” the clients of lawyers or physicians can make no judgement of their own about the quality of the service offered. If the occupation does not wish to have its professional standards dictated to it by clients or the legislature as a lay assembly, it must itself attempt at the highest possible level to enforce them. Hughes:

They do not want the client to make an individual judgment about the competence of practitioners or about the quality of work done for him. The interaction between

professional and client is such that the professionals strive to keep all serious judgments of competence within the circle of recognized colleagues. A licensing system adds the support of the state to some mechanism established by the profession itself for this purpose. It is as if competence became an attribute of the profession as a whole, rather than of individuals as such (Hughes 1958, p. 141).

In this fashion, the *social control the community of professionals* exercises over its members presents itself as a method to avoid control by laymen. Failure in disciplining its members would not only bring a loss of prestige in society but also evoke the risk of losing its freedom.

In sum, a tendency to guild formation is inherent in the occupational association. Goode (1957) therefore calls the profession or occupation “a community within the community” with an intensity of regulation that can be described as the exercise of *private government*. Key rightly describes the tendency of occupational associations to acquire quasi-official authority as “one of the recurring patterns of political behavior” (Key 1942).

Despite justified reservations about alleged universal tendencies, we can speak of a structurally determined tendency of occupational associations to acquire half-governmental status or at least recognition by the state. H. S. Harris describes this tendency and the implied swing from private to public government as follows:

In any case, the natural tendency of the associations that are formed in this way is to seek to be accepted as public agencies, and be *endowed with public authority*. All such groups, in striving to maintain or restore the threatened equilibrium, seek to legislate for the sphere of human activity with which they are concerned. To the extent to which they are able to do this and obtain the backing of the public authority for what they do, they lose their private character. If, for example, the publicly enforced condition of working at a certain occupation in a given society is that one must join the trade union or professional society, meeting the standards that it sets for entry, and accepting the disciplinary code of behavior that it lays down for its members it appears to me that that aspect of life is not any longer privately, but publicly organized (Harris 1969, p. 51 f.).

*bb) Self-Regulation through Codes of Conduct:  
The Example of the International Financial Community*

So-called *codes of conduct* (for an overview see Schuppert 2011c) are a *form of self-regulation* adopted above all by transnational corporations (TNCs) and certain sectors, a voluntary commitment to guiding principles for their entrepreneurial activities. To this extent, we can speak of a specific form of

*good practice standards*. Their almost epidemic proliferation since the 1990s is the result of increasing economic globalization accompanied by the triumph of the notion of corporate social responsibility (CSR). The interaction between these two factors has been described by Rhys Jenkins in a programmatic paper for the United Nations Research Institute for Social Development (April 2001):

The 1990s saw a proliferation of corporate codes of conduct and an *increased emphasis on corporate responsibility*. These emerged in the aftermath of a period that saw *a major shift in the economic role of the state*, and in policies toward transnational corporations (TNCs) and foreign direct investment. Whereas in the 1970s many national governments had sought to regulate the activities of TNCs, the 1980s was a decade of deregulation and increased efforts to attract foreign investment. A similar trend occurred at the international level, where efforts at regulation had been unsuccessful.

It is in this context that the recent wave of voluntary codes of conduct must be situated. US companies began introducing such codes in the early 1990s, and the practice spread to Europe in the mid-1990s. Voluntary codes of conduct range from vague declarations of business principles applicable to international operations, to more substantive efforts at *self-regulation*. They tend to focus on the impact of TNCs in two main areas: *social conditions and the environment*. A variety of stakeholders, including international trade union organizations, development and environmental NGOs and the corporate sector itself have played a role in the elaboration of codes of conduct for international business (Jenkins 2001, p. iii).

However, our concern at this point is not the general phenomenon of codes of conduct but their function as what we shall call “soft normative ordering” for a specific community with its own regulatory requirements. The community addressed in the next two examples is not an ethnic, religious, or class community but one with blurred contours, which Steffen Augsberg in his fascinating study of lawmaking between state and society describes as a “real or fictive international financial community” (Augsberg 2003, p. 279). The two examples selected are the following:

(1) *The Takeover Code*

It could be argued that the Takeover Code is an unsuitable example because it became legally largely obsolete with the coming into force of the Securities Acquisition and Takeover Act (WpÜG) on 1 January 2002. But the contrary is the case, because precisely the “fate” of this code is interesting and particularly illuminating.

Augsberg recounts the background and aim of the Takeover Code:

The Takeover Code contains rules of conduct for bidder and target companies in the context of public company acquisitions. In the original version it dates from 1995, when it replaced the guidelines of the Exchange Expert Commission. The model for the new arrangements was the 1968 British City Code on Takeovers and Mergers. The regulatory aim of the Takeover Code is to protect investors (especially by establishing transparency and equal opportunities) and to ensure and support a functioning market. In an economic system exposed to growing global interdependence, in which national regulation is increasingly oriented on the expectations of the real or fictive international “financial community,” the Takeover Code can be seen as an attempt to *introduce international standards on a voluntary basis in Germany, too*, in order to enhance the reputation of Germany as a financial centre (Augsberg 2003, p. 279. Transl. R.B.).

It is interesting what Augsberg has to say about the qualifications of the active *norm-setting body*; he notes that prevailing opinion sees the *Exchange Expert Commission* as a purely private organization, while calling this point-blank assignment to the private-informal sector into question, since the commission is something of a “*mongrel*”:

The code was drawn up by the Exchange Expert Commission, an institution attached to but part of the Federal Ministry of Finance, whose job it is to advise the Federal Government on legal matters concerning the capital and the stock markets. The lack of any reference to the Federal Government or the Federal Ministry of Finance stands in the way of classifying the code as informal administrative recommendation from government and ministry; every announcement or report on the Takeover Code names only the Exchange Expert Commission as author. It is therefore the general and apparently undisputed view that the Takeover Code is grounded exclusively in private law. In contrast, it should be remembered that membership in the Commission depends on nomination by the Federal Ministry of Finance. In its function, the Exchange Expert Commission resembles the expert bodies in what Weber called “collegial” administration. It does not act on its own initiative but “on request” from the Federal Government. Although in the absence of any corresponding legal basis it does not exercise the *powers of a public authority*, its eminent position call for investing the informal level with greater legitimacy and also rules to be set on organization (especially membership) and procedures (Augsberg 2003, p. 280. Transl. R.B.).

Be that as it may, this *hybrid norm-setting body* issued the Takeover Code, which, as we have seen, was superseded by the Securities Acquisition and Takeover Act, since the Federal Government considered it suitable and right to have the pending EU Directive transposed not into an informal code but into statute law, which, however, largely incorporated the provisions of the code. The adoption of the Securities Acquisition and Takeover Act thus

illustrates “a normative regulatory technique by which the preexisting self-regulatory mechanisms are appropriated by the state and transposed into statute law” (Augsberg 2003, p. 289. Transl. R.B.); Augsberg concludes:

The example of the Securities Acquisition and Takeover Act demonstrates the *displacement of private self-regulatory norms by state law*. But it was only experience with the Takeover Code that made it possible to draw up such a complex piece of legislation in a relatively short space of time. Its formulation shows in turn that the appropriation of this regulatory domain by the state is not complete: interaction and communication with the affected parties is still sought. It was sought to retain the advantages of self-regulation, namely flexibility and practicability, at any rate to some degree. *Private norm-setting*, if it is replaced by regulatory law, is not necessarily to be regarded as having failed, for it continues to have a *substantive and procedural impact in the provisions of the law* (Augsberg 2003, p. 292. Transl. R.B.).

## (2) *Code of Honour for Financial Analysts*

The second example is the fate of the Code of Honour for Financial Analysts. Having initially seen no need to take action in this field, the Federal Government changed its mind in late 1999 after reproaches that financial analysts had contributed to the rapid losses in the “New Market” through careless conduct. Augsberg reports that, on the initiative of the Federal Minister of Finance, Professors von Rosen and Gerke were commissioned to examine the extent to which the activities of financial analysts, in particular, could be regulated by means of a code of conduct. A questionnaire sent to the organizations and enterprises affected provided the basis of the draft of a so-called “*Code for Investor-Friendly Capital Market Communication*” that included other information intermediaries over and beyond financial analysts.

This code of honour – which we will not be looking at in greater detail here – was not very successful to the extent that the Federal Government considered this self-regulation inadequate (unlike the Corporate Governance Code) and held statutory regulation to be necessary. It therefore decided only to incorporate certain provisions of the draft code in the *Fourth Financial Market Promotion Act*, taking up the urgent proposal of the Exchange Experts Commission and, above all, the German Association of Financial Analysts and Asset Managers (DVFA) to put the conduct requirements for analysts on a firm statutory basis. The drafting of a code of honour for financial analysts was hence not in vain, since the lawgiver drew on this preliminary work and could proceed on this basis. Augsberg:



Moreover, the draft code is not to be regretted as a waste of time and effort. There is no doubt that it contributed much to regulating a matter from both a substantive point of view and a structural standpoint as regards the norm-setting mechanism. Also to the extent that the lawmakers rejected the – contestable – arguments of von Rosen and Gerke, the valuable insight was gained that the adoption of new arrangements must be preceded by analysis of alternative regulatory models (Augsberg 2003, p. 315. Transl. R.B.).

### (3) *Interim Conclusion*

There are two things we can learn from these two examples:

First, the development of behavioural norms does not necessarily require a stable and closed governance collective such as guilds with mandatory membership or the Prussian officer corps. There are also communities within communities with open boundaries peopled by typical actors such as the financial community mentioned above with its investors, banks, and rating agencies, or the scientific community that – like the key “German Research Foundation” – have given themselves behavioural rules for “good science.”

Second, these examples show that rules are made not only as either state legislation or as non-state, private self-regulation; often it is clearly a matter of a *norm-setting process on a division-of-labour basis*, in which the *non-state regulatory task* is to design *acceptable, professionally informed regulatory models*, which the legislator can completely or partly adopt if needed and politically opportune. We can therefore speak of the *coproduction of law*, and thus of an essential aspect of statehood.

#### c) *Mercantile Law: The Development of Commercial Law as a Body of Law in its own Right*

##### aa) *The Merchant Class as Governance and Regulatory Collective*

If the thesis underlying this chapter is correct that governance collectives generally seek to establish a regulatory regime for organization-sociological reasons, and that governance collectives are therefore always also regulatory collectives, we should be on the lookout for a governance collective corresponding to the commercial law regulatory regime. And there is indeed such an entity, which we shall call the merchant class, a collective that began to develop in the 11th century and which rapidly took shape with the so-called

“commercial revolution.” In *Law and Revolution*, Harold J. Berman writes: “The rise of a merchant class was a necessary precondition for the development of the new mercantile law” (Berman 1983, p. 334). But, he continues: “There is also a danger of viewing the law always as a consequence of social and economic change and never as a constituent part of such change, and in that sense a cause of it” (Berman 1983, p. 336). We have every reason to agree, having learned from our exploration of *the history of globalization as the history of governance* (Schuppert 2014) that the commercial revolution would not have taken place if the legal preconditions for non-cash payments had not been established. But this is not the only reason to quote the following passage: it also evokes the *enabling function of law*, which in our view has often been wantonly neglected (on the providing function of law see Schuppert 1993):

In fact, the new jurisprudence of the late eleventh and twelfth centuries provided a framework for institutionalizing and systematizing commercial relations in accordance with new concepts of order and justice. Without such new legal devices as negotiable bills of exchange and limited liability partnerships, without the reform of the antiquated commercial customs of the past, without mercantile courts and mercantile legislation, other social and economic pressures for change would have found no outlet. Thus the commercial revolution helped to produce commercial law, but commercial law also helped to produce the commercial revolution (Berman 1991, p. 336).

The merchant class itself played a major role in the development of an autonomous body of commercial law:

It is characteristic of the time ... that the initial development of mercantile law was left largely ... to the merchants themselves, who organized international fairs and markets, formed mercantile courts, and established mercantile offices in the new urban communities that were springing up throughout western Europe (Berman 1983, p. 340).

Since in the course of this chapter we have learned that when considering law we must always keep the enforcement dimension in mind, we ought to cast a brief glance at the mercantile courts Berman mentions. Under the heading *Participatory Adjudication: Commercial Courts*, he has this to say:

Market and fair courts, like seignorial and manorial courts, were nonprofessional community tribunals; the judges were elected by the merchants of market or fair from among their numbers. Guild courts were also nonprofessional tribunals, usually consisting simply of the head of the guild or his representative, but often he chose two or three merchant members of the guild to sit as assessors in mercantile

cases. Occasionally, a professional jurist would sit with the merchant assessors. Professional notaries often acted as clerks to take care of legal formalities. Urban mercantile courts, too, often consisted of merchants elected by their fellows. A law of Milan of 1154 authorized the *election of “consuls of merchants” to sit on commercial cases*, and this system of merchant consular courts spread to many Italian cities. It permitted foreign merchants to choose judges from among their own fellow citizens. The courts of the merchant consuls in the city republics of northern Italy gradually extended their jurisdiction over all mercantile cases within the city. Other European cities adopted the Italian institution of the merchant consul or else developed similar institutions for *adjudication of commercial cases by merchant judges*. In some countries, royal authority was asserted over merchant guilds and over town markets and fairs, but even then the law merchant continued, in general, to be administered by merchant judges (Berman 1983, p. 346).

The following remarks by Berman sum up this section on “the merchant class as governance and regulatory collective”:

*The law merchant, then, governed a special class of people (merchants) in special places (fairs, markets, and seaports); and it also governed mercantile relations in cities and towns. It was distinct from ecclesiastical, feudal, manorial, urban, and royal law, although it had especially close connections with urban law and ecclesiastical law* (Berman 1983, p. 341).

The close links between mercantile and ecclesiastical law, which might surprise some readers, are easy to explain: mercantile law is always also concerned with what is allowed – fair price – and what is not allowed – profiteering and usury. For this, so to speak, mercantile ethic, there has for centuries been a much cited and striking image: the “honest merchant.”

#### *bb) The Honest Merchant: The Efficacy of a Narrative Steeped in Tradition*

In our investigation of long-distance merchants as pioneers of globalization history and the Hanseatic League as a particularly interesting example of a powerful governance and regulatory collective (see Schuppert 2014, p. 36 ff.), we have learned how important adherence to the principles of the honest merchant have always been.

But the appeal of the narrative of the honest merchant invites us to examine the *close connection between two normative orders* – commercial law and ecclesiastical law – orders of quite different origin but which in this respect pursue *similar regulatory goals*. Under the heading “Canon Law and Moral Theology in the 16th Century,” Thomas Duve writes about the *link between moral theology and mercantile law*:

A few years after the conclusion of the Council of Trent, a number of works appeared in the Spanish monarchy that could be described as popular, late-scholastic contract law literature – texts addressing merchants and traders, instructing them on the principles of contract law. There had, of course, already been such *moral theological treatises on contract law* in the late Middle Ages. But then a considerable number were published and rapidly diffused outside Europe, too. Probably the best known of these works were the *Tratos y contratos de mercaderes* (1569, from the second edition: *Summa de tratos y contratos*) by Tomás de Mercado, the *Arte de los contractos* von Bartolomé Frías de Albornoz (1573), and the *Tratado utilísimo de todos los contratos* von Francisco García (1583) (Duve 2011, p. 160. Transl. R.B.).

Since the law merchant and canon law were two autonomous legal orders, *conflicts could not be excluded*. Harold J. Berman remarks:

The mercantile community had its own law, the *lex mercatoria*, just as the church had its own law, the *jus canonicum*. The merchants were, of course, members of the church and hence subject to the canon law, but they were also members of the mercantile community and hence subject to the law merchant. When the *two bodies of law conflicted*, it might not be clear which of the two should prevail. Both might be right. Only time could mediate the conflict (Berman, 1983, p. 346).

cc) *The Universality of Commercial Law: Lex Mercatoria as Transnational Law?*

Trade, particularly long-distance trade, necessarily operating across borders, demanded a legal regime that was not limited by territorial boundaries and prevailed everywhere where trade took place. Commercial law is therefore one of the most promising candidates for a law with a claim to universal validity. Berman shows that this was also accepted from the 15th century onwards:

The universal character of the law merchant, both in its formative period and thereafter, has been stressed by all who have written about it. In 1473 the Chancellor of England declared that alien merchants who came before him for relief would have their suits determined “by the law of nature in chancery ... which is called by some the law merchant, which is the law universal of the world.” In the first English book (1622) on the law merchant, *Consuetudo vel lex mercatoria, or the Ancient Law Merchant*, the author, Gerard Malynes, stated: “I have entitled the book according to the ancient name of *Lex Mercatoria* ... because it is customary law approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince.” And Blackstone wrote in the mid-eighteenth century: “The affairs of commerce are regulated by the law of their own called the Law Merchant or *Lex Mercatoria*, which all nations agree in and take notice of, and it is particularly held to be part of the law of England which decides the causes of

merchants by the general rules which obtain in all commercial matters relating to domestic trade, as for instance, in the drawing, the acceptance, and the transfer of Bills of Exchange” (Berman 1983, p. 342).

But the law merchant was regarded as *transnational law* not only in the early stages; present-day legal theory regards the new *lex mercatoria* taking up the medieval heritage as an excellent example not only of transnational law but also of non-state law *generated by civil society* (see Schuppert 2011c with further references). One of the most prominent scholars of this school, Graf-Peter Calliess, describes this transnational law as follows:

Transnational law is the third category of autonomous legal system beyond the traditional categories of state, national and international law. *Transnational law is made and developed through the lawmaking forces of a global civil society*: (1) it is based on (a) general legal principles, and (b) their condensation and confirmation in civil society practice, (2) its application, interpretation, and development is the task of – at least primarily – *private providers of alternative arbitration mechanisms*, and (3) its coercive nature is based on the organization and implementation of socio-economic sanctions under law. Finally, (4) transnational law is codified – if at all – in the form of catalogues of general principles and rules, standardized pro forma contracts and codes of conduct drawn up by *private norm-setting institutions* (Calliess 2004, p. 244. Transl. R.B.).

We shall leave it at that for the moment; in chapter five we will be addressing the concept of law in detail.

#### 4. Personal Governance Collectives and their Constitutive Concepts of Honour

##### a) *The Obligation to Duel and the Officer’s Honour: The Narrative of a Specific Concept of Honour in the Officers Corps*

The phenomenon of the duel and its significance in the military-minded society of the nineteenth century is the subject of *Men of Honor* by Ute Frevert (1995), a veritable treasure trove for research on governance collectives as regulatory collectives and on specific normative orders that can come into conflict with the legal order of the state. It yields astounding and impressive insights.

## aa) *The Meaning and Function of Duelling*

We begin with remarks by Ute Frevert on the importance and function of duelling and its entrenchment in the concept of honour cultivated by the noble officer corps by the bourgeois reserve officer model. The first thing that strikes one – and this is a phenomenon we have already met with in William Golding’s *Lord of the Flies* and in Popitz’s examples of the development of power structures in various “total institutions” – is that duelling is a practice that is grounded not only in societal coercion. It had the full *and inner support* of the officer corps and the higher civil service. Ute Frevert:

[D]uelling is a phenomenon with two faces whose relationship with each other is singularly strained. On the one hand, there emerges a social convention to which, in certain social institutions and circles, absolute obedience is the compulsory order of the day. On the other, a form of behaviour and a social custom become apparent which are not wholly subsumed under such extraneous rules and codes of conduct, and which therefore can only be explained to a limited degree in terms of categories such as social power and class relations.

It is this *dimension of individual motives and social significance* that is seriously difficult for us to comprehend in the closing stages of the twentieth century. The fact that men fought duels because refusal would have entailed forfeiting their status as officers or senior civil servants remains readily comprehensible to modern minds. However, a century on, the fact that in the same breath they spoke of courage and masculinity, of personality preservation and the individualist spirit, and of anti-materialism and honour, carries an unfamiliar and peculiar ring. It is completely beyond the capacity of modern society to image that which nineteenth-century advocates of duelling referred to as the ‘idealist aspect’ of the duel of honour (Frevert 1995, p. 2).

Duelling was not a harmless quirk of people with an overblown notion of honour but a widespread social practice, which led to “social dramas” of the sort often described in literature – see Fontane’s *Effi Briest*. But it is not these individual consequences that make the duel and military honour interesting but its *function as a mirror of a special relationship between state and society* and its inherent explosive force endangering the state’s monopoly of force and lawmaking:

Proceeding from the assumption that both the practice of duelling – as the scenic climax of a ‘social drama’ – and its contemporary image were a reflection of central structural principles of German society in the nineteenth and early twentieth centuries focuses attention on the *special functions which duelling performed for the way of life and differentiation strategies of the aristocracy and the middle class*. However, by provoking vehement inner resistance and outward criticism, it also provides an

opportunity to discover cleavages and fault lines in the internal relations and external contacts of these classes. Not least, the history of the duel can throw new light on the much-discussed relationship between the state and society. Since *the private duel of honour called into question the state monopoly of force*, the reactions of public authorities, courts and jurists give interesting insight into *fundamental controversies about the legitimacy and constitutional characteristics of civil law and the motives and limitations to state claims to regulatory authority* (Frevert 1995, p. 7, passage from original not included in translation. Transl. R.B.).

*bb) The Officers Corps as the Corporate Agent of a Normative Order*

This calling into question could come only from an efficacious non-state governance collective, such as the officer corps:

In socio-historical terms, the fact that the army was a powerful bastion of duelling and an institution in which it enjoyed the special support of the authorities has far-reaching implications, especially in view of the *prominent role played by the military in state and society during the nineteenth century*. Particularly in Prussia, and to a lesser extent in Bavaria, Saxony and Württemberg, *the army was a state within a state*; under direct royal command and possessing its own jurisdiction, it set itself firmly apart from civilian society. However, at the same time, the army permeated civilian life in a multitude of ways and on an extremely large scale, a process to which the phrase ‘*social militarization*’ is usually applied (Frevert 1995, p. 36).

Ute Frevert shows the great extent to which the code of honour of the officer corps operated as a corporative normative order, citing the words of the Prussian General von Müffling: “It is imperative that the world should realize that honour means everything to him [the warrior], and danger nothing ...”, thus explaining what this world really was – the *microcosm of a privileged class*:

In this case, the ‘world’ corresponded to the peers of duellists who took great care to ensure that no officer should breach their code of conduct, which was oriented towards the possession of honour and the demonstration of courage. *By definition, the honour of officers was class honour which was defined, standardized and monitored on a corporative basis*. At the beginning of the twentieth century, Georg Simmel, who, like Max Weber, considered that *honour was a means of class socialization* but who, in contrast to Weber, laid greater emphasis on the link between individual and class honour, made an observation that was particularly applicable to the honour of officers. According to Simmel, alongside morality and the law, honour was a central medium of social survival which was utilized by those ‘special groups’ which occupied a position midway between society and the individual. Whereas the law constituted the ‘survival form’ of society, and morality that of the individual, *honour represented a class phenomenon* which was all the more in evidence the greater the *cohesion of the class* in question. The purpose of honour was to stabilize ‘the cohesion,

standing, regularity and furtherance of the life processes' of a social group, and to isolate it from other 'groups' or classes (Frevert 1995, p. 47).

That the closed officer corps provides such a prime example of a governance collective with a normative order of its own is shown by the following passage, notably by the assertion by the Prussian General von Borstell that the military code of honour was a "*perfect means of bonding and cautioning*":

The best proof of the appropriateness of this sociological categorization was furnished by the officer corps, whose social isolation provided optimum conditions for the development of a special, corporatively standardized and individually practised code of honour. In 1821, the Prussian general Karl Heinrich Ludwig von Borstell asserted that honour assumed the role of a 'coalescent and prognosticatory medium' which was in a position to maintain the unity and purity [of the officer class] and [its] standing among the educated and uneducated sections of all social classes' better than any disciplinary regulations. If, on the one hand, honour created corporate equality among officers irrespective of length of service or rank, then on the other, it safeguarded the internal homogeneity of the officer class, who established *honour as a binding principle of life*. As such, honour functioned both as a *criterion for distinguishing officers from outsiders*, and as a special distinguishing feature of the officer corps, whose honour was so highly prized that it seemed well worth the risk of incurring physical injury (Frevert 1995, p. 48).

A societal practice like duelling clearly needs a *strict justificatory narrative*, because of the associated danger of triggering social drama and conflict with the state legal system and its ban on duelling.

### cc) *The Justificatory Narrative of a Specific Military Honour*

Many have contributed to the great narrative of the special position of the officer and the consequent special concept of honour, i. e., one that deviates from that of general civilian society. A particularly prominent voice was that of Prince Wilhelm, the later Prussian king and German emperor Wilhelm I, who – according to Ute Frevert – commented on the subject in 1846:

[W]hen the amendment to the criminal law on personal affronts was under discussion in the Prussian Council of State, the disputatious prince had argued more along political than along professional lines. In a minority vote, he spoke in favour of retaining the existing provisions, in accordance with which, *affronts to officers were punished more severely than affronts to civilians*. After all, so the prince argued, among the officer class, honour, and for this very reason, an affront, assumed a completely different character and a completely different significance from among other estates ... *For officers, class honour and honourableness were the primary requirements, the primary and most important prerequisites of their profession*. In this sense, an affront



to an officer, which constituted an attack upon his essential qualifications, indeed, upon his very existence, was a particularly grave crime which was all the more deserving of severe punishment; the legislator, in other words, the Prussian state, should therefore afford preferential consideration to the maintenance and encouragement of the honourableness of the officer class, to whom it largely owed its authority. The interest of the state in the honour of the officer class, which, given that the honourableness of the officer class constitutes the foundation of their security and existence, is not applicable to the same extent in the case of any other estate, would appear to be a sufficiently cogent reason for treating affronts to officers differently from affronts to other persons (Frevert 1995, pp. 39–40).

This sort of argument was apparently widespread. But if the officer's concept of honour was so exalted, it was only logical to expect the officer to disregard civil law and feel himself committed primarily to the corporate professional order. This *situation of conflicting norms* was also clearly seen, and given the justificatory narrative of the special honour of the officer, there could be no doubt about how this conflict was to be resolved. Ute Frevert cites Chief of the Admiralty von Caprivi:

In a directive issued to the naval officer corps in 1888, the Chief of the Admiralty, Count Leo von Caprivi, who had also been a member of the revision commission in 1872, expressed his opinion on duelling constraints in even more forthright terms. The future Imperial Chancellor dismissed out of hand the glaring *contradiction which obtained between the legal ban on duelling and the military convention of duelling* on the grounds that although recent legislation had ordained the prosecution of duelling offences, 'this did not necessitate any change in the conduct of officers in the face of affronts and conflicts because it continues to remain essential that officers should be compelled to satisfy the requirement of class ethics, even in the face of the threat of incurring punishment under common law for so doing. Wherever the honour of individual officers and that of the officer class are at stake, it is not permissible that the punishment required by law should have any bearing on the matter' (Frevert 1995, pp. 62–63).

This position met with approval in the most exalted circles, even though in the light of advancing societal and political democratization it was coming under increasing pressure. Ute Frevert plausibly explains this in terms of a purposive political strategy to establish that the real foundation of the Prussian state was the special status of its military and their loyalty:

The fact that this conflict of objectives in the Kaiserreich was apparently insoluble is a further indication of the virtually supraconstitutional and extralegal status of the military, who were defended and shielded against all forms of criticism by their supreme commander. In not only tolerating and protecting, but also authoritatively insisting upon, duelling as a class duty of officers, the Kaiser disregarded the laws of the land; although the provisions on duelling contained in the Criminal Code of the

German Reich of 1873 also formally applied to officers, they were not accepted as binding behavioural guidelines. In 1896, the quasi-official *Militär-Wochenblatt* commented: 'Our conduct as officers is prescribed to us by orders and regulations, and by the established ethics and traditions of our class. *Those are our laws, our source of authority.* In the event that this should bring us into conflict with the laws of the Reich, then we are prepared to bear the consequences' ...

The fact that the Kaiser and the military authorities clove to this protection in the face of massive public and growing parliamentary criticism is an indication of the serious intent of their challenge. Indeed, there are good grounds for assuming that *the duelling constraint imposed upon officers by the authorities was intended as a political signal*, the purpose of which was to underline the exceptional position of the military and their special allegiance to the supreme authority of the state. The fact that the decree on duelling of 1843 was repealed immediately following the foundation of the Reich and superseded by a far more lax arrangement and the fact that, in practice, the duelling constraint increased considerably in intensity after the 1870s are indications of the state's interest in emphasizing the *exclusive and privileged role of the officer corps* and in shielding it against civil equalization (Frevort 1995, pp. 68–69).

*dd) The Normative Order of the Officers Corps as Reflected in Popular Manuals*

In view of the elusive concept of honour and the far-reaching "social militarization" of Prussia, it is no surprise that someone had the idea of writing down and publishing the rules to be obeyed in matters of honour. Ute Frevort reports on the success of the resulting guides and manuals:

However, it was not only the superior officers and more experienced comrades of reserve officers who informed them as to the precise rules and regulations of the military codes of honour and duelling but also ... guides and handbooks ... The first German reference work on the subject of 'conventional duelling customs' (*Die konventionellen Gebräuche beim Zweikampf*) was published in 1882 in the military journal for reserve and *Landwehr* officers. Twelve months later, due to the fact that it had aroused 'universal interest in the army,' it was published as a book. It contained the rules which were to be observed during duels, which hitherto had been passed on by word of mouth, and according to the author, who was a regular officer of fairly advanced years, it was a reaction to the lack of such oral tradition among officers of reserve status. Although it stated that far from summarizing any 'officially approved rules', its intended purpose was merely to convey traditions, it rapidly *attained recognition in the officer corps as a semi-official handbook* which explained to officers the universally valid behavioural expectations which they were obliged to fulfil in cases of conflicts of honour ...

The high sales figures for such handbooks gives some indications of how widespread a demand there was for advice of this nature: by 1911, there had been seven editions of *Die konventionellen Gebräuche beim Zweikampf*. It would seem that they

fulfilled a general need for guidance. It had been assumed from the outset that there was such a need, particularly among reserve officers, but it probably also existed among their regular comrades, increasing numbers of whom were of middle-class origin and thus, without any ‘innate theory of duelling’ at their disposal (Frevort 1995, pp. 79–81).

According to Ute Frevort, however, this codification of the officer corps code of conduct initiates the process of undermining its effectiveness. We bring this section to a close with this interesting *thesis of the erosion of the unquestioned validity of an internalized code of honour through its written documentation*.

However, the written codification of the duelling regulations not only met the need for information on the part of middle-class (reserve) officers and furthered the efforts of the military authorities to achieve the effective integration of social neophytes; it also provided a boost to the formal institutionalization of duelling, which was transformed from a tradition transmitted by word of mouth, passed down from father to son and circulated among fellow officers, into a convention which it was possible to study and absorb. However, like the definition and formalization of military honour, this regulatory enshrinement of duelling issued in a precarious ambivalence: while, on the one hand, its objective was the *immortalization of a collective behavioural pattern*, on the other hand, it laid these regulations and behavioural forms wide open to abuse. The moment a tradition becomes enshrined in writing and is given a clearly defined and codified framework, it *forfeits its unimpugned validity* and can assume the appearance of an artificial product, the stabilization of which requires the employment of external means (Frevort 1995, p. 81).

b) *Do Gangs of Thieves have Normative Orders?  
The Example of “Thieves in the Law”*

At first glance, it might seem strange to put this question seriously, for how could robbers and thieves – often characterized as “*lawless*” – have a normative and hence deontological order, which would surely have to address the common good? But this is putting things the wrong way round – for three cogent reasons:

*First*, the fact that people who regularly and deliberately break (state) law does not (contrary to what the question of what distinguishes a gang of thieves from a legal system suggests) mean that the same people cannot agree on an order valid within their group. As the phenomenon of “*thieves in the law*” shows, this can by no means be excluded.

*Second*, we know from often cited politologists, sociologists, and economic historians that it is *not easy to draw a clear dividing line between gangs of*

*thieves and states*, the latter of which are generally considered to have legal systems. Citing various example, Charles Tilly (1986) has shown how gangs of thieves can mutate into states, and the economic historian Frederick Lane (1958) has describe early modern governments as force-using enterprises that produce and sell the provision of protection as a special service. The monopoly of the means of force and the *protection racket economy* thus constitute an essential aspect of state-building in Europe.

*Third*, we call to mind the methodological approach common to governance theory and the sociology of law of first analysing the actual governance structures and the law actually practised before going on to normative assessment.

Having said this, we should now examine without prejudice whether thieves, robbers, and bandits develop an order binding on their group and ensure compliance with it.

A good example of the “lawless” submitting to strict normative orders are the so-called “thieves in the law,” *wory w sakone*.

This species of organized crime in Russia had hitherto escaped our notice. Only examination of the “gang of thieves” problem brought it to our attention, and we have learned a great deal about it from the literature (especially Roth 2000a; Volkov 2001; Osterloh 2004). From the perspective of governance collectives and their normative orders, “thieves in the law” are quite fascinating. Luckily, the literature consulted is not only very informed but also very serious, so that the following, often astounding information is not the product of clichés about the Russian mafia or racist prejudice.

We need first of all clarify what “thieves in the law” actually are. Kay Osterloh – a social education worker at the Nuremberg drug aid centre with numerous Russian clients, also from Nuremberg prison – describes the phenomenon as follows:

The origin of the “thieves in the law” movement is largely unknown. Some historians place it in the second half of the nineteenth century. Others believe it emerged during the turmoil of the October Revolution. It is a *sort of secret society, a self-organization of criminals*, which drew up its own constitution. “Some criminologists consider it to be unique of its kind, with no analogy in the criminal society of other countries” ... Its members are not only classical thieves as defined by the penal code but also various sorts of “crooks” and criminals, so to speak the “aristocracy” of crime who in their statutes had given themselves a sort of law of their own under which the concept “thief” advanced to a “honorific title” to be gained only through particular “achievements.” The granting of this title was watched over by a “thieves

assembly,” the “s’chodka,” which also sat as a sort of arbitral tribunal in the event of conflicts. The “thieves law” was the only binding body of rules in accordance with which every “vor” (“thief”) had to live and act. The law of the land was regarded as hostile and simply ignored ... (Osterloh 2004, p. 2. Transl. R.B.).

Paul Erich Roth adds:

It cannot be established exactly when and in which camp a group of “thieves in the law” first formed. It was probably in the late 1920s. The process of organization in the innumerable GULAG camps extended well into the 1930s. In 1930 there were 1.7 million prisoners in the camps of the NKWD, and in those of the OGPU some 100,000.

The “blatnye”<sup>1</sup> which later took on the name “thieves in the law,” was composed of members of two groups of convicts. First there were the predominantly “socially dangerous elements” from among the “Žigany,” and second “socially-related elements,” mostly thieves and robbers, who called themselves “urki” or “urkagany.” The “Žigany” opposed the regime for ideological reasons. In the power struggle between the two groups, the “Urky” were victorious. Political motives were relegated to the background: a thief should steal and not concern himself with politics. In the early 1930s, the law of thieves was drawn up; the “crowning” as thief was the precondition for membership in the “Thieves in the Law” (Roth 2000a, p. 725. Transl. R.B.).

It is not new that power structures and rules reflecting them develop in prisons and prison camps (see Popitz 1992). But what is remarkable about the “Thieves in the Law” are *four key characteristics* that are of great interest from the point of view of governance collectives and their normative orders.

#### aa) *The Law of Thieves*

The Law of Thieves itself does not exist as a semi-official written text; like all codes of honour, it is an informal set of rules. Nevertheless, it can be approximately reconstructed. Kay Osterloh has done so (with reference to a 1997 book by Alain Lallemand on the Russian Mafia):

1. The thief must abandon his biological family (mother, father, siblings). The criminal community is his sole family.
2. A thief must not found a family of his own (have no wife and children).
3. A thief must not engage in work and must live only from the proceeds of his criminal activities.

1 In thieves’ cant, “blat” meant acquaintance, relations, which one used illegally.

4. A thief must give other thieves moral and material support *from the common purse* or the *obschtschak* [illegal solidarity fund].
5. A thief may pass on information about accomplices and their whereabouts only in strict confidentiality.
6. If a thief comes under investigation, the other thief must “cover” him and enable him to flee.
7. If a dispute arises within a gang or between thieves, a meeting must be arranged to settle it.
8. Should this become necessary, a thief must attend the meeting to judge another thief if his conduct of life or behaviour occasions criticism.
9. The punishment pronounced against the thief at this meeting must be carried out.
10. A thief must have a command of thieves’ cant.
11. A thief must play cards only if he has enough money to pay any debts.
12. A thief must instruct novices in his “art.”
13. A thief must always have a “boy” or *schestjorka* in his service.
14. A thief may drink alcohol only as long as he keeps a clear head.
15. Under no circumstances may a thief have anything to do with the authorities; a thief takes no part in the life of society; a thief must not belong to any social associations.
16. A thief must accept no weapon from the state and must not serve in the army.
17. A thief must “honour” every promise he gives to another thief ...

This “law” lays no claim to absolute validity; it is rather the sole formulated version to be found in the relevant literature. The rules were also constantly adapted to meet new realities and requirements, and proved to be highly flexible.

As we shall see, this code, although dating back to the 1920s, has had an enormous normative impact to this day (Osterloh 2004, p. 3. Transl. R.B.).

Two things about this thieves’ law should be particularly stressed. First – essential for any sort of normative order – an established and observed *procedure for conflict resolution*, and second the existence of a *common purse* from which each thief receives not only a share but which also provides support for members in prison (Volkov 2001, p. 178).

bb) *The Thieves' Organization as Ordering Factor*

In the course of this chapter we have repeatedly come across the concept of *certainty of order*. We have seen that one of the essential functions of a group's set of rules is to provide a specific order – whether just or unjust. Kay Osterloh confirms this in comments about the organization of “thieves in the law” as an ordering factor:

The “thieves' organization” soon became an ordering factor through its strict organization and unscrupulousness. In the camp (Russian “zona”) the guards ruled during the day and at night the “vory” held sway. *De facto, there was therefore a sort of tolerated double society*. The “thieves” were systematically deployed as a parallel “law enforcement agency” in the camp. This served first to further humiliate and terrorize political prisoners and second to produce a camp elite that could be correspondingly functionalized by the camp administration ... In “The World Turned Upside Down” the archaeologist Lew Klejn ... describes his own painful experience in the “zona” in the 1980s. Despite hesitant destalinization after the 20th Party Congress in 1956, things in the camps had not essentially changed. As soon as it became dark and the officers had left the block, those who were the real masters raised their heads. But their silent presence was also to be felt during the day. Nothing happened without a glance to check back with them. Such a secret master and ruler of a work troop was elected at night at a meeting of influential crooks ... (Osterloh 2004, p. 4. Transl. R.B.).

If this was the internal functional logic of the camp, it is not surprising if the governance structure of such camps is described as a caste system:

The “glavvor” (“head thief”) or the “avtorität” was elected for the whole of his term of imprisonment. His power was inviolable. *The internal power system was based on a caste system*:

1. “Thieves” did not work and exercised almost unlimited power.
2. “Servants” assisted the “thieves” and were their “enforcers”.
3. The so-called “swine” were the “parias” of the camp. A swine could be recognize by his stoop, the way he ducked his head, cast his eyes down, a certain timidity, skinniness, and bruises ... The “swine caste” included homosexuals, sex offenders, and what would now be described as “wimps” or “wusses”.

The camp administration acted as if it knew nothing about this caste structure. In reality, however, it was well informed and accepted the caste order by taking it into account in appointments to such positions as brigadier, and elder, thus validating the system, since such “positions” would otherwise be meaningless. In the camp it was unthinkable for a crook to stand to attention before a servant or, worse still, before a swine or that a swine be given command over a crook. And there was nothing funny about it at all ... Lew Klejn comes to the conclusion that “everything was like an echo: violence was followed by violence, hierarchy by hierarchy, system

by system! ...” As we shall see, this bitter formula is still highly relevant in German society ... (Osterloh 2004, p. 4 f. Transl. R.B.).

cc) *The Crucial Importance of Group Membership and Group Solidarity*

We have seen that group norms have the function of stabilizing the group internally and setting it off externally, as well as strengthening group identity. Kay Osterloh identifies a number of group values in this sense:

The decisive values of the group are:

- Loyalty to the group internally and externally
- Solidarity; sharing is the order of the day in the group (e. g., alcohol and drugs)
- Discretion externally (e. g., towards police and justice)
- Sanctioning of rule-breaking (if need be, corporal punishment)
- Betrayal is the worst violation

Loyalty to the group can go so far that in the event of suspicions or accusations being raised, responsibility is accepted even if another member of the group is actually guilty of the deed (Osterloh 2004, p. 10 f. Transl. R.B.).

It is interesting what Osterloh, looking at the example of young group members, has to say about the relationship between group norms as “endogenous norms” with “exogenous norms” valid outside the group:

*For young people the group is the crucial factor.* Its norms and values, along with the hierarchy in the group, determine their behaviour. The rules and norms of the “outside world” or society take second place. This loyalty to the group can at times take on irrational qualities. A colleague from Stuttgart reported of his experience with a group of Russian-speaking young people in a youth welfare centre. One of the young people constantly broke all the rules in force. In consultation with the colleagues involved, it was finally decided to remove the delinquent youth from the leisure group. After his expulsion, the group thanked the staff for the decision and asked why they had taken so long to make it. The staff were astonished at this comment and asked in turn why the group had not taken action themselves, since they had clearly been aware that the young delinquent would only damage the reputation of the group as a whole. The answer was even more astonishing in its logic for the social workers. The young man had long been felt by the young people themselves to be a disruptive factor for the group with his constant breaking of the centre rules, but he had not broken any group rules. He therefore had to be tolerated until the people in charge came to a decision. *Deviation from the group code would have been very rapidly and discretely sanctioned by the young people themselves.* The report shows clearly the different normative systems and their value hierarchy for the young people (Osterloh 2004, p. 10. Transl. R.B.).



The vital importance of the group within organized crime in Russia is confirmed by Vadim Volkov in “Violent Entrepreneurs in Post-Communist Russia” (2001), where he recounts that these violent entrepreneurs consist of smaller groups, which had originally formed as homeland groups, sport groups, or the like, to later become active in matters of “protection” and “violent enforcement.” The following passage gives us a brief glance at the world of group crime in St. Petersburg:

Many groups have gradually lost their original direct connection with some obscure suburb, sport club, ethnicity or the founding leader. *Actually, the meaning of the criminal group’s name is its practical usage. In the practice of violent entrepreneurship such names are used as trade marks.* The license to use the trade mark practically means the right to introduce oneself as “working with” such-and-such criminal group or with avtoritet X. Such a license is supplied to a brigade or an individual member by the avtoritet, the leader of the group, normally after the candidates have been tested in action. ...

The name of the group has a specific function in the practice of violent entrepreneurship: it guarantees the “quality” of protection and enforcement services and refers to the particular kind of reputation that is built from the known precedents of successful application of violence and “question-solving” ...

The reputation of enforcement partner, embodied in the name of the group or its leader, is crucial for the aversion of possible cheats in business and acts of violence, since it carries the message of unavoidable retaliation. The license to use the name to conduct violent entrepreneurship, i. e. to act as commercial enforcement partner, presupposes an informal contract between the leader and the unit (the brigade) that acts in his name. The contract includes the obligation to *pay into the common fund and to follow certain rules.* The group that has no license from one of the established avtoritet will have little success in its business and will either be exterminated or sent to prison with the help of police. The latter will be glad to use the occasion to its own advantage to report a successful operation against organized crime (Volkov 2001, p. 15. Transl. R.B.).

dd) *The “Thief in the Law” as an Exemplary Narrative*

Obviously, crime structures in Russia have much changed since the 1920s and 1930s, and *the “thieves in the law”* no longer exist as such:

The transformation of the “socialist” system into a capitalist market economy and civil democracy began already with Glasnost and Perestroika, and increased in pace with the demise of the Soviet Union. With the new freedoms of a not clearly defined “democracy,” and above all radical economic changes, an era began of unprecedented personal enrichment. The political and economic elite of the country showed

the way. While combine directors had already treated “public property” as their own, i.e., to line their own pockets, this attitude logically continued in the course of unguided or uncontrolled privatization. So-called “oligarchs” controlled politics with their financial power, and public funds were unscrupulously embezzled or diverted. Criminal circles, too, used the confusion of the times to reorganize. The classical organization “Thieves in the Law” experienced various internal struggles. For example the so-called “modernizers” split away. New organizations and associations developed apace, which were no longer willing to obey such a strict and obsolete regime. Today so-called “organized crime” or the “Russian mafia” is a very complex structure and cannot be simply described as monolithic ... (Osterloh 2004, p. 7 f. Transl. R.B.).

However, these changes are not our subject of discussion. But precisely in view of these changes and the time that has past since Stalin, it is striking that the “Thieves in the Law” are still a model. Kay Osterloh:

All our clients without exception knew about the “Thieves in the Law.” Uncritical and with a strongly romanticized view, they adopted clichés about this movement. It was always better to have a sense of honour as “vor,” as “thief,” than to be a “dumb Russian from Kazakhstan.” As a rule, this has nothing to do with the actual “thieves,” let alone the so-called “Russian mafia.” They “act out” the pattern.

Very few of our clients had already had contact in their countries of origin with any forms of “organized crime.” They mostly gleaned their knowledge from the tales of their elders (collective knowledge), films (e.g., “Brat” I/II or “Bumer”), videos, books, and the Russian press. To be a “gangster” or “bandit” is seen as cool, an attitude to be found in other subcultures, too. The bandit songs from the camp period thus provide a “soundtrack” for immigrant youth. They sing of honour, of “real” men and life on the fringes of society. In answer to critical questions, our clients willingly describe this way of life as the “real” life (Osterloh 2004, p. 9. Transl. R.B.).

This model function is so effective that in German prisons where delinquents originating from Russia are held, the *Russian caste system of the prison camps* is copied and practised:

The practices of the “thieves” that have been learned or adopted in idealized form are used here. Many young people have the impression that on crossing the prison threshold a Russian “prison chip” has been implanted in them. The whole programme from their “home” plays out. There are regional differences. Depending on the inmates of the particular prison, the old rules or warmed-over versions of them apply or new ones are invented. In some prisons the inmates call themselves “thief.”

The caste system of the earlier prison camps with similarly practised (in various forms and at various levels of radicality). Here they find what they had lost there [in freedom] (or what they could not hope to gain there): recognition and respect. They

discover that there is a milieu in which the qualities they have in abundance are held in high esteem, whereas qualities they lack are superfluous ... One of my clients, for instance, shaved his head immediately after being imprisoned (as is usual in Russian prisons and camps, albeit involuntarily). On a finger he had the symbol for “young first offender” tattooed, and “decorated” his knee with two eight-pointed stars (which means: I will never kneel before the cops). No-one had forced him to do so. He had, so to speak, prepared for his new life in prison. For him, life behind bars, in the “zona” was only *a different but known way of life with the concomitant, inevitable rules* (Osterloh 2004, p. 11. Transl. R.B.).

#### IV. Community-Forming Normative Orders

We have seen that groups and social associations give themselves rules and manage to enforce compliance with them. This development of rules serves to stabilize the group as such, promotes its cohesion, and establishes a corporate identity. To this extent, the development of a group normative order is always community-forming, so that the above heading could be read as unspecific. But what is meant is that there are a number of *close-knit communities that constitute themselves as communities precisely through their own regulatory regime, thus marking themselves off from other communities*. Prime examples of this are the *medieval orders and monasteries*, which not only developed their own regulatory regimes (Schwaiger and Heim 2004), e. g. the Rule of St. Benedict, but are distinguished and named precisely on the basis of *each monastic “rule”* (see the collection of major monastic rules in Balthasar 1994).

We shall restrict ourselves to examining two examples of norm-formation processes and their institutionalisation:

##### 1. The Normativity of Exemplary Patterns of Behaviour in the Institutional Structures of Medieval Monastic Life

###### a) *The Normative Force of Exemplary Narrative*

The Dresden Collaborative Research Centre 537 “Institutionality and Historicity,” which took an institutional analysis approach, investigated the genesis and establishment of medieval mendicant orders. A 1999 publication (Melville und Oberste 1999) examines how order-specific normative systems are developed and enforced. The following questions are addressed:

- To what specific guiding concepts were the early mendicant orders committed?
- What paths were available to internalize and propagate such ideas?
- How did the original ideals and the allocation of social functions consolidate into the organizational structures of the orders?

Thomas Füsler points to the importance of the *exemplum* as a medium, showing how this form of exemplary narrative, inviting emulation, can be understood as a way to develop a normative order specific to a community (Füsler 1999, p. 27 ff.). These exempla (for an overview of research see Schenda 1969) are of course concerned first with the *exemplum Christi* and second with the *exempla sanctorum*, that is to say, the numerous medieval lives of the saints, but also with the so-called “everyman” exempla, which represent the category of the unknown hero or nameless witness to the action of God in history. We are interested less in these exempla as such than in the *function of exemplary narrative in developing and enforcing normative patterns of behaviour*.

As far as the function of *exempla in developing and concretizing the normative ordering* of a religious order is concerned, Füsler has this to say:

All exempla sanctorum formulate exemplary patterns of behaviour and present them for emulation. They are at the same time explanation and explication of prevailing guiding ideas and normative systems. Hagiography and historiography cannot be kept apart; the description of the life of the mendicant saint is always an exposition of the particular order’s own history. This is especially the case in the early phase of tradition formation in both of the orders under study [Franciscans and Dominicans]. Apart from stylizing personal models, the vision reports convey a specific order identity that aims to distinguish the religious order in question from competing concepts of the religious life. A number of exempla also serve quite concretely to convey, explain, and display monastic norms. These exempla, which mostly show monks in borderline situations and norm conflicts, are of the greatest importance for underpinning the internal normative system of the monastery (Füsler 1999, p. 57. Transl. R.B.).

As for the *enforcement dimension*, Popitz has shown how important both the threat of sanctions and the *internalization of the normative order* is. Thomas Füsler on the *community form* of the order:

To produce such a meaningful order, social discipline, imposed in the medieval monasteries and orders in a close-knot network of social control through elaborate supervision and sanctioning mechanisms, does not suffice; individual self-discipline has to be produced through the *internalization of norms* and introspection, hence self-control. “Internal controls” develop above all through the “socialization of the individual into institutions.” However, the legitimization of the institution required

constant *legitimation of the behavioural demands on the individual* by consistently relating these demands to the prevailing guiding ideas accepted by all members of the institution. Only then does social control enter into the motivation of actors: a process of internalizing normative guidelines culminating in “willed conformity.” These observations are consistent with the findings of Günther Schmelzer ..., who has subjected Catholic religious order communities to social-scientific scrutiny: “As religious groups and in keeping with their tradition, orders aim to influence their members, not in the first place by the threats of sanctions but by establishing and stabilizing their understanding of values and meaning, i. e., by formalizing behavioural expectations and need structures.”

Given the tasks medieval religious orders need to perform to safeguard their existence, the importance of the *exempla* for these institutions in *mediating between abstract norms and the concrete life led by their members* is obvious. Exempla played a vital role in the subject formation of members of an institution by passing on knowledge and procedures. They performed a crucial institutional task, namely to establish permanence by stabilizing patterns of behaviour, and to safeguard it despite the dynamics to which human orderings are fundamentally subject (Füser 1999, p. 57 f. Transl. R.B.).

#### b) *Exempla Collections: A Method for Strengthening Group Identity*

The collection and centralized archiving of exempla promoted by the leadership of the religious orders had not only the function of individualizing the behavioural requirements and provide “training programmes” for “self-analysis and self-control,” but also to justify and consolidate what we would now call “corporate identity.” Thomas Füser:

The traditionary function of the exemplum, to store the experience of orders, is their second main function. Apart from stabilizing ordering patterns, their decisive institutional contribution to stability was to elaborate an internal narrative that, as group identity (“we-identity,” “corporate identity,” collective consciousness) could also be used for external legitimation *and* the self-affirmation of the order. The use of exempla within the order also provided “ideological justification of the facts.” Evidence for the legitimacy of the religious objectives of the order also guided the “means of coercion and control” used in it, and the more or less absolute claim to subject all aspects of its members lives to precise, detailed, and authoritative norms (Füser 1999, p. 101. Transl. R.B.).

## 2. The Basel Mission: A Community Caught in the Net of its Norms

### a) *Mission as Exported Pietism*

The Evangelical Missionary Society in Basel was founded in 1815 in the wake of a surge of piety in European Protestantism, a parallel international missionary movement, and a specific local development, which Thoralf Klein describes as follows:

With the founding of the “*German Society for the Promotion of the Christian Truth and Piety*,” in short “*Christian Society*” in 1780, Basel became an important centre of the *Revival Movement*. The aim of the society was to bring together like-minded, pious Christians across denominational and social boundaries. The directors included Basel vicars and merchants; the full-time secretaries all came from Württemberg (Klein 2002, p. 108. Transl. R.B.).

As Klein shows, the Basel Mission drew both in religious-theological substance and personnel on *Württemberg Pietism*, in which the Basel missionaries had been socialized, and – intensified by the training at the Basel Mission House – so thoroughly that their approach to the alien Chinese culture was “*prestructured by home conditions*” (Klein 2002, p. 120. Transl. R.B.). The nature of Basel missionary work can therefore be understood only if the particularities of *Württemberg Pietism* are taken into account. This brings us back to the key role of group membership and the special position of a community with a dense regulatory regime of its own to which it gives rise. Thoralf Klein:

The Pietists constituted a special community whose membership was based both on intensive piety and affirmation of the spiritual traditions of Pietism and on acceptance of the individual by the group. Male members addressed each other as “brother,” using the familiar “du,” and to this extent met as equals. At the same time, there was a very special hierarchy in which the “Stundenhalter,” in charge of Bible study meetings, held a particular position of leadership; presumably still greater was the influence of local and regional leaders, the so-called “patriarchs,” who exercised unlimited authority especially in matters of faith ... Externally, the Pietist sub-culture kept distant from the rest of the population, whom they disparagingly referred to as “Weltkinder,” “children of the world” with their “worldly,” that is un-Christian way of life. ...

The *rigid social norms* derived from the Pietist understanding of Christianity favoured a special position in society. They sought to suppress all drives felt to be un-Christian, such as aggressiveness, sexuality, indulgence, and enjoyment were frowned upon. Diligence, thrift, “fidelity in small things” and willingness to make sacrifices for the Kingdom of God, humility, and patience were regarded as positive

attributes of a true Christian. Compliance with Pietist norms was considered the yardstick of piety. Abuse, cursing, failure to observe the day of the Lord, visiting public houses, drinking alcohol, and gambling were sanctioned, as was “Unzucht” – a concept that covered all sexual activities with the exception of marital intercourse. Great value was therefore placed on strict separation of the sexes, particularly among adolescents (Klein 2002, p. 118 f. Trans. R.B.).

With these norms and principles in their bags, the Basel missionaries set out for South China, where they found a local culture that deviated markedly from these internalized values and conceptions.

b) *The Basel Mission as a Biotope*

Klein’s description strongly suggests that the Basel Mission displayed certain peculiarities redolent of a biotope largely isolated from the environment. Three stand out:

aa) *The Mission House: Locus of Socialization and Disciplining*

“*The basis for the social rise of most Basel missionaries was their training at the Basel Mission House. This was considered necessary because the Committee [the managing body of the Mission, G. F. S.] did not want to send out simply enthusiastic laymen*” (Klein 2002, p. 129. Transl. R.B.). On the other hand, there could be no question of a university education owing to the threat of exposure to “worldliness.” Klein describes the instruction provided at the Mission House:

In contrast [to university education, G. F. S.], training at the Basel Mission House was designed to consolidate and build on the elementary school education of mission students. Apart from the natural sciences and the basics of medicine, modern languages were taught – English, to begin with also Dutch – as well as Latin, Greek, and Hebrew, which were also important for theological training. Education was completed by practical instruction in music – hymns naturally played a major role in missionary work – horticulture, and the crafts that the missionary might have to master for his work in the field. *Interestingly, the languages of the mission areas were not on the curriculum, nor was there any instruction on the cultures of the mission areas.* The entire training programme aimed to strengthen the certainty of missionaries about the superiority of Christianity over all other religions ... At the latest during their time at the Mission House, prospective missionaries became acquainted with the *militant rhetoric* wide-spread in the missionary movement, which presented the “mission to the heathens” as a struggle against the kingdom of Satan and in metaphorical excess as an armed conflict. The hymn usually intoned at the departure of

missionaries or missionary brides “*Go joyfully forth to war against sin*” ... was doubtless a familiar companion during this time (Klein 2002, p. 129 f. Transl. R.B.).

Even more than a training centre, the Mission House was a *locus for social disciplining*:

Until the outbreak of the Second World War, the home leadership insisted on seminarian training for missionaries, defending it even against objections from China missionaries in 1911, who asserted that the times called for missionaries with an academic education. ... the Committee took the view – not publicly expressed – that such a change would have unacceptable consequences for the organizational structure of the Basel Mission. Training at the Mission House was designed not only to equip the young missionary with the self-assurance he needed for his work but also to teach him to accept his place in the organism of the Basel Mission: it accordingly continued the *mixture of inner piety and control through the community* that he had known from his earliest childhood. *Entry into the service of the Mission was thus not only an escape from a narrow village world and an opportunity to rise socially; it also marked the beginning of often lifelong social disciplining* (Klein 2002, p. 131. Transl. R.B.).

This calls for a closer look at the composition and self-conception of the Mission’s managing body, the Committee.

*bb) The Committee: A Board with a Sense of Mission*

The Committee of the Basel Mission was composed largely of members of the Basel city patriciate. Thoralf Klein’s account of the self-conception of the Committee sounds at times like a caricature:

The charismatic trait of the Basel Mission manifested itself in the leadership role of the Committee, which in its own eyes managed the mission enterprise by divine legitimation and with infallible soundness. If the mission was really, as Hartenstein put it, an “action of God” ...; if God Himself had miraculously brought the Basel Mission into being, as its founding myth asserted, *the Committee could claim to be authorized by God Himself to lead the missionary enterprise* and to exercise this leadership in His sense. Asked by what sign a missionary could recognize the will of God, Josenhans in his inimitable fashion responded “by the will of the Committee.” ... This claim to infallibility was maintained until well into the 1920s, when a number of missionaries and the directors Dipper and Hartenstein called it into question (Klein 2002, p. 135. Transl. R.B.).

We have seen what an important role rules play, for example, in *order-like associations* and in the formation of a *corporate identity*. But the rules laid down by the Committee of the Basel Mission are more than astonishing and



did not spare the private sphere of missionaries; Thoralf Klein has this to say about their *regulatory obsession*:

To establish and safeguard their hierarchical structure and to allocate responsibilities among the various institutions, the Basel Mission required a precise set of rules that could function over enormous geographical distances. Despite Pietist rhetoric, it can be said with impunity that the urge of the Basel Mission to codify absolutely everything amounted to a regular obsession. The lives of missionaries were very largely determined by the regulations of the Committee. It began early on during training at the Mission House, where the entire daily routine, including personal hygiene, compulsory attendance at the common meals and the strict limitation of social contacts were regulated by the house rules. Already at this stage, the young men, most of whom entered at the age of 18 or 19, were trained to a life of simplicity and integration into the Mission organization, but also to accept responsibility – the house rules listed a total of 39 small functions that students exercised in turn, including the supervisory functions of senior, famulus, and septimanar. In a quite comprehensive sense it can be said that the period of training at the Mission House served “to gain detailed practice in the missionary business”...

Once the missionary or missionary sister had arrived in China, there was an abundance of further rules for them to follow. In 1920, young missionaries were instructed as follows: “As far as your service status is concerned, we remind you that you set out not as a free missionary but in the service of a mission society with an established order that has developed through the experience of a century. Get to know this order as set out in the “Personal Regulations,” the Correspondence Rules, the Parish Order, the Church Organization Statutes, in the former “Official Gazette,” and in the correspondence of the Committee with the stations.” However, these regulations concerned with service-related matters were deemed far from sufficient. As during training in Basel, the *private life of the missionaries* in the field was regulated by a codified set of rules. What and how many pieces of equipment the missionary took to China, what and how many items of furniture he acquired, how often he reported back on his work, and what was to be reported on – all this was set out in black and white in separate regulations ... One particular and much-discussed case was the “*Marriage Order*,” which contained precise rules on marriage (Klein 2002, p. 142 f. Transl. R.B.).

Looking over this chapter, it is striking what a key role social groups and their codes of conduct play – whether the group is an estate, a tribe, a profession, a gang, a religious community, or an urban “*coniuratio*.” Clearly, we can conclude that normative orders or law are to be conceptualized not only, as accustomed, in terms of the individual (“subjective rights”) but also in terms of the collective, which for reasons of external differentiation and the establishment of internal coherence sets itself rules and enforces compliance with them. In the next chapter, on the plurality of norm producers, we shall also be concerned with this collective standpoint. We shall see that

there are collective actors – industrial associations, religious communities, international organizations – that produce and seek to enforce rules in their given socio-legal field. In the final chapter, we will be returning to the general topic of “governance collectives and their regulatory regimes.”

## Chapter Three

### From Plurality of Normative Orders to Plurality of Norm Producers

#### A. What is to be Discussed in this Chapter

Our foray into the thicket of normative orders has lent a great deal of support to the thesis of omnipresent multinormativity. Normative plurality, as we have seen, is not only the normal case in history, but, despite the dominance of state-made law, is now increasingly a reality that has nothing exotic about it. But since almost all normative orders can be attributed to an author or producer, in other words to a given legal source, it can be assumed that the plurality of such orders is matched by a plurality of norm producers, with most of whom we are also very familiar, for instance:

- God as lawgiver
- Parliaments as lawgivers
- The executive as issuer of regulations
- Local authorities as makers of by-laws
- Standard setters
- Transnational regulatory networks, and so on and so forth.

This chapter discusses the plurality of norm producers. But we shall not be working our way through all the norm producers we can turn up, let alone in alphabetical order. We are interested rather in what *existing norms* can be attributed to particular authors and the *normative fields* in which norm producers are typically to be found. Can “*normative biotopes*” be identified in which – generally equipped with a degree of autonomy – norm producers specific to the field are to be found and who can be named and described? Our aim is therefore to link up two of the key topics of the Max Planck Institute for European Legal History mentioned in the introductory chapter, namely *multinormativity* and *legal spaces*.

For the structure of this chapter, this means that we must first set out in search of what we shall call *normative spaces* and keep a lookout along the way for what types of norm producers we can find.

## B. The Search for Normative Spaces and How to Set About It

In the search for promising ways to track down normative spaces of all kinds, four – associated with particular authors, all interestingly enough from different scholarly disciplines – have caught our attention.

### I. Brian Tamanaha's *Socio-Legal Arenas*

Tamanaha suggests distinguishing various “systems of normative ordering in different social arenas” (Tamanaha 2008; 2010), and identifies the following “six socio-legal arenas” (Tamanaha 2008, p. 36 f.):

- Official legal systems
- Customary/Cultural normative systems
- Religious/Cultural normative systems
- Economic/Capitalist normative systems
- Functional normative systems
- Community/Cultural normative systems

This proposal is useful – regardless of whether Tamanaha has chosen the “right” arenas and whether an arena more or less would have been preferable – mainly because the “arena” concept is so inviting. Major *communication-intensive* events take place in arenas like Madrid’s legendary Bernabéu Stadium. The concept of arena therefore has to do with *communication*, and is consequently in excellent keeping with our view that the production, use, and enforcement of law are above all communication processes.

It also fits in particularly well with the actor perspective, which is always in the background. Anyone visitor to an arena knows that you have to distinguish between stage, backstage, and audience – the latter responding to the happenings on stage with varying intensity. Relations between actors performing their roles in an arena are *communication relations* and can be described and analysed as such.

## II. Sally Falk Moore's *Semi-autonomous Social Fields*

In “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” the legal ethnologist Sally Falk Moore examines two social fields – the American clothing industry and the tribal society of the Chagga in Tanzania – to discover what *rules of the game* really influence behaviour. There are three possibilities: state-made law, at any rate law from outside the *social field*; rules made in the social field itself; or a mix of the two with variable degrees of authoritativeness. She formulates the issue as follows:

The concept of the semi-autonomous social field is a way of defining a research problem. It draws attention to the connection between the internal workings of an observable social field and its points of articulation with a larger setting. ... Theoretically, one could postulate a series of possibilities: complete autonomy in a social field, semi-autonomy, or a total absence of autonomy (i. e., complete domination). Obviously, complete autonomy and complete domination are rare, if they exist at all in the world today, and semi-autonomy of various kinds and degrees is an ordinary circumstance. Since the law of sovereign states is hierarchical in form, no social field within a modern polity could be absolutely autonomous from a legal point of view. Absolute domination is also difficult to conceive, for even in armies and prisons and other rule-run institutions, there is usually an underlife with some autonomy. The illustrations in this paper suggest that areas of autonomy and modes of self-regulation have importance not only inside the social fields in which they exist, but are useful in showing the way these are connected with the larger social setting (Moore 1973, p. 742 f.).

Her observations indicate that external state-made law naturally plays a certain role as general setting, but that the real *rules of the game* are made and practised within the given social field. They can dominate actor behaviour in the shape of an *informal parallel order*, or a *pre-existing autonomous social group* can confront and more or less “outflank” state reforms with its own normative system.

In the American clothing industry, the well functioning of the sensitive fashion sector appears to depend very strongly on personal relations between designers and retailers, and particularly on the exchange of favours. Moore comments on the functional logic of this informal parallel order:

*A whole series of binding customary rules* surrounds the giving and exchange of these favours. The industry can be analyzed as a densely interconnected social nexus having many interdependent relationships and exchanges, governed by rules, some of them legal rules, and others not. The essential difference between the legal rules and the others is not in their effectiveness. Both sets are effective. The difference lies in the

agency through which ultimate sanctions might be applied. Both the legal and the non-legal rules have similar immediately effective sanctions for violation attached. Business failures can be brought about without the intervention of legal institutions. Clearly neither effective sanctions nor the capacity to generate binding rules are the monopoly of the state (Moore 1973, p. 743 f.).

The case of the Chagga, settled in the Kilimanjaro area, is quite different. In our terminology, the situation is that the governance and regulatory collective of the Chagga has a traditional governance regime for land use; a regime under which neighbourhood and lineage plays a decisive role. However, the government formed after the independence of Tanzania tried to impose a radical change of course:

For example, in 1963, the Independent Government declared that from then henceforth there would no longer be any private freehold ownership in land, since land as the gift of God can belong to no man but only to all men, whose representative was the Government. ... All freehold land was converted into government leaseholds by this act, and improperly used land was to be taken away (Moore 1973, p. 731).

Predictably, these measures met with resistance from the Chagga and were seen as encroachment on their traditional regulatory autonomy:

The second example, that of certain attempts to legislate social change in Tanzania, shows the same principles in a less familiar milieu. Here *neighborhood and lineage constitute a partially self-regulating social field* that, in many matters, has more effective control over its members and over land allocations than the state, or the “law”. The limited local effect of legislation abolishing private property in land and establishing a system of ten-house cells demonstrates the persistent importance of this lineage-neighborhood complex. The way in which this legislation has been locally interpreted to require only the most minimal changes suggests something of the strength of local social priorities and relationships. The robustness of the lineage-neighborhood complex, and its resistance to alteration (while nevertheless changing) suggests that one of the tendencies that may be quite general in semi-autonomous social fields is the tendency to fight any encroachment on autonomy previously enjoyed (Moore 1973, p. 744).

This suggests that the *rules of the game* comprise both state-made law and other bodies of norms (social norms, customary law), but that in effect non-state norms predominate:

The law (in the sense of state enforceable law) is only one of a number of factors that affect the decisions people make, the actions they take and the relationships they have. Consequently important aspects of the connection between law and social change emerge only if law is inspected in the context of ordinary social life. There general processes of competition – inducement, coercion, and collaboration – are effective regulators of action. *The operative ‘rules of the game’ include some laws and*

*some other quite effective norms and practices.* Socially significant legislative enactments frequently are attempts to shift the relative bargaining positions of persons in their dealings with one another within these social fields. The subject of the dealing and much else about the composition and character of the social field and the transactions in it are not necessarily tampered with. Thus, much legislation is piecemeal, and only partially invades the ongoing arrangements. Hence the interdependence or independence of elements in the social scene may sometimes be revealed by just such piecemeal legislation (Moore 1973, p. 743).

What we find convincing in Moore's semi-autonomous social field concept is the notion of the graduated autonomy of non-state norm producers. It is this specific partial autonomy – whether based on tradition, network-like social relations, expert knowledge in the sense of epistemic authority, or whatever – that makes the actors in a given field into norm producers. We shall be coming back to this.

### III. Thomas Duve's Fields of Normativity

Duve convincingly shows that legal or normative spaces can be successfully explored and described only if we free our perception from a “container concept” of legal history:

Again, even a cursory look at early modern empires shows that it may indeed not be useful to abide by territorial concepts of space in our research, usually even guided by the ordering of the world into homogeneous areas which originate in the world of the fictitious authority of nation states. Would other frames of reference, like point grids, for example of global cities, settlement centres, and mission stations, or even networks with nodes in the harbour and trading cities perhaps not be more adequate frameworks for research? Do we have to concentrate on secular civil law to (re)construct our traditions? Or could other frames of reference which are no longer defined by territory but by types guide our research? Our “container-concept” of legal history in Europe saves us from asking ourselves these productive questions – by the way questions which might be seen as pivotal for today's general jurisprudence concentrated on law in a diverse and global world (Duve 2013a, p. 16).

This passage draws attention to what we could term “point grids” or “nodes” of legal spaces, such as global cities, mission stations, or networks. This is extremely important because legal spaces, too, are structured spaces “inhabited” by specific actors who communicate the law and about the law.

But Duve also draws attention to a second important point. To grasp the essence of normative spaces requires first a multidisciplinary approach and second the placing of normative fields in their specific cultural context:

The analytical tools needed by a science that takes a world of “multinormativity” seriously can be ... obtained only through an empirical approach that captures and orders fields of normativity, and thus through an empirically grounded and inter-culturally validated model of different forms of normativity. This needs cooperation between disciplines that address not only law but various socio-legal arenas – and which are hence not always pursued in faculties of law. The expertise of ethnologists, sociologists, cultural scientists, religious scholars, and others is required.

However, such a transdisciplinary rather than interdisciplinary approach is needed not only for a transnational legal science and its transcultural communication about law. This points to what legal theory and the sociology of law have long demanded anyway: the abandonment of a liberal arts oriented, philosophical, or historico-hermeneutic concept of law as the basis for jurisprudence. *The focus has thus shifted to science-of-actuality, empirical legal concepts.* From a cultural studies point of view, the issue is the analysis of law as a societal system of symbols, with all its historical contingencies. This has important consequences for the links between jurisprudence and other disciplines. Law is then no longer to be seen as a phenomenon somehow embedded in a culture: *it is culture itself that produces law.* In order to analyse this law, the rules of cultural production have to be understood, which requires a number of disciplines to be drawn on. Legal theory, the sociology of law, as well as legal history as the locus of research into the evolution of law with all its historical contingencies assume a constitutive function for this process of integrating other disciplines (Duve 2013b, p. 10 f. Transl. R.B.).

This is a truly demanding research programme, but one that makes sense and is well worth contributing to.

#### IV. The *Organizational Fields* of Paul DiMaggio and Walter Powell

What the organizational field, a concept situated on a somewhat different level, is doing in this context needs explaining. We came across it (DiMaggio and Powell 1983) in connection with one of Thomas Duve’s normative point grids, namely the mission societies and their normative products: so-called mission regulations.

Hartmann Tyrell (2004) has examined the impressive variety of Protestant mission societies, particularly from the organizational sociology perspective. This quite unusual approach allows Tyrell to treat mission societies as organizations of a special type operating in an interesting semi-autonomous social field. On this normative field, markedly distant from both state and established Church, he notes:

[Mission societies] are [a subject of research in organizational sociology] as specialized religious organizations beyond Church and sects, as organized actors with



transcontinental and ... “transcultural” reach; as organizations in a field of mutual observation and imitation, competition and cooperation with one another and within a network of clearly global dimensions; and as specialized religious organizations beyond state and Church. The denominational diversity of Protestantism and a Europe-wide (and transatlantic) network of supra-denominational “neo-pietist” and “awakened” milieus form the social basis of the missionary movement. But the organizational form chosen is that of the “voluntary association” (Tyrell 2004, p. 77. Transl. R.B.).

As voluntary religious associations, which do not see themselves either as extensions of the state or the established Churches, they depend in considerable measure on the motivation of their members and – as fundraising institutions – on the generosity of their supporters:

As far as activation is concerned, [religious associations] depend strongly on moral solidarity and a certain “voluntary” but consensually directed “commitment” on the part of their members. Such inevitable reliance on the motivational resources of members and on the mobilization of the broader “mission community,” which donates and prays ... is particularly typical of mission societies. The enthusiastic beginnings “driven by the spirit of love” are part of the founding legends of almost every society. But then, as their complexity grows, they come under the pressure of multiplying tasks and obligations and consequently find themselves on the road (very much in the sense of Max Weber) to bureaucratization and growth (Tyrell 2004, p. 81. Transl. R.B.).

As professionalized and bureaucratized institutions, they had to operate in an organizational field densely “populated” by other mission societies,<sup>1</sup> which led to growing competition and mutual observation. This unconnected coexistence of mission societies was increasingly felt to be unsatisfying. To remedy the situation, interdenominational and international conferences were convened after 1850 with growing regularity at which the problems facing the shared Protestant faith could be discussed:

Not by chance, this started in Asia: from 1855 in India, from 1872 in Japan, and from 1877 in China. The multifunctionality of these conferences is understandable. Over and above the conclusion of agreements and the resolution of disputes, they were – with regard to information, consultation, and personal contacts – invaluable as venues for “exchanges” among missionaries and societies, and were thus to some

1 In South Africa in 1872, there were, in addition to the Berliners, the Moravian Brethren Mission, the London Mission Society, the South African Mission Society, the Methodists (Wesleyans), the two Scottish mission societies, as well as the Rhineland, Paris, American, and Norwegian mission societies, the Hermannsburg Mission Society, also the Episcopal-Anglican and Finnish missions, and well as the Roman Catholics (Tyrell, footnote 316).

extent resembled markets. Not least of all, it was praying and worshipping together that furthered a “spirit of unity” and Protestant brotherliness. After 1900, special joint institutions were established above the individual societies, for example a Standing Arbitration Committee in India (1902). ... Conferences were then organized at the national and to some extent at the supranational level, as well as in the home countries. Bremen, for example, welcomed the Continental Missions Conference, a series of gatherings at irregular intervals with delegates from French, Dutch, Scandinavian, and German societies. The national mission councils embarked upon the establishment of an umbrella organization with great hesitancy; ... Germany led the way with a joint “committee” set up in 1885 endowed with special authority; its task was to represent the societies vis-à-vis the Colonial Office. Further developments cannot be gone into here, but it is easy to see that the “isomorphic principle” of learning, imitation, and adaptation came into play (Tyrell 2004, p. 131 f. Transl. R.B.).

As we see – and this is important – institutions, especially norm producers, have not only to be placed in their specific cultural context but also examined against the backdrop of the organizational environment. It is essential to look closely at this specifically structured *organizational field*, because it can explain the *organizational behaviour* of an institution, which can of course also influence the nature of its norm production.

After these methodological considerations, we can now look in greater detail at some of the normative fields we have selected.

### C. A Tour through Five Normative Fields and to the Norm Producers they Accommodate

#### I. Societal Subsystems and “Their” Law

Two examples will show that societal subsystems tend themselves to develop the rules necessary for their specific functional requirements – especially when the state cannot or does not wish to provide what is needed (on the providing function of law see Schuppert 1993). These examples are the “law of the economy” and the “law of sport.”

##### 1. The Law of the Economy

One of the most important subsystems whose well functioning is essential to the well-being of a society is “the economy.” Economic processes are transactional processes, and to keep *transaction costs* low transactional processes require a reliable legal environment. The link between economic rationality

and the production of legal certainty by a polity under the rule of law is unlikely to be denied.

Where reliable rules are lacking – for instance, in the transnational domain not subject to national regulation – “the economy” itself takes action as norm producer, giving itself, as it were, the rules that facilitate transactions in global markets or even enable them in the first place. Dieter Grimm describes this sort of norm production as follows:

Beyond states and beyond international organisations, forms of lawmaking are spreading over which the two no longer have any influence. *Global markets create legal arrangements quite independently of politics*. More and more, multinational corporations, represented by international law firms, are concluding agreements that no longer fall under any national legal order or jurisdiction. In the event of conflict, international arbitration tribunals decide, which are expected to apply transnational law they have largely made themselves in the course of application, and which spreads by analogy to similar cases (Grimm 2003, p. 19. Transl. R.B.).

Thomas Duve argues in the same vein, observing that a veritable market for law practised alongside state structures has developed in recent decades:

A mass of new non-state norms and decision-making institutions has developed – in the field of the Internet, in the economic field, in sport; ...

The importance of this law beyond the bounds of national or even supranational institutions is by no means limited to Europe, to industrial countries, or areas of intensive legal cooperation. On the contrary: the growing integration of so-called developing and newly industrialized countries into the world economy as production locations or raw material suppliers has in many regards subjected local populations to rules and practices that are neither local, state, nor international, but *set solely by non-state actors*. “Global governance” has produced rules and enforcement tools that in their impact on states or people are comparable to or even surpass the classical control of behaviour and sanctioning of misconduct through law. Safeguards developed in state legal systems against the accumulation of market power, control mechanisms, and legal protection authorities are frequently ineffectual in this space of non-state action, often with serious consequences for people. Owing to hopes aroused by modernization theory (law and development; theories of legal transplant, etc.) and not least because the export and import of law and the associated services have increased substantially since the 1990s, a market for such “law” practised alongside state structures with concomitant communicative and institutional networks has formed (Duve 2013b, p. 6. Transl. R.B.).

But law made by the economy itself is not – as one might think – merely a consequence of transnationalization and globalization, and hence a thoroughly modern phenomenon. As long ago as 1933, Hans Großmann-Doerth had already discussed the relationship between the self-made law of the

economy and state law, taking standard business terms as his example. He described general standard terms and conditions explicitly as “law” and consequently treats the relationship between the self-made law of the economy and state law as an instance of applied normative plurality:

I call standard business terms “law,” in contrast to state law, the self-made law of the economy. This is an extension of the “law” concept: unlike state law, standard business terms do not apply without further ado for the individual contract but only on the basis of a corresponding agreement between the parties, thus by virtue of the intention of the parties. This distinction is certainly not unimportant: the courts have to ensure that in the individual case standard business terms do not come into effect against the intention of the contracting parties; and they have effective – albeit not always sufficiently exploited – means to act against this self-made law. But the practical importance of this distinction from state law should not be overestimated. Agreement on standard business terms as *lex contractus* of the individual contract is purely a matter of form in many areas of economic life. These legal norms must be in conformity with the intentions of the parties to be effective, but societal powers regularly loom behind them that ensure that these intentions are supplied. Over and above this, standard business terms are in the same position as state-made law. Not drafted by the parties to the individual contract but rather independently of them and often with no provision for alteration, standard business terms, like state law, are a power that determines the contractual relationship from without. In my view, this similarity in societal position justifies calling standard business terms “law.” This is no mere terminological issue. I use this designation time and again, as today, to indicate the true meaning of a development to which jurists usually pay too little attention. I certainly do not call standard business terms law because I approve of this development but, on the contrary, because I consider the coexistence of the two legal orders, state law and economic law, to be a highly problematic matter (Großmann-Doerth 2005, p. 78 f. Transl. R.B.).

All three authors show that this self-made law is not born without subject, so to speak, nor in the lap of a vague civil society, but that specifiable actors are at work: big international law firms (as we shall see), the communicative and institutional networks identified by Duve, or industrial and business organizations, generally with professional legal “coaching.”

We now move on to standard-setting as a prime example of a semi-autonomous field for the self-production of norms by the economy.

a) *Standards and their Semi-Autonomous Field:  
Standards as Norms of the Economy for the Economy*

The conviction with which most standard-setters regard their norm production as a service to the economy is revealed by a 2002 article in a *Süddeutsche*

Zeitung report on an interview with the then president of the German Standards Institute (DIN) Dietmar Harting under the heading “The Lord of Standards.” Harting explains the link between standardization and globalization and the function of product standards to open up more and more international markets:

The various standards are the precondition for marketing products worldwide and for successful participation in globalization, said Harting. He is certain that “Whoever sets the standard makes the market.” The president of the institute knows only too well what he is talking about. He is general partner of the Harting Technology Group, which has become the biggest producer of electronic connectors in the world thanks not least to consistent standardization work. ...

For the company head and DIN president, this success is proof that *standards open up markets* and promote the fast implementation of innovative ideas in marketable products. *Standards are set above all by industry for industry.* But they are not binding rules but only recommendations based on broad consensus.

The standardization committees, on which some 26,000 experts collaborate, representing firms, testing institutes, public authorities, research and development, as well as environmental and consumer protection organizations, look for common solutions. The cost of this democratic standardization apparatus is enormous. The Fraunhofer Institute for Innovation Research puts the annual cost of standardization work in Germany at some € 700 million.

On the debit side, however, at least € 16 billion are saved by the painstaking harmonization undertaken by the DIN. The work also commands respect abroad. Some 90 per cent of the standards set by the DIN are now used outside Germany, as well (Uhlmann 2008, p. 20. Transl. R.B.).

Situating a certain type of norm in a given semi-autonomous field does not, however, mean that this is for all time. Bodies of norms can, so to speak, “emigrate,” from the private locus of origin into the public sector. One interesting example of such a shift from the private sector to the domain of the state are international accounting standards. Sebastian Botzem and Jeanette Hofmann report on their “migration”:

The second case example is the genesis of transnational private standards for corporate accounting. Emerging from an association-based harmonization project dominated by experts and of initially questionable character as an alternative to state regulation, an effectual private organization developed over three decades whose standards have been accepted almost throughout the world and with increasingly binding status. The development of the originally discretionary standardization project has been marked by the growing integration of important – also critical – actors. On the other hand, it has also been tied into the public hierarchy, above all

where transnational standards have been recognized (Botzem and Hofman 2009, p. 226. Transl. R.B.).

Such cases – Sebastian Botzem and Jeanette Hofmann’s other example is regulation of the Internet infrastructure – therefore involve the interactive dovetailing of private and state actors and the emergence of mixed, i. e., public-private regulatory arrangements:

*The interdependence of private and state actors in transnational rule-making produces empirical oscillation between private and state-dominated governance arrangements. In other words, our comparison shows that changes in governance structures are not, as often assumed, linear, either as denationalization or more recently as “re-regulation” ... but are rather a process of oscillation between different forms of transnational norm-setting. Empirical comparison reveals different phases in interaction between private and public actors and underlines the dynamism of transnational standardization. However this case comparison also shows that the oscillation involved is not merely a return to the point of departure. Actor constellations undergo organizational and functional changes in the course of negotiations. For the present at least, there is a great deal of evidence that actors’ perception of problems, organizational structures, and legitimation strategies tend to harmonize ... This also shows a double dynamic of transnational regulatory arrangements: in the content of regulatory measures and the design of public-private regulatory arrangements (Botzem and Hofman 2009, p. 227 f. Transl. R.B.).*

*b) The Norm Producers: Non-State Actors as Standard Setters*

Institutions that produce standards are called standard setters. As Anne Peters et al. (*Non-State Actors as Standard Setters*, 2009c) show, such institutions are predominately non-state actors. In their introduction, Anne Peters, Lucy Koechlin, and Gretta Fenner-Zinkernagel explain this increase in the importance of non-state regulatory actors mainly in terms of the general shift in weight between market and state brought about by transnationalization and globalization, evidenced especially in the erosion of the *state monopoly of regulation*:

On all levels of governance, standard setting (norm formation or regulation), is no longer the exclusive domain of states or governmental authorities. The role and the capacity of increasingly diverse and polymorphous non-state actors involved in standard setting are expanding. Also, the processes by which norms are shaped are becoming more varied. Finally, the rapidly growing number of national, sub-national, and international standards has increased these standards’ diversity, but also regulatory overlap and norm conflicts.

The context in which the proliferation of non-state actors' standard setting occurs is well known. Globalisation, liberalisation and privatisation waves which swept the globe in the 1980s and 1990s have contributed to *shifting the focus away from the state* as the sole source of regulation. The result is the often referenced blurring of the public and the private sectors. The integration of national economies into a world economy has diminished or at least modified the authority of the state and has pushed its regulatory capacity to its limits both in substance and in terms of territorial scope. Policy issues that have formerly been treated at the level of nation states, for instance environmental pollution, migration, or organized crime, are increasingly understood as phenomena with global scope and global roots which cannot be tackled in a satisfactory manner through national standard setting (Peters et al. 2009b, p. 1 f.).

For Peters et al., two types of non-state actor play a key role: NGOs and TNCs (transnational corporations). Since these two types of governance actor will be dealt with separately at a later stage, the focus here is on another typology of standard setters displaying the *mixture of state and non-state actors* mentioned.

Hans Christian Röhl (Internationale Standardsetzung, 2007) proposes four types of standard-setting clearly demonstrating that *standards and standard-setters* should always be thought about in conjunction, because in this area of non-state rule-making the connection between the two is not nearly as evident as between legislation and legislator, regulation and regulator. Whereas when considering the classical sorts of lawmaking, the author of the norm is always at the back of one's mind, this is simply impossible when it comes to the multitude of standards and standard-setting actors. This is confirmed by Röhl's four types of standard-setting, which are rather *four types of standard-setting organization*:

- (1) Standard-setting in the framework of the ISO (International Organization for Standardization). Standard-setting here takes the form of private law, which, however, builds on collaboration with national standardization organizations. Such – non-binding – standards are set by a quasi-private institution. Their purpose is above all to coordinate the behaviour of private parties. They are important for European law because the European Committee for Standardization (CEN) bases its standards to a very large degree on ISO standards or sets them in cooperation with the ISO. But CEN standards (and their national transpositions) also play a key role in the context of the European product safety policy “new approach”.
- (2) Codex Alimentarius: the Codex Alimentarius Commission sets food standards, which are also non-binding. These standards are set with the backing of two international organizations (FAO/WHO). States are formal collaborators. Unlike the ISO, this is an institution under international law. Much more

strongly than in the case of the ISO, transposition into national law is the aim of these non-binding norms.

- (3) The third example is rule-making under the aegis of organizations governed by international law that set standards on amendments to appendices to international treaties. This – so to speak – secondary international law is intended to be transposed into national law. This can be illustrated by agreements in the field of transport: the International Civil Aviation Organization (ICAO) established by the Chicago Agreement, and the International Maritime Organization (IMO).
- (4) Finally, there is a trend towards standard-setting by exclusive organizations that do not seek general international accessibility. They can be based on cooperation between public authorities, for instance cooperation in the Basel Committee for Bank Regulation, or even be purely private organizations like the International Accounting Standards Board (IASB), which sets the rules of international accounting, International Fiscal Reporting Standards (IFRS) (Röhl 2007, p. 321 f. Transl. R.B.).

## 2. The Law of Sport

The law of sport is association law. This is simply because, in Germany and throughout the world, sport is association sport. Uwe Schimank:

Sports clubs and sports organizations equivalent to clubs are embedded in sports associations. Sports associations are in the first place organizations of persons who practise sport – usually a particular type of sport. ... they exist for almost every type of sport – one example being the German Football Association (DFB) – and also as overarching organizations – such as the German Sports Confederation (DSB). National associations are in turn embedded in international associations. Sports associations have a number of functions ... They set the rules for the given type of sport and monitor compliance with these rules in competitions, ratify wins and records, organize and coordinate competitions, and represent the sport externally – especially vis-à-vis state authorities (Schimank 1988, p. 191. Transl. R.B.).

Sports associations' strong position is due mainly to the so-called one-association principle, which gives them a *de facto monopoly of rule-making*, a constellation that Klaus Vieweg describes as follows:

The one-association principle states that a single association should be exclusively responsible for each sport (specialism component) and that for a defined territory only one association should exist (territorial component). The variants that can be derived from this permit the establishment of *specialism/territorial monopolies* of international and national sports associations. This facilitates *control over a sport practised in accordance with uniform rules* and helps avoid conflicts of competence. The one-association principle has been universally adopted in the statutes of world-



wide international sports associations, continental and regional sports associations and organizations. There are practically no major exceptions (Vieweg 1990, p. 66. Transl. R.B.).

Because all this runs so well, sports associations and their members treat the relevant rules as “their” law, which, as Vieweg stresses, is in keeping with the sociological facts:

The common interests of the association and the typical member is to obtain the status of legal norm for association rules. This is the best way to establish association norms as part of an overall ordering that is binding on all members and cannot be individually negotiated. *Acceptance of the rules as legal norms corresponds to the sociological facts of the case.* It finds expression in the titles given to the statutes and secondary rules of German sports associations: “Grundgesetz” (“basic law”), “Gesetze” (“laws”), and “Ordnungen” (“regulations”) (Vieweg 1990, p. 323. Transl. R.B.).

The power of sports associations also – until the ruling of the Munich Higher Regional Court of 15 January 2015 – rested strongly on the monopoly they claimed of arbitration; athletes participating in international competitions were required to sign a declaration that they recognized the sole competence of the disciplinary commissions of the given association and the Court of Arbitration for Sports (CAS) in Lausanne as the final court of appeal for all arbitral decisions “to the complete exclusion of the ordinary courts.”

The decision of the Munich court has now toppled this pillar of association power, ruling that any such requirement is illegal because it constitutes an abuse of a market-dominating monopoly position. Recourse to the ordinary courts is now open. This is seen as an important milestone because – as the court convincingly argued – of the structural predominance of association representatives in these arbitration tribunals.

But the court’s ruling is interesting not only because in the Pechtstein case it put an end to the monopoly of the sports association in dispute resolution but also because, in stating the grounds for its decision, the court argued above all in terms of cartel law, emphasizing the economic nature of the organized practice of sport in a manner that shows the law of sport to be almost a subsystem of the law of the economy. To begin with, the plaintiff Claudia Pechtstein was presented as follows: “The plaintiff is an internationally successful speed skater, who earns her living by practising this sport.” Particularly interesting, however, is what the court had to say about the

entrepreneurship of the International Speed Skating Association – the second defendant:

For the purposes of the enterprise concept underlying the Act on Restraints on Competition, an economic activity is any activity consisting in offering goods or services in a given market. If this precondition is met, the circumstance that an activity is connected with sport poses no obstacle to application of the rules of competition law ... Sports associations are to be seen as enterprises in so far as they operate in the market for sporting events ... because they offer the corresponding services.

Substantively relevant in this dispute is the market for organizing world championship competitions in speed skating.

The second defendant holds a monopoly in the relevant market for admission to speed skating world championships, and as market-dominating enterprise is the addressee of Section 19 (1 and 4 (2)) of the Act on Restraints on Competition.

On the market for organizing world championships in speed skating, the second defendant is the sole offeror owing to the one-place principle and due to the lack of competitors therefore dominates the market as monopolist in accordance with Section 19 (1 and 4 (2)) of the Act on Restraints on Competition. Under Section 19 (1 and 4 (2)) of the Act on Restraints on Competition, a market-dominating enterprise is forbidden to demand remuneration or other terms and conditions that deviate from those that would with strong probability prevail in effective competition. The second defendant was therefore not allowed to demand the consent of the plaintiff to the arbitration agreement of 2nd January 2009 (OLG München, partial judgement of 15/01/2015, Marginal no. 77 ff. Transl. R.B.).

In sum, sport and commerce are close companions, united also in their tendency not only to give themselves their own rules but also to withhold legal disputes from the jurisdiction of the state and entrust them to arbitration tribunals.

After this instructive excursion into the apparently close-knit world of the economy and sport, we turn to another normative field, the world of basic rights.

## II. Fundamental Rights as Collective Ordering Phenomena and Supra-Individual Fields of Meaning

Thomas Vesting et al. in their treatment of *basic rights as phenomena of collective ordering* (Vesting et al., 2014) draw our attention to the circumstance that fundamental rights with their protected areas both open up and legally circumscribe specific normative fields. In their preface they state:

In the current view, legal positions protected by basic rights are largely equated with individual freedoms. The guiding principle is the autonomy of the individual subject. From this standpoint, “collective” or “institutional” aspects of fundamental rights protection beyond the individual dimension are only a secondary phenomenon that derives from the primary individual freedom. ... The contributions to this volume put this common conviction to the test. The authors address the extent to which traditional basic rights theory and dogmatics systematically underestimates the trans-subjective societal content expressed in basic rights (Vesting et al. 2014, p. V. Transl. R.B.).

Consideration of the basic rights particularly prominent in this connection – the freedom of organization, the freedom of religion, and the freedom of occupation – shows that such institutionally protected areas can be understood *as normative fields, as semi-autonomous social fields* in which specific types of norm producer operate. A closer look at the arguments put forward by some of the authors in this volume will throw light on this insight.

## 1. The Collective Understanding of Fundamental Rights

Thomas Vesting et al. seek to counter the subjectivist understanding of fundamental rights with a *collective understanding*. Under the heading “the priority of the whole – as rule and institution,” the editors outline their collective or rather *institutional* approach as follows:

Precisely this [collective] aspect is nowadays largely ignored by prevailing basic rights theory and dogmatics. The individual is taken as a self-evident reality instead of recognizing that all the (necessary) state structuration of basic rights practices is preceded by the self-organization of society through an *infrastructure comprising social norms, institutions, practices, conventions, and ways of life*, which produces subjects and a collective order among subjects; that is to say, sets rules of co-existence. This way of seeing things objectifies subjects as subjects of freedom only to place them in relation to an (also objectified) collective order of society, which is understood as instituted by the state or democracy.

This overlooks the pre-existing *dependence of the individual on rules and institutions*. This oversight leads to a misunderstanding of the institutions, which then appear to be merely permanent “institutional complexes” in the public space. Instead of thus narrowing the concept, it should be defined more broadly as a “totality of actions and ideas” that have “completely established themselves”; “institution” accordingly means the sum of the “ways of acting and thinking that the individual finds already in place and which are generally transmitted through education”... Modern society in particular must be conceptualized as depending on an abundance of scattered practices and institutions. In the theoretical language of institutional analysis, we could also speak of norms as decentralized societal mechanisms that regulate behav-

our and accordingly have consequences for society (Vesting et al. 2014, p. 6f. Transl. R.B.).

Thomas Vesting adopts a particularly programmatic stance in his article on the collective understanding of basic rights. First, he rejects the container conception of fundamental rights underlying the view that they are rights of defence: “The notion of defence against encroachment shows the subject of basic rights as a sort of closed container, as an ‘individual,’ who ‘holds’ or ‘possesses’ freedoms like things, whereas vice versa the state faces the abstract and closed individual as a similarly abstract and closed legal personality” (Vesting 2014, p. 62. Transl. R.B.). To counter this approach he proposes the concept of a *culturally embedded individual*:

The point of departure is now not the freedom of an isolated individual but the notion of a individual who is already culturally embedded, who is for his part already entangled in specific narratives and who, through his own actions, his practical life, himself contributes to reproducing neighbourly forms of basic-law subjectivity: as a father bringing up children, as a consumer of media, as entrepreneur, or as amateur yachtsman. The subject of fundamental rights must be conceptualized as inseparably interwoven with the horizon of human experience and its pre-reflexive components. In this cosmos of basic-rights theory, the self-reflexivity and self-determination of subjects in pursuit of their possibilities and ways of life are naturally included. However it is assumed that a self open to the future and which takes on the social world and its constraints is possible only because individuals are already in norm-controlled relationships with one another, are already part of an existing way of life, already have neighbours before the state comes into play (Vesting 2014, p. 73. Transl. R.B.).

From this basic position, Vesting comes to an understanding of basic rights as *fields of meaning*. With reference to Husserl, he notes:

The insights of phenomenology undermine the widespread notion in conventional basic rights theory and dogmatics that it is possible to capture basic rights as explicit corpus, an institution laid down in a document and hence strictly separate from all external references – such as moral norms, social conventions, and practical knowledge. Phenomenology redirects basic rights theory. From its perspective *basic law theory must emphasize the embeddedness of all fundamental rights in networks of practical relationships*, which would mean treating these rights as inseparable from complex *social fields of meaning and cultural life worlds* – not only because this is in better keeping with the facts, but also because basic-rights normativity is constituted in the first place only through practical (life-world) networks of relations and communication, which are themselves normatively structured. In short: there is no freedom of art without the institutions and conventions of the art world, no freedom of religion without the “particular domain” of lived religions, no freedom of property and contract without a practical culture of market economy, no media freedom

without journalism, publishers, media firms, etc. Basic rights would then have to be construed as primarily impersonal rights, and the individuals that assert them as *interactional participants in a network of relations and communication that always surpasses them* (Vesting 2014, p. 70 f. Transl. R.B.).

These lengthy observations justify use of the term “normative fields” in the sense of semi-autonomous social fields to capture the notion of institutionalized basic-rights fields of meaning in the context of this discussion.

## 2. Reference Areas for Normative Fields Protected by Basic Rights

In what follows, we look at three reference areas focused on constellations of fundamental rights “not limited (solely) to protecting the individual subject of basic rights” but which have an overarching impact dimension and/or presuppose a supra-individual concretization component” (Augsberg 2014, p. 165. Transl. R.B.). Such an “overarching impact dimension” is particularly well illustrated by our first example, the freedom of association and organization.

### a) *The Freedom of Association and Organization*

The collective character of these basic right guarantees is especially evident in the freedom of association. Under the heading “the collective element in economic basic rights,” Steffen Augsberg (Augsberg 2014) notes:

- Obviously, the *freedom of association* directly concerns the concept of people joining forces to form collective entities. Even if associations themselves are not regarded as protected under Article 9 of the Basic Law, the separate but by no means normatively singular (see, e. g., Art. 4 (140) of the Basic Law) emphasis on organizationally consolidated and stabilized human contacts is not to be understood only as strengthening protection of the individual personality; as a “*principle of free social group formation*” it has an *intrinsic value recognized by constitutional law, but attributed functionally to democracy governed by the rule of law*.
- Furthermore, the *institutional guarantees that are to some extent read into* Art. 9 of the Basic Law can (also) be developed in collective regard. ... This means not only an obligation on the part of state institutions to provide “a sufficient diversity of forms of law” (BVerfGE 84, 372, 378 f.) but is also implicitly to be understood as including the creative potential of norm addressees that can be exploited only together with others (Augsberg 2014, p. 168 f. Transl. R.B.).

The freedom of organization is a normative field of largely autonomous private law production protected by basic rights. Steffen Augsberg:

- This brings us already to a field of law that, while shaped by constitutional law, also has an intensive life of its own and is subject to active development by the courts: *collective labour and industrial action law*. This not only provides a particularly drastic example of the general debate on relations between the first and third branches of government; *precisely in this context there have recently been complaints about a “loss of constitutional thinking”* ... Criticism has been directed against a line of development in adjudication and literature under the heading of “new law of industrial action,” which, although recognizing the individual and collective guarantees under the freedom of organization nevertheless neglects the institutional dimensions ...
- Finally, the *legal institution of the declaration of general application* of collective agreements should be mentioned as an example of the application of a concrete organizational/procedural effect dimension. This institution allows the state to extend the binding application of agreements to non-participants. This form of “private lawmaking,” which replaces individual by collective legitimation or at least supplements the first by the second, is acceptable (only) because there is not only a long, pre-constitutional tradition to this effect in collective bargaining law but also because Article 9 (3) of the Basic Law provides a specific basis in constitutional law for this form of cooperative lawmaking (Augsberg 2014, p. 169 f. Transl. R.B.).

#### b) *Freedom of Occupation*

The freedom to choose an occupation or profession protected by Article 12 (1) of the Basic Law does not stress the collective component so strongly, first because the Federal Constitutional Court has emphasised above all the importance of practising an occupation for developing the individual’s personality, and second because the phenomenon of professional organizations and their law production is measured above all against the yardstick of the freedom of association. But from the functional point of view, the professions and their law – from canons of professional ethics to codes of conduct – undoubtedly belong within a broad normative field of freedom of occupation.

Steffen Augsberg has his sights on another interesting topic, namely how job profiles arise and who has the right to “invent” them:

It is also recognized ... that not only occupations that present themselves in specific, traditional, or even legal prescribed occupational descriptions are protected. The

freedom of occupation also covers atypical activities chosen and shaped by the individual subject of fundamental rights; the concept of occupation or profession is accordingly broad and regarded as in principle “open (to development).” *What is therefore required is a model that builds on the creativity of the practitioner, a model that takes account of the factual plurality and diversity of occupational forms and does justice to the basic-rights interest in maintaining and protecting this variety.* Given the tendency in legal practice to fix occupational descriptions permanently through normative, particularly statutory requirements, the preferability of such a liberal approach should be underlined. This does not preclude the state from defining professions and occupations; but such definition must be recognized as a restriction of liberty and not be accepted as mere demarcation of protected areas. But it would also be wrong to understand as solipsistic a return to an open conception of the freedom of occupation and the concomitant autonomous right of practitioners to shape and invent occupations. On the contrary, it offers a collective, interactive element in the sense that the right to design and invent occupations regularly and implicitly presupposes the societal recognition of a certain activity, thus tending to oppose unilateralism (Augsberg 2014, p. 173 f. Transl. R.B.).

In short, the normative field of the freedom of occupation has strong internal dynamism.

c) *Freedom of Religion*

But the prime example for the correctness of an (at least also) collective understanding of fundamental rights is the freedom of religion. We cite three authors on the subject:

- The first, Stefan Koriouth, has this to say about the collective character of the freedom of religion (Koriouth 2014):

Like the other fundamental rights of communication ... the freedom of religion depends particularly strongly on an infrastructure of societal habit and communication opportunities. *What distinguishes the freedom of religion from fundamental rights of communication is the collective framework. Religion has a collective proprium; it is about the freedom to act in a common context and on the basis of shared convictions.* A private religion as the sum of individual convictions that no-one else shares is not a religion. The freedom of religion as a individual right addresses a space of self-determination derived from religious groups and collectives and which in the event of conflict has to be rendered plausible by reference to them (Koriouth 2014, p. 233 f. Transl. R.B.).

- The second author to be cited is once again Thomas Vesting, who backs Koriouth as follows:

... this position would also mean recognizing the freedom of religion as a basic right addressing a supra-individual field of meaning from the outset. “The individual believer does not constitute the faith anew; he finds his way into a pre-existing body of rules, patterns of behaviour, and common convictions. In this sense, individual belief is a downstream effect, made possible only on the basis of a religion conceived of as a collective phenomenon” (Vesting 2014, p. 72. Transl. R.B.).

- The third author, just quoted by Vesting, is Ino Augsberg, who in an essay entitled “‘If you want to believe, you have to pay?’” (2013) comments on the collective nature of the freedom of religion: “In brief, it can be argued that such a thing as a ‘private’ religion cannot exist. Religion is directed from the outset towards a collective form of practice ... In the nature of things, collective religious determination therefore has primacy over individual, self-determination” (Augsberg 2013, p. 518. Transl. R.B.).

The ecclesiastical right of self-determination lies primarily in the power of the Church to give itself a legal order of its own, with the consequence that the individual believer is subject to two different legal orders at the same time:

... above all, the special emphasis on the collective dimension of the freedom of religious belief is in keeping with an understanding of religious constitutional law which regards its mechanisms and approaches as a reaction not to an individual problem but to a fundamental legal-pluralistic conflict. The individual believer is accordingly not subject only to obligation arising from his private convictions. As a member of a religious community he is rather subject to the legal orders of both the state and his religious community. He must therefore address the problem of possible divergence between normative commands, not only in the narrow field of morally decisive decisions of conscience but also in relation to modes of behaviour that, looked at from outside, may seem neutral and banal (Augsberg 2013, p. 521. Transl. R.B.).

Ino Augsberg’s observations are particularly interesting for another reason, too. He associates his reflections on religious constitutional law with general *conclusions in the domain of fundamental rights theory*, which we see as confirming our own thoughts on the conceptualization of normative spaces. Looking at the freedom of science and art, Augsberg rightly insists that a spatio-static notion of the domain that basic rights protect needs to be replaced by a model that defines the object of such protection in processual terms:



The exercise of fundamental rights in these fields cannot be convincingly described in terms of possession and the use of pre-existing communication possibilities. What is decisive is protection of acts that break out of pre-existing communication routines and open up new, hitherto inconceivable possibilities. Such a model can be described as creative rather than possessive. It is grounded above all in the reflexive structure of science and art. It posits that what is to be recognized as art or science is not a quasi-ontological datum but is itself the necessary, always provisional result of a permanent process of artistic or scientific preoccupation. An exclusively “objective” definition of protected areas must therefore fail. Art and science are discursive products: what the scientific community or art scene recognizes as art or science. The spatio-static concept of the protected area is therefore replaced by a model that defines the object to be protected by basic rights in processual terms (Augsberg 2013, p. 528 f. Transl. R.B.).

Still more importantly, he understands this processual event as *communicative event*:

From the point of view of religious constitutional law and its conceptualization of the conflict between the individual and collective dimensions of basic-law protection, this model with its implicit assumptions can be still further radicalized. ... discourse participants qualify as such only in and through discourse. Who is a scientist is decided by the scientific community – for example, by specific rites of initiation, that is to say, specially designed admission procedures subject to defined conditions, but also in more informal but no less effective fashion. In analogy to Lindbeck’s description of the connection between religion and subject constitution it can be said that in both science and art the subjects of basic-rights protection do not precede it; they are produced through *communicative processes within a specific social sphere*. The specific scientific language game and its rules precede the individual player and his moves. Basic-rights protection that sets in at this point can accordingly relate neither to an ostensibly objective protected area nor to ostensibly pre-existing discourse participants. The primary point of reference is the given communication sphere within which individual communicative acts and communicative subjects themselves come into being (Augsberg 2013, p. 529 f. Transl. R.B.).

This confirms our view that normative or legal spaces cannot be defined in spatial terms but are produced only through processes of communication. This is an important insight.

Leaving the issue of normative fields under the protection of fundamental rights, we turn to a quite different arena with quite different norm producers: international institutions.

### III. The International Arena and “Its” International Institutions

#### 1. The Arena of International Institutions: An Arena with High Change Dynamics

##### a) *The Growing Importance of Transnational and International Institutions: From Rule to Authority*

The indisputable increase in the importance of international institutions is understandable against the backdrop of the growing “denationalization of problems” (Zürn 1998): the challenges posed by denationalized problems demand denationalized institutional solutions, that is to say, the establishment of new international institutions or the strengthening of existing ones. International institutions will thus become not only more important – in terms of the problem-solving competence vested in them – but also more political; a process that Michael Zürn, Martin Binder und Matthias Ecker-Ehrhardt rightly call the “politicization of international institutions” (2012). This is comprehensible and not particularly surprising.

However, our interest at this point is another: we want to examine a process that Michael Zürn has recently described as the path “from rule to authority” (Zürn 2014). By this he understands an observable shift in importance from the classical, rule-determined exercise of power typical of Western constitutional states with norm-setting parliaments to a form of governance in which national governments and their parliamentary institutions do not have the primary say but where command is taken by transnational or international institutions, institutions that rely not on the classical legitimation resource of democratic elections but on their specific *authority*, fed by their special expertise, impartiality, and independence.

On closer inspection, the process “from rule to authority” consists of two sub-processes: first, shifts of power within institutional structures, and, second, changes in the legitimation basis of political decision-makers.

- The former can be illustrated by the consequences of the euro crisis for the institutional structure of the European Union. Michael Zürn:

First, the current institutional outcome does not point at all towards a renationalization of European politics. In spite of growing public skepticism, the European institutions seem to emerge from the crisis with more competences than ever. The neo-functional logic of European integration seems to prevail again. Earlier deci-

sions written into the Maastricht treaty make further integration necessary, thus creating a demand for the strengthening of European institutions.

Second, *the institutional losers are parliaments* on both the national and the European level, *the winners are expert bodies* on both levels such as courts and central banks. Very telling is the episode with the German Constitutional Court: Here, a non-majoritarian national institution was asked to protect the rights and competences of the majoritarian German parliament against non-majoritarian European institutions. While rhetorically taking the side of the German parliament, in substance it decided for very good reasons in favour of the European institutions. And what is even more telling: It was neither Merkel nor Sarkozy, but the European Central bank that sent the decisive signal to the markets (Zürn 2014, p. 2).

There are, as we learn, institutional losers and institutional winners and international and transnational institutions appear to be among the winners.

- Following Michael Zürn's formulation, the second process can be described as progression *from constitutional rule to loosely coupled spheres of authority*. Denationalized problems are no longer coped with primarily through the showpiece institutions of modern constitutional statehood, that is to say parliaments and national governments, but through constitutional institutions of a different type like constitutional courts, central banks, and regulatory agencies, to mention only the three most important. This movement *from constitutional rule to loosely coupled spheres of authority* can be described in still relatively abstract terms as follows:

Leaving the era of neatly separated territorial states does not lead us to a world state, to a moving up of the constitutional state to a higher level. It rather seems that segmentary differentiation as the fundamental principle of politics is partially replaced by *functional differentiation in absence of a meta-authority* that can coordinate from above. There is no constitutionalized place for the final decision. It may be too far-fetched to talk about full-scale institutional fragmentation, yet it is an institutional architecture which lacks centralized coordination – which is why we move from encompassing constitutional rule to plural and only loosely coupled spheres of authority ...

The depicted institutional developments on the domestic and the international level are often analyzed separately, both within their subdisciplinary niche. They have however a lot in common. Most obviously, their empowerment took place in parallel. Both non-majoritarian domestic institutions within democracies and international institutions became more powerful especially in the last three to four decades. All of these institutions, moreover, represent a type of public power which is limited in scope and often stands in competition with other institutions. In this

sense, they are different from the constitutional state and *indicate a shift toward plural spheres of authority*. Finally, all the mentioned national and international institutions show similar patterns both with respect to the justifications they use and to the level and sources of social acceptance (Zürn 2014, p. 10 f.).

We must accordingly investigate what constitutes these spheres of authority and who operates in them.

### b) *The Institutional Architecture of Spheres of Authority*

The first question to ask about spheres of authority is naturally what sort of authority is actually meant (on the variants of authority, especially in comparison between legal and religious authorities see Schuppert forthcoming). The classical types of personal, e. g., charismatic authority or the institutional authority of constitutional institutions are increasingly being joined by what can be called epistemic authority, based above all on trust – in the expertise, independence, and integrity of an institution. Michael Zürn:

The other basic type of authority [as opposed to *political authority*, G. F. S.] can be labeled epistemic authority. This type of authority is based on expert knowledge and moral integrity. In this case, the views and positions of an individual or an institution are adopted because they appear at the same time to be both knowledgeable and nonpartisan. Epistemic authority is based on the assumption that knowledge and expertise are unequally distributed, but that there is a common epistemological framework which makes it possible to ascertain inequality. An epistemic authority need not in all cases convince people factually and in detail. It is therefore not the quality of the specific argumentation, but rather *the general reputation of an institution or person* which is decisive. What is involved is *governance by reputation ...* (Zürn 2014, p. 7).

What sort of institutions “populate” this sphere of epistemic authority and give it its distinctive character? Michael Zürn has coined the term “politically assigned epistemic authorities” (PAEAs), what we might call a “new institutional trinity” of constitutional courts, central banks, and independent regulatory agencies:

A special version of this type of public authority arises when an epistemic authority is assigned to that status by political institutions. Then we may speak of *politically assigned epistemic authorities* (PAEAs). And it is especially this type of authority which has gained enormously in importance and has changed the constellation in the exercise of public power.

On the one hand, *three developments* in the domestic realm need to be mentioned.

- As Ran Hirschl has pointed out: “Over the past few years the world has witnessed an astonishingly rapid transition to what may be called *juristocracy*. Around the globe, in more than eighty countries and in several transnational entities constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.”
- *Independent central banks* in the Western world also have uniformly become more important. They have gradually been introduced in many countries and their independence has been strengthened. Between 1990 and 2008 no fewer than 84 countries passed legislation to enhance the formal autonomy of central banks. At the same time, the importance of monetary policy tools in the general economic control toolbox has generally increased with the spread of monetarism. Central banks thus became more autonomous and more important at the same time.
- Ultimately, however, central banks are only the manifestation of a broader development: the *increase in so-called “independent agencies.”* On average, according to a quantitative study “*autonomous regulatory agencies*” play a role in 73 per cent of all policy areas in the countries under investigation in a study by Jacint Jordana and Levi-Faur. The study shows steady quantitative growth between 1966 and 2007, becoming almost exponential in the 1990s and declining slightly only after the turn of the century (Zürn 2014, p. 8 f.).

So much on this key context for understanding the growth in the importance of international institutions.

c) *Norm Production and Norm Interpretation as Components of the Governance Functions of International Institutions*

Norm production and interpretation are increasingly integral components of the governance function of international institutions. In “International Authority and its Politicalization” (2012), Zürn, Binder and Ecker-Ehrhardt write:

We first show that international institutions exercise authority to a significant degree. They do so across a wide range of governance functions including rule formulation and decision making ..., monitoring and verification of rule implementation ..., interpretation of rules ..., rule enforcement in the case of non-compliance ..., and direct implementation by international agencies ... In this sense, international institutions exercise authority in that they successfully claim the right to perform these functions and in that member states recognize – at least to some extent – the right of international institutions to do so (Zürn et al. 2012, p. 89).

The authors go into detail about these governance functions:

(1) Rule setting and majority decisionmaking

International institutions that set rules via majority decision-making exercise political authority. ... Majority decision making increases the ability of international institutions to act by nullifying the vetoes of individual states and overcoming blockades. Majority decision making is not a practice limited to just a handful of well-known organizations like the EU, the UN Security Council and General Assembly, or the World Bank. Today, roughly two-thirds of all international organizations with at least one participating great power have the possibility to decide by majority. ...

(2) Monitoring and verification

[T]he need for independent actors who process and make available information on treaty compliance is growing steadily. Such information is increasingly provided by the international secretariats of treaty systems ... and autonomous organizations such as the World Health Organization (WHO) or the International Atomic Energy Agency (IAEA), to name just two prominent examples ... These are cases of politically delegated epistemic authority. NGOs may also function, more or less informally, as monitoring agencies. Amnesty International and Human Rights Watch, for instance, are important actors for monitoring compliance with human rights standards. In general, Jonas Tallberg and colleagues have shown that, since the 1980s, the access of NGOs to international policy processes has increased significantly. ...

(3) Rule interpretation

Regarding rule interpretation, we find a significant increase in the number of international judicial bodies dealing with collisions between international and national law, and between conflicting international regulations. In 1960, there were only 27 quasi-judicial bodies worldwide; by 2004, this number had grown to 97. If we narrow the definition and include only those bodies that meet all of the prerequisites for formal judicial proceedings, then only five such bodies existed worldwide in 1960, their number climbing to 28 by 2004 ... For example, the World Trade Organization's Dispute Settlement Body (WTO-DSB) decides in matters of controversy over the application of rules in international trade, while the ICC has jurisdiction over genocide, war crimes, and crimes against humanity. These institutions produce legally binding decisions that cannot be easily revised by their members. In this sense, they exercise a form of political authority that claims to be epistemic authority. ...

(4) Rule enforcement vis-à-vis states

Only a few international institutions have the capacity to enforce their own decisions, thus exercising the strongest form of political authority. Nevertheless, we can observe that the practice of levying material sanctions against violators has

increased. For example, *jus cogens* (independent and binding international law not requiring the consent of states) in the meantime reaches beyond the prohibition of wars of aggression to include inter alia the prohibition of crimes against humanity, genocide, and apartheid. In the same vein, under Chapter VII authority, the Security Council makes use of coercive measures against the will of affected governments or parties to a conflict [...], including military humanitarian intervention, economic sanctions, or “robust” peacekeeping operations [...]. From 1946 to 1989 only 3.4 percent of Council resolutions were adopted under Chapter VII of the UN Charter. This number rose to roughly 38 percent between 1990 and 2008. By 2008, about 62 percent of all Security Council resolutions were adopted under Chapter VII authority. ...

#### (5) Implementation

The implementation of international regulations is frequently left to member states. Nevertheless, some institutions such as the World Bank or the WHO implement their policies directly [...] and therefore exercise a strong form of political authority. Likewise, UN agencies in the field of humanitarian assistance or development aid have gained significant implementation authority. Transitional administrations that were set up after the end of the Cold War in Eastern Slavonia, Kosovo, or East Timor, for example, represent a special type of implementation authority; to establish them, UN took on far-reaching executive, legislative, and judicial powers (Zürn et al. 2012, p. 90 ff.).

Given the background material provided by this overview, we turn to the question of what sort of rules international institutions make, interpret, and/or enforce.

## 2. Modes of Rule-Making by International Institutions

### a) *Exploring the Regulatory Diversity of International Institutions*

When exploring difficult, highly diversified terrain, it is advisable to secure the services of a guide familiar with it. José E. Alvarez is such a guide. In *International Organizations as Law-makers* (2006) he has investigated the “varied forms of international institutional law” and classified the types of regulation IOs produce on the basis of *ten different international institutions*. We cannot go into this material in depth but will have to be content with a simplistic overview:

- The Codex Alimentarius  
The Codex Alimentarius der FAO (Food and Agriculture Organization) comprises more than 200 Standards “[that] deal with maximum

limits of pesticide, food hygiene, food additives, and even labeling. The Codex's legal status is a matter of some doubt" (Alvarez 2006, p. 222). Although the standards are not legally binding in the strict sense, they are de facto so:

Even though many states have not filed their acceptances and the Codex is formally only a "recommendation" in such cases, there is abundant evidence that its terms are widely accepted by those engaged in the food trade as well as governments, and that the pressures of the market (as well as those imposed by the WTO as described above) render its standards binding in practice, irrespective of whether governments have formally consented to them (Alvarez 2006, p. 222 f.).

- ICAO Standards and Recommended Practices (SARPs)

The case of the International Civil Aviation Organization (ICAO) is also concerned with whether the standards and recommendations it issues can claim binding force. For members of the ICAO "merely undertake to "collaborate in securing the highest practicable degree of uniformity" with respect to such standards and only undertake to notify the organization should they find it 'impracticable' to comply in all respects with such standards and procedures" (Alvarez 2006, p. 223). Alvarez therefore speaks of rule "existing in a motherworld between binding and non-binding."

- IO "Advisory" Material

Alvarez cites amongst others the "continuous stream of opinions" issued by the Secretariat of the International Labour Organization (ILO) as an example of such "advisory material":

That Office has given, when requested by states, hundreds of advisory opinions relating to both general legal matters, such as whether reservations are permitted to labor treaties adopted within the ILO, to interpretations of specific ILO conventions. Such interpretations, ... have established a considerable body of ILO institutional law that is difficult to disentangle from the substantive international labor law produced by ILO conventions (Alvarez 2006, p. 225).

- ILO Recommendations

ILO recommendations, too, which explain and interpret the ILP conventions, are "halfway houses" between binding and non-binding regulation:

ILO recommendations are adopted by its General Conference in the course of adopting labor conventions that only bind members that ultimately ratify them.



The uses and effects of such recommendations need to be examined alongside the labor conventions that they are meant to elucidate or interpret. Under the ILO Constitution, such recommendations are, upon adoption by the General Conference, to be communicated to all members for their consideration with a view to giving them effect and to be presented not later than eighteen months after the closing of the Conference before the domestic authorities that might be expected to enact appropriate legislation or otherwise take action (Alvarez 2006, p. 227 f.).

- IAEA Standards

On these standards of the International Atomic Energy Agency, Alvarez notes: “IAEA recommendations, like some ILO recommendations, perform a gap-filling role by providing the elaborate, context-specific, and changing implementation details that are impossible or impractical to achieve via treaty” (Alvarez 2006, p. 231).

- The FAO and UNEP Prior Informed Consent Regimes

The concept of prior informed consent (PIC) is about protecting developing countries against unregulated imports of hazardous chemicals and pesticides. To this end, the FAO adopted an *International Code of Conduct on the Distribution and Use of Pesticides* in 1985, and the *United Nations Environment Programme* formulated the *London Guidelines for the Exchange of Information on Chemicals in International Trade*:

These codes made it illegal for states to export banned or severely restricted pesticides or chemicals without the explicit agreement of the importing countries. These two soft law approaches relied on comparable approaches and procedures thanks to joint expert and governmental consultations and close coordination between the two organizations (Alvarez 2006, p. 232).

- WTO Soft Law

Alvarez uses this term to draw attention to the fact that even in an institution like the World Trade Organization, which normally has to do with “hard” contract law and its “harder” enforcement, declarations in the sense of “deals” occur whose legal status is not clarified:

A knowledgeable observer of the WTO concludes that the legal status of these two Doha Declarations is ambiguous given their text and negotiating history since they could be viewed alternatively as (1) merely political commitments no different from G-7 declarations, (2) binding decisions whose provisions may or may not be subject to interpretation and enforcement under the WTO’s dispute settlement scheme, or (3) a new kind of secondary law emerging from the ‘constitutive process of decision-making of the WTO as an organization’ (Alvarez 2006, p. 233).

- The WHO Code on the Marketing of Breast-Milk Substitutes

The background to this code was a bitter dispute between various NGOs like Oxfam, Christian Aid, and Third World First with the Nestlé group, which was accused of marketing breast-milk substitutes very aggressively and misleadingly to induce mothers to wean their children and to develop an artificial dependence on milk substitutes. In 1981 this led to adoption by the WHO Assembly of the Code of Marketing of Breast-Milk Substitutes, which contained guidelines on the sale, effect, and labelling of such substitute products. Alvarez comments on the process by which this code was produced:

The circumstances surrounding the adoption of the WHO Code suggest a law-making process very much at odds with the positivist conception of traditional sources of law. In that instance, states, ostensibly the only actors with authority to make international law, were only one group of actors in creating the relevant rules of conduct. To a considerable extent, these rules emerged as a result of the work of non-state actors: IOs, NGOs, and multinational corporations. These other actors, to a great extent, took the initiative, served as the venue for negotiations, and drafted the relevant rules. To a considerable extent, these non-state actors were responsible for enforcement and even on-going interpretation (Alvarez 2006, p. 235).

- The World Bank Guidelines

The “World Bank Guidelines” are another interesting case. They have nothing to do with interpreting and applying bank’s charter but address only the staff of the bank, imposing certain behavioural obligations of a mostly procedural sort; but even such internal organizational rules of conduct, as Alvarez shows, can develop into law:

The World Bank’s ombudsman, its Inspection Panel, created in 1993 by resolution of the Bank’s Board of Executive Directors, receives and investigates complaints from those adversely affected by the Bank’s activities and enforces compliance with the Bank’s standards on the Bank’s staff. The adoption of an internal “disclosure policy” that made its policies accessible to the public at large and the creation of the Inspection Panel, nowhere explicitly authorized in the World Bank’s charter but which “judicialized” its policies by empowering private guardians to ensure compliance with their terms, *transformed the Bank’s Guidelines effectively into law*, at least in terms of general perceptions (Alvarez 2006, p. 236 f.).

- IMF Conditionality

The last item in this overview is the conditionality regime of the International Monetary Fund (IMF), the IMF practice of setting con-

ditions for loans – particularly to developing and newly industrialized countries:

By 1997, the Fund was following in the path of the World Bank and broadening its concept of appropriate conditions to *embrace good governance* generally. Its new guidelines indicated that it would now take note of a broad range of institutional reforms “needed to establish and maintain private sector confidence and lay the basis for sustained growth” (Alvarez 2006, p. 242).

Critics of the conditionality regime complain that it places borrowing countries under economic and legal guardianship and transferring regulatory power from the developing countries to the industrial countries.

We have briefly presented all ten of the cases Alvarez deals with because we need a concrete idea of what sort of law-making and law interpretation actually takes place in international institutions. Without an adequate empirical basis neither informed normative judgements let alone – as Thomas Duve demands – the development of empirical legal concepts is conceivable. Our review allows general consideration of the concept and function of so-called *soft law*.

b) *The Eroding Distinction between Binding and Non-Binding Norms, between Hard Law and Soft Law*

As the cases presented show, the question of “law” or “non-law” cannot be avoided here, either. Given that *guidelines* and *standards* are in practice followed and treated as law by those involved, are they already law or are only rules made or recognized by the state admitted to the table of the law? One way out of this dilemma is simply to posit two fields of law, the world of *hard law* and the world of *soft law*. But on closer inspection this seemingly practicable solution more and more frequently leads nowhere because in practice the cleancut distinction often proves impossible, and because *soft law can harden* – for example, when in *hard law cases* reference is taken to originally non-binding rules, as in decisions of the WTO or other international organisations. Alvarez describes what this adds up to in practical terms:

Examples whereby more than one IO is involved in law-making are becoming ever more abundant. The Convention on the Law of the Sea (UNCLOS), for example, incorporates by reference “generally accepted” international “rules, standards, regulations, procedures and/or practices.” *This effectively transforms a number of the IMO’s*

[IMO = International Maritime Organization] codes, guidelines, regulations, and recommendations (dealing with such matters as pollution control measures to be obeyed by vessels while traveling their international straits or exclusive economic zones, for removal of installations to ensure safety of navigation, or relating to sea lanes or traffic separation) *into binding norms*, even for states that may not have approved of these standards within the context of the IMO but have become parties to the Law of the Sea Convention. Even though the IMO formally has no power under its constitution to take formally binding decisions, UNCLOS, a treaty whose scope and history suggest its comprehensive impact on general customary law binding even on non-parties, has remedied that handicap at least with respect to some of the IMO's work products. Similarly, ... the World Bank makes use of a wide number of non-binding instruments produced by other IOs, such as FAO's Code of Conduct on the Distribution and Use of Pesticides, in effect *turning such instruments into binding rules* for its staff, and when incorporated into its loan agreements with states, perhaps even into binding forms of international or national law (Alvarez 2006, p. 220).

c) *The Concept and Functions of Soft Law*

Although we essentially know what soft law is, it could be useful at this point to summarize the generally accepted criteria:

Soft law ... refers to regimes that rely primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance arrangement. Although the parameter of "primarily" permits some ambiguity (as well as flexibility), the key characteristics of a soft law arrangement are clear, in contrast with a hard law arrangement. First, in a soft law regime, the formal legal, regulatory authority of governments is not relied upon and may not even be contained in the institutional design and operation. Second, there is voluntary participation in the construction, operation, and continuation. Any participant is free to leave at any time, and to adhere to the regime or not, without invoking the sanctioning power of state authority. Third, there is a strong reliance on consensus-based decision making for action and, more broadly, as a source of institutional binding and legitimacy ... Fourth, and flowing from the third, there is an absence of the authoritative, material sanctioning power of the state – police power as a way to induce consent and compliance (Kirton and Trebilcock 2004, p. 9).

More interesting are the various functions of soft law. In *Soft Law in Governance and Regulation*, Ulrika Mörth identifies six:

- Soft law may precede hard law
- soft law has the potential for independence
- soft law can be disguised
- soft law is closely linked to politics

- international organizations can modernize themselves through the use of soft law
- soft law provides room for flexibility and unintended consequences (Mörth 2004, p. 19).

With the help of Mörth, we shall take a brief look at three of them:

First, soft law can be a precursor to binding legal instruments, which means that it is not always linked to network governance; rather it can be more closely linked to the traditional steering mode of government. The regulatory status of soft law is, however, a complex issue. Several authors in this volume have emphasized the difficulty of determining if soft law develops into hard law, given the close connection between these two types of law. Indeed, there are fuzzy boundaries between regulations. ... Several cases in this book have demonstrated different ways of transforming soft law into hard law. In Aldestam's on EU's state aid policy, for instance, *the transformation of soft law into hard law* is often a function of the Commission, which issues guidelines, recommendations and letters to the Member States. According to Aldestam, the Commission's position has even been interpreted as having the power to establish rules with or without the agreement of the Member States. The chapter on state aid also showed that soft law can be transformed into hard law if the national administrations believe that the rules are hard. Thus, the *perception of rules* is an essential mechanism in deciding whether soft law will be transformed into hard law. ...

A fourth conclusion is that soft law is closely linked to politics. ... In the EU policy cases on employment and state aid, one might expect a less powerful position for the European Commission. This is especially striking in the case of State aid as outlined in Chapter 2. According to conventional wisdom in the EU literature soft law is presumed to be useful because it preserves national sovereignty. In practice, however, the autonomy of the Member States seems to be relatively weak. One explanation for this discrepancy between the formal and informal processes is cosmetic. It is important for the politicians to retain national sovereignty, however symbolic it may be, if they are to co-operate on politically sensitive domestic issues.

The fifth conclusion is that international organizations use soft law because they see it as a characteristic of the modern way. Göran Ahrne and Nils Brunsson suggest that soft law is not only the most readily available regulatory mode for modern organizations, particularly for meta-organizations, but also the most attractive way of compelling members to comply with the rules. Modern organizations are less prone to use their hierarchical authority, and so become advisory rather than directing. Even organizations like the European Union with the potential and the ability to use hard law seem to follow this modern trend toward soft law. Thus, soft law is an attractive form of regulation and governance because it is considered to be modern (Mörth 2004, p. 191 ff.).

She concludes:

... soft law is sometimes an independent form of regulation that fits well into a system of governance characterized by networks, horizontal relations and voluntary

rules. Whether soft law is an independent form of regulatory mode or a step in a process of hardening the rules depends on several factors and mechanisms. One factor and mechanism is *the way in which the actors perceive the rules* and to what extent the organization wants to identify itself with hierarchy and coercion. The *political will and context* can also determine whether the rules will lead to a more formal legislation process or if the rules will stay soft. Another factor has to do with the organizational authority and capacity. *Rules do not float freely*. Meta-organizations – organizations that have other organizations as their members – often lack a clear authoritative centre, common resources and the right to issue legal sanctions (Mörth 2004, p. 195).

#### IV. The *Global Administrative Space* and its *Regulatory Agencies*

We had briefly addressed the question of how *legal spaces* can actually be identified, described, and analysed. In the course of the repeatedly – often in very general terms – evoked transnationalization processes, one such legal space is increasingly taking shape. Richard B. Stewart (2012) calls it the *global administrative space*:

The growing density of international and transnational regulation, which in part reflects the inadequacies of uncoordinated national systems of regulation as means to address global interdependencies in fields that include market activities and their spillovers, security, and human rights, has created a multifaceted “*global administrative space*” populated by several distinct types of regulatory administrative bodies together with various types of entities that are the subject of regulation, including not only states but firms, NGOs and individuals (Stewart 2012, p. 4).

According the Stewart, four types of regulator operate in this global administrative space:

*Formal intergovernmental organizations*, established by states (or and in some cases other international organizations), typically through treaties that impose obligations on states parties but whose ultimate aim is often regulation of private actors (e. g., Kyoto Protocol) and include a variety of administrative bodies operating under treaty aegis but often exercising very significant lawmaking and discretionary and administrative powers, including lawmaking powers.

*Intergovernmental networks of national regulatory officials* responsible for specific areas of domestic regulation (banking, money laundering, etc.) who may agree to common regulatory standards and practices which they then implement domestically. These bodies are increasingly becoming strongly institutionalized with significant administrative components.

*Hybrid intergovernmental-private bodies* composed of both public and private actors, such as the Global Partnership for HIV/AIDS and the global sports regime complex, a type that is becoming increasingly significant in contemporary governance generally and private bodies exercising public governance functions, such as the Forest Stewardship Council deciding on criteria for products from sustainably managed forests to be certified and labeled, or the International Olympic Committee deciding where the Olympic games should be held and under what conditions.

*Domestic administrations forming an integral part of global regulatory regimes* represent a fifth type of body involved in global regulation. These agencies implement global regulatory law through a distributed system of administration, and in so doing (and in other ways) shape it (Stewart 2012, p. 4 f.).

This transnational legal space has taken shape with the emergence of a *global administrative law* (Kingsbury 2009; Cassese 2005; Cassese et al. 2008), which the relevant scientific community affectionately calls GAL, and which, unlike national administrative law, consists less of concrete legal provisions and legal institutions than of a bundle of very general principles:

... diverse forms of global regulatory administration and their interactions are (or can be) organized and shaped by *principles of an administrative law character*. A growing body of global administrative law, based on largely procedural principles of transparency, participation, reasoned decision, review, is emerging in global regulatory administration to promote greater accountability and responsiveness to affected actors and interests, including developing countries and civil society interests (Stewart 2012, p. 5 f.).

We are naturally particularly interested in how to conceive the emergence of such *global administrative law* and who can be regarded as the *producer of this legal regime*. Stewart shows that there has been *no master plan* behind the “creation” of the GAL and that a *plurality of producers* have contributed to the development of the legal principles that have shaped it:

The development and spread of GAL practices and norms has been accomplished by many different types of institutional actors, motivated by a variety of objectives. *There has been no overall plan or system*. Rather GAL has accreted through the accumulation of discrete decisions by the different generative actors responding to the need to discipline the exercise of administrative power occurring in certain recurring structural modes ... These actors include not only domestic regulatory authorities, business firms, NGOs, and private and public/private networks or actors. Some of these actors, such as courts and tribunals and international investment arbitral bodies, review the legality of global administrative decisions and norms (including those of their distributed domestic components) as a condition of their validity and enforcement. In other cases, a domestic agency or another global regulatory body, in deciding whether or not to recognize or validate a global

regulator's decisions or norms may give weight to whether or not it followed GAL practices in decisionmaking. . [sic!] As discussed below, these decisions are instinct with the need to channel and regularize the exercise of authority through law. In still other cases, private actors are deciding whether to conform to the decision or norm in order to enhance their reputations, become credible partners in business or other transactions or ventures, or otherwise further their interests. In all of these contexts, the extent to which the global regulator has followed GAL practices of transparency, participation, reason giving, and opportunity for review in making decisions is often a substantial and in some cases a controlling factor in the decision of the validating or recipient authority or actor in deciding whether or not to validate, recognize or conform to the decision or norm in question (Stewart 2012, p. 7).

The conclusion is that *legal spaces* can perhaps be conceived of less as spaces characterized by the validity of a common, detailed legal regime than as spaces that – at least in the early stages of their development – come into being on the basis of common, recognized legal principles to which the “population” feel themselves committed. Legal spaces could then be conceptualized as spaces of common legal principles – such as the principles of the rule of law. We shall be returning to this at the end of the present chapter.

## V. The *Transnational Legal Arena* and its *Norm-Entrepreneurs*

As when dealing with the norm-producing role of standard-setters and international institutions, we are concerned here with the nature of the *playing ground* on which norm entrepreneurs (see Flohr et al. 2010; Wolf 2011) are to be found. Returning to our arena concept, this *playing ground* can perhaps best be described as a *transnational legal arena*.

### 1. The Transnational Legal Arena as Field of Operation for Norm-Entrepreneurs such as NGOs, TNCs (Transnational Corporations) and Big Law Firms

As noted elsewhere (Schuppert 2008c; 2010), we are witnesses to an ongoing process of the transnationalization of law. This process, too, is accompanied and promoted by a number of actors for whom operating in spaces beyond the state is a matter of course and, moreover, for whom the given transnational space is where they are at home. This is particularly the case for



transnational corporations and for international law firms, as well as for many NGOs that use to world stage with great professionalism.

It therefore seems obvious to relate the transnationalization process of law to the actor perspective in order to gain an idea of a transnational legal arena. With reference to Buaventura de Sousa Santos (1995), Klaus Günther and Shalini Randeria provide the following, very informative description (2001, p. 87) under the heading “The Transnationalization of Law.” We take the liberty of replacing this title by the formulation “The Transnational Legal Arena,” giving the following overall picture:

### The Transnational Legal Arena

	<i>Transnational actors</i>	<i>Normative and institutional context</i>	<i>Consequences for the state</i>	<i>Type of legal pluralism</i>
<i>Transnationalized state law</i>	IWF; World Bank; WTO; TNCs; States; legal advisers	Regulation deregulation structural adjustment	Heterogenization of the state	Development of semi-autonomous fields of law within state law
<i>Regional Integration (EU)</i>	States; supranational political institutions	Regional institutions subsidiarity principle	Overlapping sovereignty (“sovereignty pooling”)	Supranational law
<i>Lex mercatoria</i>	TNCs; US law firms	International treaties and arbitration tribunals	Erosion of sovereignty	Law parallel to the state
<i>Cosmopolitan law (environment, human rights)</i>	NGOs; social movements; states; UN system	International tribunals and conventions; alternative NGO treaties	Limitation of sovereignty; cosmopolitan legal culture	Universal rights beyond the nation state
<i>Transnationalization of infrastate law</i>	Social movements; NGOs; UN system	Group rights Self-determination law	Local self-government Shared sovereignty	Complementary/ competing legal orders in the state

Going a step further, we could perceive not only certain institutional actors in this transnational legal spaces but also the people operating in them, such as the stressed manager so brilliantly and ironically portrayed by Martin Suter (Suter 2014); administrative networkers commuting between Washington, Brussels, and Berlin; or the familiar international lawyers, who can

be regarded as the personification of transnational legal knowledge and a transnational legal elite.

In “Governance by Practitioners” Sigrid Quack describes the role of international law firms as *carriers of transnational legal knowledge*:

Law firms operating internationally are big business enterprises. As such, they seek to satisfy the needs of their clients and to maximize income in subsidiaries throughout the world. Lawyers working for them also serve as development platforms for solving the legal problems their clients face. Marc Galanter ... takes the view that the working style in mega law firms differs qualitatively from that in “ordinary” law firms. According to Galanter, thorough investigation of different legal options and creativity in problem-solving approaches and in court-room tactics are characteristic of such firms. Because they work for many clients in similar areas, lawyers in mega law firms gain good insight into current developments. They are “repeat players” and often take a leading role in new developments. Owing to their strategic position, they can better understand emerging organizational problems and find suitable legal solutions ... The knowledge acquired in various projects is thus stored in accessible form, so that over time law firms become *sources of valuable legal knowledge*. Owing to their size, international law firms cover both different national jurisdictions and many special legal fields. For this purpose, they employ lawyers from different countries and with different specialities, who can profit from one another’s experience and. These international firms consequently have unique access to “application of the law at the stage of its development” and can use this knowledge in many fields of transnational law. Robert Nelson’s ... assertion that the business of American mega law firms is to change the law is more true today than ever before. Like 25 years ago, “the intellectual impact of big law firms exercises a permanent influence on the jurisprudence of our times” (Quack 2009, p. 582 f. Transl. R.B.).

Taking an image from the world of soccer, the biggest of these international law firms constitute something of a “Champions League” among transnational legal actors. Quack:

The Americans and British dominate the top bracket of international law firms. This Anglo-American predominance is attributable to the enormous size of the American market and to British history shaped by colonialism and the commonwealth, the economic influence of the American economy, and the importance of the London and New York financial centres. The case law that applies in the USA and Britain offers law firms domiciled there more liberal possibilities in *creating innovative contractual arrangements* than the more restrictively codified legal systems on the European continent. British and American law firms have accordingly had a head start in the internationalization process. ... The social stratification of law firms in terms of membership of the “magic circle,” the opening of foreign subsidiaries of these firms in a limited number of metropolises in proximity to other professional service providers, the hierarchy of lawyers in international mega law firms between those

from the US or Britain and those from elsewhere: these are typical aspects that influence *membership of the new cosmopolitan legal elite*, whose members contribute to resolving problems of cross-border coordination and intercultural communication (Quack 2009, p. 583 f. Transl. R.B.).

## 2. Three Types of Norm Entrepreneur at Work

### a) NGOs

The role of non-governmental organizations (NGOs) in norm production and diffusion has often been described. Klaus Günther and Shalini Randeria provide a particularly striking portrait of such organizations:

NGOs are important, hardly researched new actors in law production, law diffusion, and monitoring. The making of new transnational norms in the field of human rights and environmental protection and their global diffusion is to be counted among their achievements, as well as the establishment of a general and public awareness of injustice in the face of violations of the law. They influence national and supranational lawmaking and thus often call the legal sovereignty of the state into question. To be seen in this context are the new coalitions between NGOs, certain governments, and some private sector actors which cooperate in formulating and implementing human rights and contribute to changing the state monopoly in this field. This new sort of *public private partnership* constellation is also becoming more important in global environmental policy. In climate policy, for example, strategic alliances between NGOs, international organizations, and business enterprises set new environmental standards and push their implementation. This type of “privatization of world policy” offers opportunities for the just and effective resolution of global problems, but it also endangers the democratic control of policy decisions. Nevertheless, the state is not deprived of its rule-setting function. Not only must it subsequently embed international norms and treaties in the national context but also ensure their implementation (Günther and Randeria 2001, p. 63 f. Transl. R.B.).

Following this first overview, we turn to a particular field of NGO activity, looking over their shoulder as they work at the law, participating in the setting of standards. Anne Peters, Till Förster and Lucy Koechlin (2009c) identify three variants defined in terms of the type of standard involved.

- In the first, the contracting states are the actual standard setters and NGOs are only lookers-on, reduced to lobbying:

First, NGOs are engaged in the elaboration of ordinary inter-state international conventions ... Here NGO involvement is largely informal. NGO forums are held in parallel to and separate from the intergovernmental standard-setting conferences,

such as the Rio conference of 1992. So NGOs do not have any negotiating role whatsoever here. However, their *direct lobbying at those conferences* can be crucial (Peters et al. 2009a, p. 493).

- In the second variant of participation, NGOs are involved above all procedurally in the process of norm production:

The second type of standard setting occurs within international organisations or quasi-organisations, in particular in the framework of the highly institutionalized multilateral environmental agreements. Here, the governmental bodies or conferences of the parties create secondary law for the implementation of the respective regimes. To most of these bodies, NGOs are *accredited in formal procedures* and thus enjoy an observer (or in the Council of Europe: “participatory”) status. This legal status is an intermediate one *between exclusion and full participation as co-law makers*. It entails various rights to be invited and to sit in meetings, to obtain information (agendas, drafts), speaking time, the allowance to distribute documents and the like (Peters et al. 2009a, p. 493).

As Anne Peters et al. note, international lawyers do not agree whether customary law meanwhile permits NGO participation in setting international standards. The authors believe this not yet to be the case, but that things are moving in this direction:

Among international lawyers, it is controversial whether NGOs have, as a matter of customary law, a general entitlement to participate as observers (and thus to be heard) within the law-generating international institutions. Such an NGO right to be heard would come to bear in institutions which have no or only deficient special rules of procedure. We submit that a customary right of NGOs to participate in the international legal discourse does not yet exist, because practice and *opinion iuris* have not sufficiently matured. But NGOs already enjoy a legitimate expectation that – once an institution has admitted them – the participatory conditions will entail two core components: oral interventions and written submissions. Refusal of these rights must be specifically and concretely justified. In the current international legal system, the NGOs’ voice is thus the functional equivalent to the formal law-making power which other actors (the international legal subjects) possess. Because of *this legal function of NGOs’ voice*, there is a need to legally structure NGO participation (Peters et al. 2009a, p. 494).

- In the third and final variant, NGOs are directly involved in norm setting in that they produce their own draft texts and formulate concrete proposals for norms:

Finally, NGOs sometimes *draft private texts or propose norms* (often in conjunction with academics), such as codes of conduct and guidelines, interpretative treaty commentaries, or principles, in the hope that they will be adopted by other international actors, cited, and accepted as contributing to the corpus of international law.

Examples are the numerous Rules of the International Law Associations, the Helsinki Rules on the Use of Waters of International Rivers of 1966, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1997, the Montreal Principles on Women's Economic, Social and Cultural Rights of 2000, or the Princeton Principles on Universal Jurisdiction of 2001 (Peters et al. 2009a, p. 494).

Despite this broad range of NGO activity in the norm-setting field, states still have “a tight grip on the formal law-making processes” in the view of Peters et al. Even in those areas where NGOs have had greatest impact, *states control the agenda and the access to the law-making arenas*, in particular through the accreditation procedures (Peters et al. 2009a, p. 494). We have our doubts about the general accuracy of this assessment, suspecting that it underestimates the potential for networked NGOs with a sovereign command of the Internet to at least strongly influence the political agenda. But we cannot go into this question here.

#### b) *Transnational Corporations (TNCs)*

There is abundant evidence of and research into the important role that transnational corporations play in the “rule-making business.” We call two authors to the witness box.

In her often quoted book *A Public Role for the Private Sector: Changes in the Character of Business* on the phenomenon of industry self-regulation, Virginia Haufler (2001) examines the extent to which TNCs *play a public role* apart from their private one as money-making stock corporations, *and therefore assume public responsibility*. This double role of transnational corporations, their commitment to profit-oriented “shareholder value” and their assumption of “corporate social responsibility,” can be seen as one of the most important *consequences of globalization*, because both the *composition of governance actors* and *transnational corporations’* understanding of their role have changed as globalization has proceeded.

On the change in the governance scene, Haufler notes:

The character of international relations has changed in the past 50 years from one in which the global agenda was established by the most powerful countries, to one in which *powerful commercial and activist groups shape the debate* and often determine outcomes. Industry self-regulation is just one more piece of evidence regarding the *changing nature of efforts to govern the global economy* and establish collective mechanisms for resolving global policy issues (Haufler 2001, p. 121).

According to Haufler, this change in the governance scene has been accompanied by a change in the role of big companies, which manifests itself above all in a new conception of their role (see Schuppert 1998). On this new public role of transnational corporations, which ties them through their self-regulation into what we could call a system of shared responsibility, she comments:

The voluntary adoption of social standards by an increasing number of companies *presents a different picture of the role of the corporation in world affairs*. Observers and participants alike point out that the standards these companies establish are often higher than national or international ones. They address contentious public issues and not just technical standards that only concern industry. When companies establish their own rules and standards in socio-political areas, *these can complement or supplement government regulation*, especially in countries with weak capacity to regulate. International standard setting fills in the gaps where national regulatory systems conflict or remain silent. *Where governments do not govern, the private sector does* – often in response to the demands of public interest groups who find themselves unable to move national governments. And when governments are unwilling or unable to govern effectively, potential leaders may see private governance as a valuable tool to achieve public ends.

National policy makers are beginning to pay attention to the possible benefits of industry self-regulation. They may hope that as business improves its behavior abroad then government will be under less pressure to act against the private sector at home or abroad. They may also *hope to use corporate social responsibility as a tool to promote “soft” foreign policy goals, such as human development* (Haufler 2001, p. 29).

Doris Fuchs (2005), our second witness, has systematized the “channels of influence” used by TNCs in her book *Understanding Business Power in Global Governance* (2005). She distinguishes between “instrumentalist, structuralist and discursive approaches.” We are particularly interested in the *structural power of business*, within which she differentiates as follows:

- “Channels of the Structural Power of Business
- Mobile Capital: The Agenda-Setting Power of TNCs ...
- Quasi-Regulation: The Agenda (and Rule) Setting Power of Coordination Service Firms ...
- Public-Private Partnerships: Participation in Rule-Setting ...
- Self-Regulation: Increasingly Autonomous Rule-Setting Power ...” (Fuchs 2005, p. 120 ff.).

But what is behind these three variants of rule-setting? What Doris Fuchs calls “*quasi-regulation*,” has to do with the *development of standards* set by

private, profit-making corporations and which perform a – sometimes worldwide – control function. Two actors take the scene: rating agencies and the big *multinational law and accounting firms*. As far as *rating agencies* are concerned, she has this to say:

Quasi-regulation provides the second mechanism through which business actors exercise passive structural power in global governance today. Quasi-regulation, in the context of the present analysis, refers to the ability of coordination service firms to indirectly *set standards for policies and practices worldwide*. At the core of this debate is the role of rating agencies and their ability to determine the acceptability of national policies. In this context, quasi-regulation is related to the passive structural power exercised by corporations vis-à-vis national governments delineated above, the only difference being that rating agencies do not threaten that one company will move its investment out of a country, but rather *influence the investment decisions of the entire global financial market*. To the extent that these *standards are made explicit*, moreover, this passive structural power comes close to an active one (Fuchs 2005, p. 124).

But the big *international law and accounting firms* also play an important role in developing transnational standards:

Next to rating agencies, other coordination service firms have obtained substantial structural power in global governance. *Multinational law and accounting firms* as well as management consultants *exercise transnational rule-setting power* by determining and enforcing standards for the behaviour of business companies ... Again, this structural power reaches into the realm of active structural power to the extent to which these rules are made explicit. While these actors do not influence public policy as directly as rating agencies, they do have a substantial impact on corporate conduct and economic organization. In consequence, similar criticisms pertain to their structural power as to that of rating agencies (Fuchs 2005, p. 125).

With regard to participation in rule-setting in the framework of public private partnerships (PPPs), Fuchs sees the participation of firms in PPPs as an avenue to collaboration in setting “transnational rules”:

PPPs, then, provide business with an avenue to exercise active structural power. In PPPs, business actors directly *participate in decisions on rules and regulations*. The extent of this power, however, differs across PPPs. While in some PPPs, business may dictate agenda- and rule-setting, in others, public actors enforce strict limits on the decision room of business actors. Moreover, public actors still are in control to the extent that they can decide with whom they want to sit at the table. This may be more so in the national arena, however. In the international arena, PPPs can provide large business actors with considerable leeway in agenda- and rule-setting due to resource scarcity among public actors and a frequent lack of transparency in decision-making processes (Fuchs 2005, p. 127).

Turning finally to *industrial self-regulation*: it is not a new phenomenon – the *lex mercatoria* inevitably comes to mind, in our view a “legal phantom” difficult to pin down (see also Ipsen 2009) – but, owing to its growing diffusion, it is attracting more and more attention (see, e.g., Cutler et al. 1999):

Partly, however, the rise in interest results from the dramatic increase in quantity and influence of self-regulatory arrangements as well as new facets to self-regulatory practices. *Private actors today define regulations across a wide range of policy arenas*, including environmental issues, human rights, or the international financial system. Developments are particularly noteworthy in the *area of standards and codes of conduct*, which now exist at the level of individual companies such as Levi-Strauss or Karstadt; at the sectoral level such as the Responsible Care Program of the Chemical Industry; and at the global level, such as the regulation of transport of dangerous goods by the International Air Transport Association, the ISO 14000 or SA 8000 standards for environmental management and social accountability ..., or the advertising code of conduct developed by the International Chamber of Commerce. Importantly, much of this activity extends beyond core activities of business (Fuchs 2005, p. 129).

To sum up, what interests Virginia Haufler and Doris Fuchs – among many others – is the role of corporations that, in the absence of a transnational lawmaker fill existing *regulatory gaps* and substitute or supplement state law. To this extent we can indeed speak of norm-setting by corporations and thus of a type of coproduction of law.

c) *International Law Firms (Mega Law Firms, MLFs)*

If we now cast a brief glance at the role of international law firms in setting norms, we are interested less in their concrete activities than in explaining why they have acquired so dominant a position in the *transnational legal arena*. There appear to be two main reasons: a growing market for legal advice and a type of legal advice practised by such firms that is referred to in the literature as *creative lawyering*.

aa) *The Growth of the Legal Advice Market*

The thesis that – chiefly as a consequence of transnationalization and denationalization – there is a growing market for legal advice, is in keeping with



our own observations. This thesis is advanced particularly strongly by Klaus Günther and Shalini Randeria:

In the sectors of the world in which the economic system is transnationally differentiated, there is a *growing market for legal advice* in which law firms can successfully operate that also organize themselves transnationally, usually in the form of a network-like groups of locally more or less autonomous law firms, which do business under a common name. They can therefore serve as an example of organizations that Rudolf Stichweh has called “engines of globalization.” He describes them as follows: “They are membership associations that, through personnel mobility within the organization, their ability to establish branches and subsidiaries in many different places, and through facilitated communication flows in the organization, can develop considerable globalization effects, effects that can be held within the organization or impact the societal environment.” This question is likely to be an important research topic particularly with regard to transnational law firms because they interact closely and intransparently with the international capital market and are integrated into the dynamics of global competition between transnational corporations.

Law firms have become such organizations through the high demand for legal advice, legal organization, and out-of-court conflict settlement competence that necessarily accompanies the process of economic transnationalization. Compared with early periods, legal problems to do with the international exchange of goods and services have increased only in number. However, new sorts of legal problem have arisen with the privatization of state enterprises (e. g., Deutsche Telekom AG), with long-term borrowing by transnational corporations and growing investment activities by transnational investment funds and pension funds on the international capital market, with transnational mergers (German examples: Daimler/Chrysler, Vodafone/Mannesmann), and with international joint ventures (e. g., dam projects in India and China, oil pipelines from the Caspian Sea to Germany) (Günther and Randeria 2001, p. 52 f. Transl. R.B.).

Not only the need for legal advice is growing but also the need for regulation to be satisfied by lawyers – which brings us back to the function of filling regulatory gaps:

Law firms can ... become important actors in global locational and regulatory competition when advising their clients in “forum shopping” about the production and distribution locations that offer the most favourable tax, social, competition, labour, and company law conditions. Ultimately, however, lawyers also become actors in law generation beyond the state everywhere where global markets have to rely on legal rules to coordinate activities and on conflict settlement mechanisms that a national lawmaker and state judiciary cannot provide alone or not fast enough – or where such rules are more favourable for everyone concerned without state intervention. Finally, political measures for deregulation by transmuting public-law forms of regulation into private-law forms and through privatization con-

tribute for their part to increasing the demand for private-law regulation to be satisfied by lawyers (Günther and Randeria 2001, p. 53. Transl. R.B.).

*bb) Assumption of Creative Legal Functions – Creative Lawyering*

The increasing importance of international law firms – particularly in Europe and in Germany, where the legal profession is still considered an “independent institution of the judiciary” – can really be understood only if the type and style of legal advice that such firms practise are taken into consideration, whose lawyers are either themselves from the Anglo-American legal system or have undergone at least some of their training in the United States.

In an interesting working paper on “The The Role of International Law Firms in Cross-Border Commerce” (2006), Fabian Sosa and John Flood offer reflections that deserve our attention for two reasons: they describe first the *creative form of legal advice* practised and the *semi-autonomous legal fields* created and dominated by such *mega-law firms*:

The discourse about international lawyering focuses mostly on Anglo-American mega-law firms, whose services are usually limited to the large multinational companies. The prevailing opinion assumes that only these law firms are able to provide effective legal support at the global level. Most of these firms have their headquarters in the US (with subsidiaries in many areas of the world). They have hundreds of partners and often over a thousand associates. Trubek et al. ... describe this ‘*American mode of production of law*’ and the decisive role played by these multi-purpose, commercially-oriented law firms in the common law. US lawyering known as “legal entrepreneurialism” has led to a pro-active strategy in structuring, negotiating and drafting contracts, requiring an understanding of legal as well as economic and management competences. Lawyers advise their clients, draft complex contracts, influence the lawmaking procedure and file class actions. Law firms exercise an enormous influence on cross border commerce through this *creative form of lawyering* ... According to some authors, the mega law firms have created a *largely autonomous system of private ordering* which is of much greater importance for global commerce than the legal structures provided by nation states (Sosa and Flood 2006, p. 1 f.).

What Sosa and Flood have to say about American research into this specific style of legal advice is also interesting. How international law firms function is described in a fashion that makes their central role in the transnational arena very plausible:

In the context of the law firm literature, those approaches are of interest which focus on the function of lawyers and the effect of their work. Well known concepts from this literature are the *concept of creative lawyering* ..., *the concept of the lawyer as legal entrepreneur or legal engineer* ..., or *the lawyer as manager of uncertainty* ... However, despite their relevance for the present project, these approaches seem to be too specific for a basic general approach.

A more general approach can be derived from the works of Lawrence Friedman, who has argued that the significance of lawyers and their indispensability increases the weaker and lumpier existing legal structures are ... This argumentation has also been used to explain the dominance of Anglo-American MLF in the global context and the growing Americanization in the global legal field ... The fragmentariness of the global legal system leads to a comparative advantage for US law firms because these firms are familiar with the openness of the legal system in the common law and the coexistence of different legal systems. In this context they were able to develop *a particular style of lawyering, much more creative and business oriented than in the civil law countries* (Sosa and Flood 2006, p. 4).

These reflections on the three types of norm-entrepreneur encourage us to bring a concept into play that we have found useful elsewhere (Schuppert 1994), namely “institutional competence.” Both NGOs and transnational corporations, and especially international law firms, have their own specific competence, which enables them to play an important role in the norm-setting processes of the *transnational legal arena*. For NGOs, apart from their enormous agenda setting power, it is the critical scrutiny of existing normative regimes in global justice discourses and their role as carriers of local and alternative regulatory knowledge. The institutional competence of transnational corporations for participating in norm production in arenas beyond the state is, so to speak, innate to them. Global players by definition, they operate in the framework of transnational regulatory structures and – if other regulatory authorities fail to provide them – establish such structures themselves. As far as the institutional competence of international law firms is concerned, it clearly consists in the ability to satisfy the need of a globalized economy for legal advice and regulation better than any.

Before concluding this third chapter with reflections on the normative benchmarks of pluralized law production, an important issue needs to be considered: the public function of private norm-setting.

## D. Normative Yardsticks in the Pluralized Production of Law: The Rule of Law

### I. Private Norm-Setters as Public Institutions

Andreas Engert has recently examined the manifestations and consequences of private norm-setting power (2014). Taking three examples, the rules of the International Swaps and Derivatives Association (ISDA), the German Corporate Governance Code (DCGK), and the International Financial Reporting Standards (IFRS), he describes the most important functions of private norm-setters:

Recurrent transactions almost inevitably generate *network effects* and thus *natural standardization*. Widespread rules like the *pari passu* clause [debtor declaration vis-à-vis the creditor that his claim will be treated “on an equal footing”] therefore shape contracts at least as much as the norms of state dispositive law. However, whereas legal norms can mostly be attributed to the legislator, private standards have so far appeared to be “heteronomy without heteronomous agents.” The ISDA rules, the DCGK, and the IFRS show that private standards also frequently build on a central institution. When a particular actor claims responsibility for the private norm, its heteronomous effect is more apparent. The most important role in this is to give substantive shape and an authoritative formulation to the rule (Engert 2014, p. 331 f. Transl. R.B.).

These functions, and particularly the network effects of private rule-makers noted by Engert mean that they obtain a “certain power over ‘their’ norm” (Engert 2014, p. 334) and accordingly perform *de facto* a public function. Engert identifies two groups of actors that have outgrown the purely private sphere: big law firms, and industrial federations or other non-profit institutions.

He outlines the action logic of big law firms, which at first glance are not obviously norm-setters:

Legal advisers can go to great lengths to develop appropriate solutions; others copy their arrangements, so that network effects arise and the solution becomes an established standard. Since lawyers and other service providers frequently accompany the same sort of transaction with changing parties, they are in an especially favourable position to diffuse a solution and coordinate market participants. However, the aim of their activity as “norm entrepreneurs” is to keep their consultancy fees flowing. They have no interest in making their services superfluous. No norm-setting is to be expected from them in the sense of formulating generally applicable rules and making them available to others. Legal consultants will more likely seek to at least avoid any impression of standardization for fear their services could appear inter-

changeable. The publication of a uniform normative text and concomitant guidance for application is therefore not to be expected from legal consultants (Engert 2014, p. 334 f. Transl. R.B.).

As far as the second group of actors is concerned, their norm production quite clearly “provides a *public good* and therefore constitutes a *public task*”:

Where rules are set not only as a collateral effect of providing legal advice, private norm-setters are generally industrial federations or other non-profit institutions. The network effects of arrangements mean that an efficient normative configuration – including the substantive quality of predominant standards – is a public good of the given market. ... With regard to the status quo, it should be noted that, with the services they render but also with their (limited) disposition over the norms they provide, private norm-setters perform a public task. In influencing the normative configuration, they influence the developing network effects without fully internalizing them. How they employ this norm-setting power depends on their internal constitution. This raises questions for private standard setters similar to those facing other public institutions, especially about the representation of the interests concerned (Engert 2014, p. 335 f. Transl. R.B.).

If not only state-made law but also private law production provides public goods, a yardstick is needed not only for good lawmaking but – in keeping with our science of regulation approach – for *good rule-making*, notably rule-making beyond state law.

One such yardstick could be the sheaf of principles that constitute the *rule of law*. By the rule of law we understand not a state-centric principle but – on the contrary – an ensemble of second order rules that can be drawn on as a benchmark wherever rules are being made, also and particularly by non-state rule-makers.

## II. Rule-of-Law Principles as Second Order Rules in the Sense of “Rules for Rule-making”

In our view, rule-of-law principles in the sense of second order rules are a particularly suitable normative yardstick for every form of rule-making. Robert S. Summers (1999) explains the distinction between primary and secondary rules commonly drawn in legal theory:

The principles of the rule of law differ from principles of ordinary “first order law.” Principles of ordinary first order law apply directly to determine legal relations between immediate addressees of such law. ... Unlike such “first order principles,” the principles of the rule of law are what might be called “*second order*” principles. ... Principles of the rule of law are about first order law in the sense that they are

general norms that direct and constrain how first order law is to be created and implemented (Summers 1999, p. 1692).

Michael Zürn and Bernhard Zangl also take up this distinction, finding it useful in examining juridification:

Characteristic of juridification processes is ... that so-called secondary rules are defined institutionally. Where the making, application, and enforcement of rules do not function in accordance with pre-defined procedures ... one can hardly speak of law. To this extent, a meticulous legal system presupposes primary and secondary rules ... (Zürn and Zangl 2004, p. 21 f. Transl. R.B.).

With this in mind, we can conceive the role of rule-of-law principles as second order rules:

- *On law production* or – to put it more generally – rule-making, and notably on what authority is legitimated to make rules and what procedural law demands are to be made of the production process
- *On the nature of the product itself, i. e., the quality of the norms produced*, not only in the sense of what type of norms are to regulate what areas, but in the sense of the demands made on every type of norm designed to control behaviour and which must therefore have a modicum of clarity, certainty, and freedom from contradictions
- *On law enforcement*, since such enforcement rules are indispensable for modern societies:

The effectiveness and societal relevance of a legal order is determined essentially by the extent to which it can guarantee its realization. At the same time, fundamental decisions of a society on values are revealed by the extent of and limits to the coercion considered acceptable (Nehlsen-von Stryk 1993, p. 350 f. Transl. R.B.).

If by the rule of law we understand an ensemble of *second order rules* for the generation and enforcement of behavioural control rules, it is also clear that such second order rules cannot be limited to state-made law. The yardstick of rule-of-law principles therefore needs to be applied above all in areas in which no state-made law exists or where it is ineffectual but where other, non-state forms of ordering and conflict resolution are to be found that are equivalent in function to “classical law.” The scope of application for *rule-of-law* principles can therefore not be meaningfully limited to the state and the law it produces. To the extent that the rule of law means the exercise of power and the management of societal conflicts through the law, this scope

must be seen as including forms of regulation other than law made by the state.

What is also needed is the *area-specific operationalization* of the *second order rules* – described here only in very general terms. This is a task that the International Organization for Standardization (ISO) has already set itself. It has drawn up a “Code of Good Practice for Standardization,” providing *standards for standardization*. Note particularly rule 3.1, which explicitly explains that these *second order rules* have to do with every sort of standardization:

3.1 This code is intended for use by any standardizing body, whether governmental or non-governmental, at international, regional, national or sub-national level. ...

4.1 Written procedures based on the consensus principle should govern the methods used for standards development. Copies of the procedures of the standardizing body shall be available to interested parties in a reasonable and timely manner upon request.

4.2 Such written procedures should contain an identifiable, realistic and readily available appeals mechanism for the impartial handling of any substantive and procedural complaints.

4.3 Notification of standardization activity shall be made in suitable media as appropriate to afford interested persons or organizations an opportunity for meaningful contributions. ...

4.6 All standards should be reviewed on a periodic basis and revised in a timely manner. Proposals for the development of new or revised standards, when submitted according to appropriate procedures by any materially and directly interested person or organization, wherever located, should be given prompt consideration. ...

6.1 Participation in standardization processes at all levels shall be accessible to materially and directly interested persons and organizations within a coherent process as described in this clause (ISO/IEC 1994).

In brief, it can be said that, in the field of non-state standard setting, rules for rule-making have already developed, which in this domain fulfil precisely the functions that we assign to the rule of law as an ensemble of second order rules. *Standards for standardization* are nothing other than second order rules designed to control the process of standard setting, and which therefore, as we have seen, formulate certain procedural “law” and organizational requirements for this process. From the point of view of a science of regulation not focused exclusively on the state legal order but which embraces the full span of normative regulatory systems, it is easy to comprehend that it is essentially about the application of rule-of-law principles. This should be

no surprise when one considers that from an Anglo-American standpoint, the rule of law has never been an exclusively state-centric concept.

This third chapter comes to an end with a glance at the rule-of-law concept recently presented by Jeremy Waldron, who argues in very similar vein, adding a noteworthy normative point.

### III. Jeremy Waldron's Rule-of-Law Concept

The conception of the rule of law to be presented in conclusion argues – as we have just done – in a number of steps:

- The first is what we have called the *requirements of law production*. We agree with Waldron that law must be produced essentially in a “*constraining framework of public norms*”:

The rule of law is a multi-faced ideal, but most conceptions give central place to a requirement that people in positions of authority should *exercise their power within a constraining framework of public norms* rather than on the basis of their own preferences, their own ideology or their own individual sense of right and wrong.

Beyond this, many conceptions of the rule of law place great emphasis on legal certainty, predictability, and settlement ... (Waldron 2008, p. 5).

- The second step is concerned not with rule-bound law production but with what we call the requirements of normative quality, i. e., clarity, reliability, and consistency, which arise from the control function of law:

A conception of the Rule of Law like the one [outlined above] ... emphasizes the virtues that Lon Fuller talked about in his book *The Morality of Law*: the prominence of *general norms as a basis of governance, the clarity, publicity, stability, consistency, and prospectivity of those norms*, and congruence between law on the books and the way in which public order is actually administered. On Fuller's account the Rule of Law does not directly require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly *predictable* way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so. Requirements of this sort are described sometimes as procedural, but I think that is a misdescription. They are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based (Waldron 2008, p. 6).



- The third step is about the *application of norms*; Waldron’s position on this has been summed up by Richard B. Stewart under the heading “regularity of norm application” in his essay on global administrative law:

Norms must be applied in specific instances through procedures that ensure accurate and impartial administration, ensuring that officials respects [sic!] the limits on their authority that those norms establish, and protect the correlative rights and the security of persons subject to their exercise of authority. Regularity of application requires procedural and institutional arrangements to ensure impartial decisions in specific instances in accordance with relevant regulatory norms that are accurately and consistently applied. In the core situation, where officials enforce sanctions, impose liabilities, or make other decisions that impact the rights and obligations of specific persons in ways that have serious consequences, domestic administrative law typically requires adjudicatory hearings in which the affected person has a right to participate and present evidence and argument to an impartial decisionmakers to why norm does or does not apply in his case, a reasoned decision based on evidence of record, followed by opportunity for review of the decision by an independent authority (Stewart 2012, p. 10).

- But the aspect we find most interesting is what Stewart calls “*public regarding*” – “the norms regulating official conduct towards citizens must be public regarding, in substance and the procedures for their adoption and application must promote their public-regarding character” (Stewart 2012, p. 10). Jeremy Waldron writes:

[T]he norms must be not only general but public. They must be promulgated to the public – to those whose conduct will be assessed by them and to those whose interests their application is supposed to affect ... The publicity of these norms is also not just a matter of pragmatic administrative convenience along the lines of its being easier to govern people if they know what is expected of them. It embodies a fundamental point about the way in which the systems we all call legal systems operate. They operate by using, rather than short-circuiting, the responsible agency of ordinary human individuals. ...

We recognize as law not just any commands that happen to be issued by the powerful, but norms that purport to stand in the name of the whole society and to address matters of concern to the society as such (Waldron 2008, p. 25 ff.).

There is nothing to add.

## E. Concluding Remarks

A chapter on the plurality of norm producers might have offered a closer look at “law as a product.” As we have seen in discussing the law of the economy, there can be said to be a global market for law in which states compete. The Federal Republic of Germany is no exception: writing on the website of the Federal Ministry of Justice, former minister of justice Leuthusser-Schnarrenberger had the following to say about the “Law – Made in Germany” project:

“Made in Germany” is not just a quality seal reserved for German cars or machinery, it is equally applicable to German law. Our laws protect private property and civil liberties, they guarantee social harmony and economic success. For entrepreneurs, German law constitutes a genuine competitive advantage. It is predictable, affordable, and enforceable. Our law codes ensure legal certainty. Whoever loses his case in court will have to bear the costs of the litigation. Once a court has made its rulings, its judgments are enforced swiftly and effectively. It is primarily for the sake of legal certainty and swift enforcement that German law does not recognise some legal concepts, such as class actions or punitive damages, which are common in other legal systems. German law is steeped in the tradition of the system of codified law that has evolved throughout continental Europe and that has proven its worth even in difficult times. After the Second World War, it was German law that helped facilitate the “economic miracle” in West Germany. After the fall of the Berlin wall, German law assisted in the transformation of East Germany. Today, prosperity and democracy prevail throughout Germany. In large measure, we owe this success to our law. Anyone choosing continental European – German – law today, is making a wise choice, as “Law – made in Germany” helps guarantee success (Bundesministerium der Justiz 2011).

Leaving aside the advertising jargon, the kernel of truth in this statement is that there is something like a world market for law, because other states or corporations have a choice, albeit limited, between American and German insolvency law or American and British accounting standards (see Botzem und Hofman 2009 on competition between accounting standards). To this extent, we can speak of *competition between legal orders*, with the very real consequence that “law – made in Germany” and law made in the USA come up against one another in certain markets, with, so we hear, the Americans not hesitating to deploy even members of the Supreme Court as “legal advisers” (see Gemkow 2012 for a highly graphic description of American *legal imperialism*).

The focus of this chapter, however, has been different. Our concern has been to link examination of a plurality of norm producers with investigation

of the normative spaces in which such norm-producing institutions are to be found. The aim has been to contextualize what we call norm production: to place it in the context of a given normative arena or normative field.



## Chapter Four

### From the Plurality of Normative Orders to the Plurality of Norm Enforcement Regimes: Jurisdictional Communities and their Specific Jurisdictional Cultures

#### A. Normative Orders: “Ought-Orders” Intended for Realization: The Enforcement Dimension of Every Normative Order

##### I. Law Enforcement: A Necessary Element of Effective Legal Orders

Karin Nehlsen-von Stryk stresses that every legal order aspiring to effectiveness depends on orderly enforcement: “The effectiveness and societal relevance of a legal order are also essentially determined by the extent to which it *can guarantee its realization*. At the same time, fundamental decisions of a society on values are revealed by the extent of and limits to the coercion considered acceptable” (Nehlsen-von Stryk 1993, p. 550 f. Transl. R.B.). Christian Waldhoff has taken this quote as a leitmotif for his treatment of the state as a law enforcement authority, adding:

The law as an “ought” system aims not at abstract validity but at realization. In the democratic constitutional state, the two types of legal coercion, namely enforcement and sanctions, are the final stages in a uniform and comprehensive process of realizing the law. It begins with lawmaking, continues with application of the law as the concretization of general/abstract rules in relation to individual cases, and ends – if need be – with the more or less coercive enforcement of the law. This model can be graduated, extended, or adapted in many ways. In all variations, however, it remains essentially the same. Under this uniform model for realizing the law, coercive enforcement as the category subsuming enforcement and sanctioning is given substance and impetus, goals and programmes by the law to be enforced. ...

Not only the goal but also much of the legitimation for [the coercive realization of the law] derives from the law to be enforced – which for its part requires democratic legitimation – while procedural decoupling from the rights and rulings to be enforced keeps this realization at a rule-of-law distance from them. The law to be

enforced can be described as substantive law, the norms of the enforcement and sanctioning regime as law-enforcement law (Waldhoff 2008, p. 13 f. Transl. R.B.).

We turn to another author who gives a vivid account of the enforcement dimension of every normative order intent on realization. In his habilitation thesis on *The State Guarantee for Public Safety and Order*, Markus Möstl writes – with regard to state-made law – of the *rule-of-law mandate to enforce the legal order*.

The mandate to enforce the law is in many regards immanent in the principle of the rule of law. On the one hand, it follows from the fundamental rule-of-law mandate to preserve and safeguard the public peace and legal certainty: both historically and dogmatically, keeping the peace through a legal order is among the original and constitutive properties of the rule of law. However, the public peace and certainty as to the law (legal certainty in the broader sense of the term) presuppose that the legal order of the state, which is to provide this peace and certainty, not only exists but is effective, which in turn requires this legal order to be sufficiently efficient and actually enforced. The efficiency and enforcement of the law are therefore permanent requirements of a state governed by the rule of law. But even if – second – the focus is less on peace than on freedom as a conceptual cornerstone of the rule of law, the result is no different: if the essential property of the rule of law is to ensure lawful freedom and self-determination through the law, this presupposes that lawfulness and the law are actually realized and enforced, not only in relation to the state to ensure freedom from unlawful coercion but also in relation to third parties to ward off unlawful encroachment; for only the all-round enforcement of the law produces the state of lawful freedom that the rule of law seeks to guarantee. ...

Third, this idea is reinforced in the democratic constitutional state, because in such a state the enforcement of the law serves not only to produce lawful freedom but also to give effect to the law as the outcome of democratic will formation (Möstl 2002, p. 65 f. Transl. R.B.).

There seems to be full agreement that the law (as a prime example of a normative order) must if necessary be enforced *by coercion*. This insight brings the realization that the law, which seeks to prevent the use of coercion and violence to impose interests and purported claims cannot itself manage without coercion if it is to perform its central function with credibility. We can therefore speak of a law-enforcement paradox, a situation that Christian Waldhoff describes as follows:

The law works by enabling disputes to be resolved without the exercise of physical force, and thus keeps the peace. To this extent, the law is a tool for non-violent dispute settlement. In borderline cases, however, the law itself has to use coercion and physical force to perform its function: to domesticate power and violence, the law has to threaten the use of force, violence, and coercion (Waldhoff 2008, p. 17. Transl. R.B.).

## II. The Organizational-Institutional Dimensions of Norm Enforcement: Norm Enforcement Law and Norm Enforcement Regimes

Norm enforcement law has already been mentioned; it determines the circumstances under which and the means by which coercive measures may be taken to enforce the law. Waldhoff describes the administrative enforcement of the law as follows:

In relation to substantive law, the law pertaining to enforcement is instrumental. The distinction, effective impact and interaction between between these two levels are key problems in the administrative law dogmatics of the law pertaining to enforcement. In other words, this dogmatics is concerned, first, with enforcement norms and procedures themselves, and, second, with examining the relationship between the substantive and enforcement norms. What is at issue is ultimately the choice between different models of law enforcement, the relationship between enforcement and sanctioning, but also alternatives to the coercive realization of the law. This choice between “models” of coercive administrative realization of the law can be made at the law-making and application levels (Waldhoff 2013, p. 271, marginal note 2. Transl. R.B.).

Waldhoff thus points out that law enforcement is not only about normative statements – about what enforcement measures are permissible and required and when – but also about the *enforcement procedures* and the *organization of enforcement*: he writes of various law enforcement models, a useful concept that we shall, however, modify. The concept of law enforcement regimes brings together the substance, procedures, and organization of law enforcement with deliberate allusion to the concept of *governance regime* as a *task-related institutional arrangement* that has to consist not only of legal rules but also legally non-binding modes of control such as social pressure or governance by reputation (Schuppert 2010, p. 93 ff. On the concept of governance regime see Trute et al. 2008).

If we thus leave the somewhat too narrow world of state-made law and recall the plurality of normative orders treated in chapter two, we can expect to come across a *variety of law enforcement regimes*. And this proves to be the case. Werner Gephart and Raja Sakrani identify at least four norm enforcement regimes – from excommunication to social exclusion mechanisms (Gephart and Sakrani 2012, p. 108):

Figure: Validity and Binding Force of Normative Orders

<i>Validity Dimensions</i>	<i>Religion</i>	<i>Law</i>	<i>Custom</i>	<i>Fashion</i>
<i>Symbolic validity</i>	Symbolic representations of final reference	Difference between symbolic and factual validity	Distinctions between manners, conduct, and affectation	Paradox of the 'éternel dans le fugitif'; uniqueness and group membership
<i>Normative validity</i>	Degrees of binding effect, virtuoso and lay obligations	Arbitrary changeability, force du droit, 'consensual binding effect' as validity fiction	Facticity	The plural validity of dress codes
<i>Organizational validity sanctioning</i>	Excommunication, confession, and conscience control, threat of eternal damnation	Enforceability and enforcement staff, selection of validity claims	Social sanctioning	Market versus institutional control and social exclusion mechanisms
<i>Ritual consolidation</i>	Ritual hostility verses ritualism	Ritual legitimation versus procedural legitimation	Routine	Rituals of self-presentation and group membership
<i>Period of validity</i>	From the beginning in all eternity	Illusion of eternal validity; by nature; contingent validity	Factual duration	Illusion of eternal validity
<i>Grounds for validity</i>	"Because it stems from a higher being and exists from the outset"; sacred origin legitimation	"Because it was always so" or "because it can be changed again"; from sacred grounds to arbitrary regulation as a ground for validity	"Because it is so"	"Because it is so beautiful," "because others do it"; validity paradoxes

On the basis of this overview, we shall be looking at various manifestations of norm enforcement regimes; but first we turn to the fundamental question of what authorities or actors provide for the validity and enforcement of a normative order.



### III. The Diversity of Norm Enforcement Regimes as a Reflection of the Diversity of Normative Orders

As discussed in the introductory chapter, our concern in “The World of Rules” is to capture the diversity of normative orderings, of which the state legal order is only one, albeit particularly important element. If, as we have just seen, it is immanent in every normative order to develop a specific regime to ensure that it is respected and complied with, we posit that the diversity of normative orderings must be mirrored in a diversity of norm enforcement regimes.

If this is indeed the case, a key methodological consequence is that we need a wide-angle lens in this chapter, too. Not only the state sanctioning system needs to be considered, which, as Christian Waldhoff has shown, is legally so wonderfully elaborated – as doubtless appropriate for a community that sees itself as a state governed by the rule of law. We need also to ascertain the mechanisms that come into play in enforcing legally non-binding norms that nevertheless control behaviour – for instance, monitoring and evaluation systems up to and including intangible forms of “mere” social control, which – as the example of political correctness will show – can be particularly unforgiving in the intensity of their sanctions.

But this does not mean that we intend to go through the various types of norm ordering again from the point of view of what sort of norm enforcement regimes they have developed in order to propose more or less convincing couplings – for instance, on the pattern:

- state law – state judiciary
- customary law – customary courts
- canon law – ecclesiastical court and penance system

or the like; this in itself quite plausible procedure (on the comparison of various types of state and various types of regulation see Schuppert 2001) runs the risk of neatly dividing up the world of rules into such diverse couplings without placing them in their given specific societal and political contexts – for instance, the link between norm enforcement and functional differentiation or norm enforcement as a manifestation of institutionalized social disciplining. But these functional links are particularly interesting, and they explain the structure of this chapter, which addresses “norm enforcement in context” on the basis of examples.

## B. Safeguarding and Enforcing the Law as Functions of Government

Law affects the development of a community in many and varied ways. As Carl Schmitt noted (1923/2008), the law sides with revolutionaries who make throne and altar tremble in the name of inviolable human rights and with the defenders of an existing social order. For the latter, in particular, it performs what we shall call a *transformation function*. Law – as we have shown in detail elsewhere (Schuppert 2003b) *transforms power into government*. By grounding pure power in law as well as channelling it, the exercise of power becomes government and proving and safeguarding the law become key functions of government.

Benno Zabel describes this link between the legitimation of rule through law and the safeguarding of the law:

The paradigm of safeguarding the law points to ... the key link between providing certainty and legitimating rule. It played an outstanding role in the difficult birth of modern criminal law. The corresponding *leges* or sanction patterns along with the “staged” principle of public trial and proceedings establish institutions and rituals, that is to say stabilization factors, which alone can ensure durable, albeit proto-state guarantees and public peace. We can hence also speak of the basic structures of sovereign power or of an independent “mode of the legal” (Zabel 2012, p. 24. Transl. R.B.).

Historically, the task of safeguarding the law – especially by ensuring the public peace and legal certainty – has fallen primarily to the governance collectives state and church, each with a monopoly of power in its specific field:

The genesis of and changes in the form of safeguarding the law were ... closely associated with the development and transformation of governance monopolists, namely, empire and church. The governance monopolist par excellence was, at the latest since the Peace of Westphalia in 1648, the (secular) state as an ordering and sense-making functional entity. The evolutionary history of the state always has to do with a changing and to this day controversial history of sovereignty. It should be remembered that Bodin’s *Six Books of the Commonwealth* begins with the key thought “A commonwealth may be defined as the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power” ([http://www.constitution.org/bodin/bodin\\_1.htm](http://www.constitution.org/bodin/bodin_1.htm)). Worth noting in the postulate is that, at the rational level, sovereignty and government are primarily directed towards *greater rationality*, which, over and above particular, moral, and religious interests, can *guarantee peace and protection*. As things have developed, the scope of the Leviathan has changed and grown. Alternately or simultaneously,

the ordering power became a welfare state, a state governed by the rule of law, an ensuring or social state. ... [W]hat has remained constant, however, is the pretension, namely to concentrate rule, with or without a separation of powers, in an institutionally organized functional unit (Zabel 2012, p. 151. Transl. R.B.).

These considerations invite the conclusion that any observable change in statehood would have to be reflected in changes in how the law is safeguarded. Zabel therefore rightly speaks of a *structural change in the safeguarding of the law*, a change that cannot be overlooked, despite the fact that the state continues to be the dominant governing authority. His arguments are worth looking at, because they not only bring the governance perspective into play – *safeguarding the law as a governance problem* – but also point to the key importance of *self-disciplining on the part of governance collectives*:

... Governance models and strategies, thus cooperative forms of coordinating action, safeguards, and conflict resolution [play] an important role in both political and legal contexts. With regard to *structural change in safeguarding the law*, this aspect still needs to be looked at more closely. Governance strategies are primarily concerned to meet the need for less control and for informalization in modern regulatory and crime policy. In contrast to a hierarchical/vertical ordering regime, they stress the horizontal, that is to say, negotiatory nature of societal interaction and interest communication. Developed originally in the transnational and international field as global or good governance, governance has meanwhile become firmly established [on the relationship between transnational or international governance concepts with domestic governance concepts see Behrens 2004, p. 93 ff.; on informalization tendencies see Schuppert 2011b, p. 27 ff.]. The focus today is on maintaining, re-establishing, and coordinating the political and economic, institutional and legal balance by activating non-state or “semi-state” actors. For society as a whole, this then affects social subsistence, economic development, cultural, educational, and science management. The goal is the self-regulation of entire areas of society, either through cooperation among themselves or with state authorities. The latter not only eases the burden on the state – a direct goal – but also leads to various forms of endogenous and exogenous disciplining of the parties involved (Zabel 2012, p. 155 f. Transl. R.B.).

We now turn to variants of the link between the exercise of authority and the safeguarding and/or enforcement of the law.

# I. The Safeguarding of the Law and Judicial Office as Tasks of the Divine and/or Religious Exercise of Power

## 1. God as Judge

Wolfgang Schild, writing about “God as judge” notes from an art history perspective that the Christian faith has always conceived of God as a judge.

One of the key elements of the Christian creed is the notion of God as judge: “From thence He shall come to judge the living and the dead.” He is Christ, the incarnate Son of God, who “sitteth on the right hand of God the Father Almighty,” to whom, according to John (5.22) the Father “hath committed all judgement” ... “That all men should honour the Son, even as they honour the Father”; “And hath given him authority to execute judgement also, because he is the Son of man” (John 5.27). According to St. John the Evangelist, Jesus says “I can of mine own self do nothing; as I hear, I judge; and my judgement is just; because I seek not mine own will, but the will of the Father which hath sent me” John, 5.30). Judgement therefore lies also in the will of the Father. What is more, Christians have also regarded God the Father Himself as judge (Schild 1988, p. 44. Transl. R.B. Bible quotes from the King James translation).

Delving deeper into this fascinating material, we come across innumerable representations of God the Father and Christ as judge and depictions of the Last Judgement. At the Last Judgement, the focus on Christ the Judge in all these pictures also – as Schild posits – has to do with the *development of law*:

Theologians had always compared the Last Judgement with legal proceedings before an earthly court – one need only recall Tertullian († 160) and John Chrysostom († 407). But this forensic aspect had been relegated to the background by the idea of Christ the Ruler. But the parallels between the Last Judgement and the earthly court now became apparent and were expressed. In the commentary on the Saxon Municipal Law (*Weichbildrecht*) written between 1330 and 1386, the author notes: “Where the judge sits and judges, in the same place and at the same hour God sits in divine judgement over judge and lay judges, and every judge should therefore have the stern court of our Lord depicted in the courthouse” ...

As the tasks of presiding and passing judgement were gradually united, with the judge playing an ever more active role, the notion of Christ as Last Judge changed. He had to become what he had really always been: the active lord of the court, behind whom the apostles appointed as (co)judges according to Matthew 19.28 had to take second place.

The Last Judgement itself followed an elaborate judicial procedure like every earthly court:

Witnesses did not need to be heard, since the Book of Life was read and so forth. The act of judgement itself was differentiated: Mary, John the Baptist, the apostles and martyrs (Rev. 20.4), the saints (and holy rulers) were not judged. Similarly, no judgement needed to be passed on the Jews, the heathen (including the old gods of the Greeks and Romans), Saracens, Egyptians, or, for example, on Nero, for they were damned from the outset, like Lucifer and the fallen angels. Only sinful Christians had to face judgement, which is described as the weighing of their deeds. The subsequent sorting of the saved and the damned to the right and left of the throne are dramatically played out; above all the torments of hell are graphically displayed as deterrence and warning (Schild 1988, p. 70 ff. Transl. R.B.).

From Divine Judgement we now move “downstairs” to canon law.

## 2. *Utrumque ius in utroque foro*: Normative Pluralism as Reflected in the Specific Jurisdictional Culture

### a) *The Duality of Secular and Ecclesiastical Jurisdictional Cultures*

The duality of temporal/secular and spiritual/ecclesiastical legal order that prevailed throughout the Middle Ages is interesting in this context as a *duality of jurisdictional communities each with its own jurisdictional culture*. This duality manifests itself in two ways: in the dualism of punishment and penance and in a dualism of administration of justice and administration of penance.

- Paolo Prodi has this to say about the *dualism of punishment and penance*:

Many Roman-Germanic peoples introduced the norms of the Ten Commandments into their own secular criminal law. On the one hand, secular adjudication sought to guarantee the capacity of the individual to act in order to obtain satisfaction for violations suffered, and did so through legal means, from the feud and judicial vengeance to many forms of compensation and financial penalties such as the weregild. The aim was thus to re-establish a balance in the human relations at issue. There is no superordinate justice “out of the blue,” and the state limits itself in a certain manner to regulating the procedure for expiation and to “quantifying” compensation. On the other hand, the institution church sought in the same fashion to regulate relations on earth between people and God. In so doing, it did not exercise divine judgement but intervened in the visible part of sin to allow the human being to achieve true and sole judgement through a different, inner accounting in which sin is set off by acts of penance, prayer, fasting, alms, or other acts that the church regards as equal in value and imposes. This was the perspective adopted by one of the prominent church fathers of the Early Middle Ages in Europe, the Venerable Bede: penance does not expunge the offence, but while confession before the judge leads

to punishment, confession before God leads to forgiveness (Prodi 2003, p. 38. Transl. R.B.).

- This sanctional dualism finds institutional correspondence in a dualism in the administration of justice and the administration of penance. Prodi:

The fact that canon law holds its own as a legal order means that Roman thinking developed belatedly and from a defensive position, in close symbiosis with the imperial ideology of the separation from and autonomy of the secular power of the empire from the spiritual / ecclesiastical power of the papacy. This is the sense in which the famous commentaries of Accursius “*Sacerdotes*” and “*Cuique*” prefacing the digests are to be interpreted, in which the jurist is compared with the priest: Just as the priest administers things sacred (“*sacra*”) the jurist administers the laws, which are “*sacratissimae*.” Scholars have rightly paid attention to this solemn assertion. But what is particularly interesting is that, in the same passage, Accursius makes a much more valid comparison, between the administration of justice and the administration of penance as two different and parallel applications of the law, which Ulpian defines as “*suum cuique tribuere*.” There appears to be no competition between the two orders but rather a difference of level, a justice spanned between God and humanity. In the following considerations of the commentators, however, the problem seems to be a quite different one. Competition – with common reference to natural and divine law – exists between two concrete institutions, the papacy and the empire; both are equipped with the same power with regard to the forum and differ only in competence. Canon law is law, in both ecclesiastical and secular regard: it applies in the territories of the church; on the territory of the empire, secular law applies, but canon law increasingly has the upper hand when it comes to sin, and it is the church alone that passes judgement in this field (Prodi 2003, p. 90. Transl. R.B.).

b) *Norm Enforcement through a “Scaled” System of Penance:  
The Priest as Judge*

Finally, Paolo Prodi also provides us with the relevant information about the *judicial function of penance* and the role of the priest as judge:

In the treatise *De vera et falsa poenitentia*, written in the mid-11th century and attributed to Saint Augustine (which had great influence throughout the following century), confession heard by a priest itself, causing the penitent to blush at his own sins before the representative of God, is already the penance required. The priest is therefore the judge and must have the knowledge and ability to proceed against the person before his court; he must be capable of inquiring into and assessing the aggravating or mitigating circumstances of the sin committed, as well as uncovering sins the sinner has not admitted to himself. Absolution – the remission of sins –

precedes penance; it follows immediately after confession and is a final judgement. It is no longer determined by completion of a long process of penance; and the absolution formula itself develops out of the preceding and differing formulations asking for divine intervention in forgiveness, up to and included the juridical judgement: “*ego te absolvo ...*”. Penance in the traditional sense of atonement now seems a mere appendage; it remains a condition but not a necessary condition for a juridical act that is considered valid in itself before penance has been done. What was once the solemn procedure of penance and reserved solely for public, punishable sins now extended in simplified and milder form to the entire sphere of sin, i. e., even to venial and private sins (Prodi 2003, p. 57 f. Transl. R.B.).

Abandoning the religious, ecclesiastical domain, we now turn to that of secular law.

## II. Law Enforcement as a Task of the State: The Duty of the State to Maintain the Well-Functioning Administration of Criminal Justice

Markus Möstl (2002, p. 65 f.) had pointed out that law enforcement can be understood as a constant requirement of a state governed by the rule of law. Criminal law is doubtless the most powerful enforcement weapon, suggesting that *the rule of law also requires criminal law to be used as a tool for enforcement*. Writing about “the duty of the state to ensure the effective administration of criminal justice” Herbert Landau, judge at the Federal Constitutional Court underlines this conclusion (Landau 2007). Interestingly, he embeds this requirement in the *overall system of social control*, a context we shall be looking at later from the *social disciplining perspective*. Landau:

The efficient administration of criminal justice ... is a *conditio sine qua non* for every ordered state, just as the well-ordered administration of civil law is indispensable for the economic system. This is obvious and therefore needs no more explaining than does the need for every state to engage not only in will formation but also to exercise authority if it does not wish to see a state of nature reasserting itself. ... If this is the case, the *telos* [of the efficient administration of criminal justice] lies in simple social contexts: the necessity of exercising social control through state institutions to ensure comprehensive internal public peace. The administration of criminal justice is only one aspect of societal and social control. What is decisive is the overall system of social control that enables the public peace to be kept. But without criminal law no state can survive; protecting the coexistence of people in communities is a fundamental task, indeed one of the most essential objectives of the state. It is the precondition for all life befitting a human being in freedom and security. Criminal law is so important because its function is reflected more cogently and obviously in people’s awareness than that of all other fields of law, which often do not invite such insight. With respect to the aim of ensuring social acceptability and

the public peace, the criminal law is, in the eyes of the public, the very epitome of law (Landau 2007, p. 124f. Transl. R.B.).

The second main argument that Landau advances for the fundamental task of the state to ensure the effective administration of criminal law is the need to secure a minimum standard of social ethics within the state, particularly in the interest of those subject to the law, who trust in the enforcement of such a standard:

Since every state must ensure a minimum standard of social ethics, and under the prevailing circumstances this can be done only through criminal law, the administration of criminal justice must seek to ensure the acceptance of this standard. Criminal law safeguards the inviolability of this order, i. e., it aims to maintain an objective state of public peace and to safeguard the legal goods of the individual and the state. But its objective is also and in equal measure to provide for the subjective certainty of those subject to the law that members of the community will comply with this objective order. The ultimate goal of the administration of criminal law in every polity is thus to establish a socio-psychological state of certainty as to the inviolability of recognized ethical minimum standards. Experience has shown that this can be achieved only through the threat and exercise of state coercion, which therefore is also the focus of criminal law methods. It is generally recognized that only the state can proceed against violations of this order with the most effective means available to a polity, namely the public punishment of offenders. This centuries-old cultural conception is undisputed. Awareness that the guarantees of freedom associated under the rule of law with the attainment of this goal are specific, hierarchically derived ends and methodological instructions cast in procedural rules can develop only if these simple conditional relations are taken into account. Here, too, it can be said that we owe our freedom to the limits to freedom that result from the necessity of penalization by the state. If we accept these conditions, the topos of the effective administration of criminal law must be a prime duty of the state, regardless of its concrete structure; it can therefore not represent a countervailing interest in taking account of individual interests and basic rights or a partial aspect of the obligation to provide justice (Landau 2007, p. 126. Transl. R.B.).

We do not share this “fundamental-theological position” as such, but shall not comment on it at this stage; we let it stand as – probably – prevailing opinion. In the course of the chapter, we shall be going into greater detail on the mechanisms of social control as part of a differentiated, “broad” concept of law compatible with the rule of law.



### III. Judicial Authority as a Component of the Manorial System: Two Examples

Until the state monopoly of lawmaking and law enforcement became established, the exercise of judicial authority was viewed as a subfunction of the manorial system, as we shall show with two examples.

#### 1. The Example of the English Justice of the Peace

Particularly from the point of view of regulated self-regulation, the English justice of the peace is an interesting construction; “JPs” were culled from among the propertied classes and entrusted with judicial authority on an annual basis by the crown. Ronald G. Asch:

In England, the crown managed to win the nobility for the task of keeping the peace at the local level, even though the inclination to resolve conflicts by force, as in the so-called “poaching wars” was still rife in the sixteenth century. In the shires, the corresponding functions were in the hands of the gentry, in particular, who provided the membership of the so-called commission of peace. Ever since the fourteenth century, the king had commissioned a small number of local landowners in the shires with the task of punishing offences of all sorts by vesting judicial powers in them through an annually renewed commission. The members of this commission were entitled “justice of the peace.” In the sixteenth and seventeenth centuries, the number as well as the powers of these royal commissioners grew (in the late Middle Ages there had often been no more than 12 or 15 per shire, their numbers later increased to 40 or 50 and after 1600 to 100 or more). They were *de facto* responsible for enforcing all laws, issuing licenses to publicans, administering poor relief, ensuring that roads and bridges were in good repair, setting wages and sometimes food prices, settling disputes, and punishing all minor criminal offences. Since the Reformation they had also been responsible or partly responsible for prosecuting Roman Catholics. However, the crown could only appoint people to the office of justice of the peace if their wealth, pedigree – this factor still played a role in the sixteenth century – and general standing gave them enough authority in the county. Vice versa, misconduct as justice of the peace could lead to them being excluded from the commission. This was naturally a blot on the family escutcheon and a threat to their reputation, namely when their position within the gentry was in some doubt, owing, for instance, to humble origins (Asch 2008, p. 243 f. Transl. R.B.).

## 2. The Example of the Manorial System

### a) *The Manorial System as Type of Government*

The so-called manorial system or manorialism was an autonomous type of government in Europe from the 15th century on (Peters 1995); one could even speak of manorial societies (see Peters 1997). The study by Monika Wienfort on the nobility in the modern age provides first information in the following infobox (Wienfort 2006, p. 63):

#### The Germanic Paradigm *Grundherrschaft*/*Gutherrschaft*

The term *Grundherrschaft* to describe a type of manorial regime was first recorded in the fifteenth century, but the system had existed since the early Middle Ages. It combined landholding and lordship rights (vested in the nobility/gentry). *Rentengrundherrschaft* was a type of manor where the lord derived his incomes primarily from cash dues paid by peasants and the rural population.

The *Gutherrschaft* regime combined *Grundherrschaft* and adjudicative authority. The lord of the manor operated a large enterprise of his own. In early modern times, freedom of movement for the rural population was restricted in many places by hereditary servitude [*Erbuntertänigkeit*]. In everyday life, *Gutherrschaft* manifested itself above all in greater services and dues owing to only one lord.

Since jurisdiction relating to land rights can be understood only in the social context of the *Gutherrschaft* system, we shall cast a brief look at the manorial system as an ensemble characterized by communicative interaction (see Wunder 1997, p. 227), where judicial authority constitutes only one element of this ensemble.

Heide Wunder gives us a graphic description of the governmental system of a manor, taking the example of the Dohnas (1997). She reports on the how this noble Prussian family *understood government* and its Christian foundations:

... [T]he conception of government held by Peter's Calvinist grandsons, the brothers Friedrich, Abraham, Fabian, Achatius und Christoph is contained in the "Eternal Will and Testament" of 1621. They drew up a "constitution" that was to be followed by their children and descendants "in the future and for all time." With regard to relations with their subjects, it stated:

"It is our firm will that our future descendants treat their subjects and servants not tyrannically but in a Christianly and moderate manner, for they must bear in mind

that Christ our Lord and Saviour shed His holy blood for the least pauper and for the noble mighty of this world. Therefore they should follow our example and be satisfied with only moderate interest and benefit from their labour and the labour of their beasts in such fashion that the poor shall have bread and nourishment. For where his subjects perish so does the lord also. If they are not burdened with toilsome service or bled dry by severe chastisement they will flourish, so that the poor will pray for their masters and God will send his blessing from heaven on both for their wellbeing; for the tears of the poor provoke God's just punishment. So may our beloved descendants be mindful of this for the sake of their earthly and eternal welfare" (Wunder 1997, p. 229 f. Transl. R.B.).

This conception of government was very much that of sovereign rulers in that, for example, the Dohnas were intent on decreeing and enforcing the uniform regulation of village conditions throughout the area over which they held authority:

While their conception of government showed the mindset of a sovereign ruler, the Dohna's specific governmental arrangements, also introduced in 1624, reinforced this impression. With the "*Willkür*" [statute or constitution] for all the villages under his dominion, Count Dohna succeeded in a project that the ducal administration had sought to achieve in vain in the sixteenth century, namely the uniform regulation of village conditions by means of a "general," i. e., identically worded statute, which also covered fire prevention and the use of forests and wood, not to mention the celebration of betrothals, weddings, and baptisms. These "*Dorfwillkür*" thus aimed to guarantee "good public order." Such normative standardization of local conditions was certainly in the interests of rational estate administration; nevertheless most of the substantive provisions of communal statutes went back to the period of the Teutonic Order, so that the *Willkür* cannot be read only as a document of a lord. In key sections it established peasant participation in local government and is therefore constitutes a form of government in which peasants organized in the community took part. How this proceeded in detail can only be ascertained "ex negativo" from judicial conflict resolution. The series of *Willkür* accounts from the seventeenth and eighteenth centuries – which recorded the dates for reading out the *Willkür*, the activities of the bailiff and suitors, the income and expenditure of the community – provide evidence of specific communal practices and of the independent life of the community.

Further insight into the importance of community participation in "public order" in the manorial system is provided by the rules for the common court of the Dohnas in Deutschendorf. Although the version available to me dates only from 1710, the precise provisions pertaining to participation of village court officials are all the more important. In addition, the rules of the court give insight into questions important to subjects: bailiffs were not to interfere in judicial matters but limit themselves to maintaining "law and order," i. e., adjudication and administration were kept apart. In holdings outside the immediate demesne, however, there were subsidiary courts (*Beigerichte*) with jurisdiction over fellow tenants. Fines paid to the

manor are recorded, for example in the annual accounts for Reichertswalde and Lauck for 1710/11 under the heading “Fines imposed out of court” (*An Straffen. Außer Gericht erkant*) (Wunder 1997, p. 231 f. Transl. R.B.).

- In general, the *Gutsherrschaft* manorial system must be conceived of as an ensemble with various actors playing specific, more or less defined roles. Writing about big landowners in Hungary, András Vari uses the concept “*game of government*” (*Herrschaftsspiel*):

There were at least five players in the game of government: the lords of the manor, the officials, the tenants, the rich peasant members of the municipality or the mayor and peasants. Of these five participants, the mayor (*Gemeindevorsteher*) and the tenants (*Pächter*) need more explaining. The important role of the mayor arose from the far-reaching autonomy of the farming community during the reconstruction period in the first half of the eighteenth century. Municipalities regulated the ploughing of waste arable land and land use to a large extent jointly, and on this basis interpreted the competence of the freely elected village judge very broadly. Although the reaction of the manorial authorities meant that they had to accept curbs to the judicial competence of the village court, for instance that the village judge was to be appointed from among three candidates nominated by the lord of the manor, other more essential rights were not touched (e. g., the free election of village jurors, the right of appeal to the district (*Komitatsstuhl*) and to the royal governor’s office (*königliche Statthaltereie*). In many places, the municipality was strengthened by the acquisition of municipal property (Vari 1999, p. 265. Transl. R.B.).

#### b) *Jurisdictional Authority as a Right in Rem*

As defined by the General Law for the Prussian States (*Preußisches Allgemeines Landrecht – ALR*), so-called *patrimonial jurisdiction* (see Wienfort 2001) was, as juridical construction, a right in rem, tied to possession of certain property, with the consequence that judicial rights went with the property when transferred. Since possession of the given property was the decisive factor (possession was treated as synonymous with ownership), anyone could in principle assume judicial authority, “what counted was not the noble status of the candidate but only the circumstance of possession” (Wienfort 2001, p. 34); but this did not change the fact that in social reality judicial authority was reserved to the nobility:

It was therefore not contradictory that in around 1800 judicial authority was almost everywhere vested in nobles. In sum, it can be said that the legal perspective of rights in rem concealed the politico-social classification of patrimonial jurisdiction as a

socially exclusive privilege. A treatise published in 1790 on “the law of the propertied nobility in Germany” described patrimonial jurisdiction as a “right in rem of the nobility,” which, however was grounded in a universal “property law.” In the pursuit of various and sometimes opposing interests, judicial rights therefore developed into a question of possession (Wienfort 2001, p. 34. Transl. R.B.).

c) *Patrimonial Jurisdiction between State Sovereignty and Private Property*

The extent to which traditional patrimonial jurisdiction could be reformed or even abolished was not only a question of the political relation of forces but also a subject of vehement legal controversy (see Wienfort 2001, p. 134). Whereas the one camp stresses the administration of justice as a function of state law that is conferred but can also be withdrawn, the nobility and sections of the noble reform bureaucracy evoked the duly acquired right of property in land, which since the Middle Ages had included judicial rights; we shall take a brief look at two views on the subject.

The renowned criminal lawyer Paul Johann Anselm von Feuerbach was a strong opponent of patrimonial jurisdiction as a privilege of the nobility. Since the French Revolution, in his opinion, manorial jurisdiction should be burnt at the stake of history:

The same blow that in France destroyed the feudal aristocracy also struck down patrimonial jurisdiction. Confronted by the personal freedom and independence of the citizens in their mutual relations, by the idea of the universal equality of subjects before the law, patrimonial jurisdiction, like slavery, serfdom, and hereditary servitude had to vanish (quoted from Wienfort 2001, p. 135. Transl. R.B.).

The opposing view was put by Carl Ludwig von Haller in his programmatic-conservative and very influential “Restoration of Political Science” (*Restauration der Staatswissenschaft*); Monika Wienfort:

*In Haller’s 1817 work, the jurisdiction of the lords of the manor was described as “natural” and “not a delegated right.”* Hereditary and patrimonial jurisdiction, he lectured, could “well be restricted as to its scope but never fully abolished.” Haller thus cautiously sanctioned the state assuming criminal jurisdiction. The majority of those exercising patrimonial jurisdiction welcomed such a plan without reservation because of the high costs of criminal proceedings. The view of statist and some liberals that judicial rights had been delegated to the sovereign by “social contract” was explicitly rejected. Haller’s praise of patrimonial jurisdiction as “local, fast, cheap,” just and impartial stylized and emotionalized the relationship between the lord of the manor as judge and those under his jurisdiction as “family,” as paternalism par excellence. All authors intent on defending judicial rights in the period

leading up to the March Revolution of 1848 referred, sometimes with direct quotations, to Haller's "Macrobiotics of Patrimonial States" (Makrobiotik der Patrimonialstaaten) (Wienfort 2001, p. 137. Transl. R.B.).

### C. Safeguarding the Law as Civil Right and Civic Duty

In the preceding section, we were concerned exclusively with safeguarding the law and enforcing norms as functions of government. If, however, governance collectives are understood as regulatory collectivities and hence as *legal communities* – as they are throughout this book – an eye needs to be kept on the actors who exercise power and their "legal staff" (Max Weber) as well as *citizens*, not only as the addressees of norms but also as members of the given legal community, which both endows them with basic rights and imposes basic duties on them.

If – as we have just seen – every normative order has a norm enforcement dimension, for the state legal order, which springs primarily to mind, this would mean that *the enforcement of the law is also a task of the state*; logically, the modern state claims a monopoly not only on lawmaking but also on law enforcement. However, inspired by Anglo-American models and the European Union, there are an increasing number of interesting exceptions that invite more thorough consideration of the relationship between law enforcement by the state and enforcement under private law.

Comprehensive treatment of this interesting perspective is beyond our present scope. We limit ourselves to examining three brief examples of the role of the citizen as *autonomous actor in safeguarding the law*.

#### I. Mobilization of the Citizen for Environmental Protection in European Law

It has always been the right of all citizens to defend themselves when their rights are restricted or even unlawfully encroached upon. On the grounds that their subjective rights have been violated, citizens can take action before the courts – the "right of action" or "standing to sue" in juridical jargon – which is additionally protected by Article 19 (4) of the Basic Law. There are corresponding provisions in European law, which by waiving the criterion of individual involvement essentially go much further towards mobilizing the citizen to enforce the law (see Masing 1996); the citizen is quasi institu-

tionalized as advocate of the common good and the safeguarding of the law (see Schuppert 2004c).

Significant for the mobilization of the citizen under European law in support of environmental protection as a public good is the highly regarded Council Directive on Freedom of Access to Information on the Environment of 7 June 1990 (OJ No. L 158/56) – unusual for German law – which has meanwhile been transposed into national law by the Environmental Information Act. The duties to provide information under the directive ensure that the interested citizen receives comprehensive access to all relevant environmental data without this material having been pre-sorted or processed, for example in the course of public relations work by the authorities. The aim of such transparency is to provoke an “open discussion on the environment” and “strong public participation in the environmental policy decision-making process,” notably “improved cooperation with environmental organizations, non-governmental organizations, and other interested parties” (Economic and Social Committee 1989) Freedom of access to information on the environment is intended to “strengthen public participation in procedures for supervising environmental pollution and preventing environmental damage and ... thus contribute effectively to attaining the objectives of Community action in the field of environmental protection” (European Commission 1988). Johannes Masing has summarized the concept as follows:

The concept pursued is clear. The implementation and design of Community environmental law is not to be assigned to the arcana of national administrative authorities but made public through the *participation of vigilant citizens*. Responsibility is not to be vested only in the national executive machinery; the citizens themselves are to be mobilized as stewards of the environment. They, too, should take care of the environment. Public information on the environment thus brings citizens and administration closer together: both authorities and citizens keep watch. Not only the public sector but also private organisations consider and initiate measures (Masing 1996, p. 33. Transl. R.B.).

## II. Enforcement of Antitrust Law by Public Authorities or through Private Law?

Market economy activity is activity under competitive conditions. The Act on Restraints on Competition (GWB) and the existence of the Federal Cartel Office indicate that the state is responsible for guaranteeing well-functioning

competition. This is also quite particularly close to the heart of the European Institutions. The smooth running of the European single market requires undistorted competition among the participants in such an internal market. Considering, however, what tools are suitable for ensuring well-functioning competition, individual market participants should obviously be brought into play as guardians of competition and given the appropriate legal means to fulfil this task. This is the declared policy of the European Commission and points to a trend that Wernhard Möschel criticizes:

*The strengthening of private legal protection under antitrust law is in keeping with the international trend.* In 2005, the German legislator amended the Act on Restraints on Competition to comply with the 2004 reform requirements of EU competition law. A key aim of the legislation was to expand the possibilities for private legal protection. In December 2005, the EU Commission issued a Green Paper on damages actions for breach of the EC antitrust rules. The purpose was to make it easier for consumers and businesses to claim compensation from offenders for damages suffered. It was also sought to strengthen the application of competition law (Möschel 2007, p. 483. Transl. R.B.).

Individual competitors that consider they have been specifically disadvantaged or have suffered damages were thus to be enabled and encouraged to enforce the application of competition law; the necessary tools are the effectuation of damages claims, but above all the admission of so-called competition complaints, which allow market competitors to take legal action against state aid detrimental to competition (for example, unlawful state aid to finance regional airports, see Martin-Ehlers and Strohmayer 2008).

Not aspiring to the status of experts on competition law, we shall be content with these few remarks to point the way to a more general issue, namely whether law enforcement is necessarily a primarily state task or whether private law, “normally” serving private interests, is “called upon” to enable or facilitate enforcement of the law with an eye to the public interest. It is a both fundamental and interesting question.

### III. Norm Enforcement through Private Law?

How enforcement by the state and through private law relate to one another has been thoroughly and convincingly examined by Dörte Poelzig (2012), taking the example of antitrust law and capital market law. She sees norm enforcement through private law as in conformity with the system because business law in the form of the antitrust and capital market law on which



she focuses has the job of advancing private interests; ultimately it pursues public interest goals (in the importance of the public interest topos in economic law, see Eberhard Kempf et al. 2013), since it is concerned to order and maintain the institution of the market:

With the involvement of private parties in the effective enforcement of business law, private law assumes a function in the enforcement of objective law that serves the general economic interest. Private law is accordingly assigned a control function of its own in the interest of protecting the market. ... [T]he focus is not on the private utility of private-law powers but on the public good. The general interest that private-law sanctions pursue in enforcing the behavioural norms of economic law thus goes beyond the public interest, which generally consists in upholding the objective legal order by exercising subjective private rights. Concern about the instrumentalization of private law as a control tool in economic law is therefore due largely to the classical understanding of private law as a system of action by private-law subjects in their own interest. There are fears that the “collectivization of interest evaluation” in economic law could eliminate the advantages of the decentralized evaluation of interests in concrete relations between parties proper to private law. If a party can invoke the public interest and thereby strengthen its position, the balance between parties would be seriously perturbed. The common good could be advanced at best as a useful side effect of individual legal protection (Poelzig 2012, p. 29 f. Transl. R.B.).

Dörte Poelzig sees the division of labour between the two legal orders quite differently; she considers enforcement under public law and under private law to be *equivalent alternatives* for inducing market participants to comply with the rules of market conduct:

The enforcement of rules of market conduct is the common goal of public-law supervision and private-law demands. Public-law and private-law sanctions are therefore functional alternatives directed towards a common goal – enforcement of market conduct norms in the public interest to *protect the market as institution*. Public law and private law thus differ not in their regulatory purpose but in the tools they use to attain this purpose. The decision about public-law and/or private-law norm enforcement is more often a question of practicality than of principle. Whether a legal order opts for private-law or public-law forms of enforcement is therefore often also determined by history (Poelzig 2012, p. 566. R.B.).

The thought behind this argument is the conceptualization of the two legal sub-orders of civil law and public law as “*mutually supporting systems*” that we owe to Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (Schmidt-Aßmann and Hoffmann-Riem 1997). This theoretical approach allows the relationship between norm enforcement by the state and through private-law to be perceived as a division of labour. Poelzig:

As the law stands, private law is already a key regulatory instrument in markets – traditional with respect to fair trading, antitrust matters, and the capital market. It seeks to enforce rules of market conduct. Such rules serve primarily to protect the market as institution and the interest of all participants in its well-functioning. To this extent, private law as a regulatory tool is committed not primarily to protecting the individual but to protecting the market as institution. *In order to control the market, private persons are vested with a claim to its regulation.* The private-law enforcement of rules of market conduct thus places the law in the hands of market participants with an interest in the well-functioning of the market and thus in compliance with such rules. General and individual interests hence run in parallel or indeed converge. Societal countercontrols through organizations and market participants acting to protect the market are hence an expression of secondary societal responsibility – in other words supportive responsibility – for the common good. Together with public law, private law forms a regulatory system “in joint ownership,” which can achieve effective enforcement of the rules of market conduct only in conjunction, and thus efficiently defend the interests of the community as a whole (Poelzig 2012, p. 593. Transl. R.B.).

#### IV. Defence of the Law (*Rechtswahrung*) in Criminal Law – Self-Defence

One of the few cases in which the citizen is lawfully permitted to use force to uphold the law is self-defence, which in Germany is dealt with under Section 32 of the Criminal Code. It is a matter of controversy whether what is being defended in the exercise of self-defence is only the specific individual object of legal protection – such as property and the physical integrity of the victim in a robbery – or whether the person attacked is also defending the legal order as a whole and thus exercising an essential function of state authority. Johannes Kaspar sums up opinion on the subject:

Three opposing views have long been advanced in this field. A minority view, which has gained increasing support in recent times, is that the rationale of Section 32 of the Criminal Code is solely the *protection of the individual good*. The counterposition, represented particularly by Schmidhäuser, is that self-defence is grounded solely in the *supra-individual aspect of “defending the law.”* The act of self-defence directed against an unlawful assailant is to be seen solely from the perspective of “defending the legal order,” whereas the protection of the individual good that it also effectuates is to be regarded as a side effect of the act of defence and mere “reflex.”

Common to these two approaches is that they are monistic, that is to say, they set out from a single fundamental principle. The predominant dualistic view, by contrast, combines these two aspects: the justification of Section 32 of the Criminal Code is considered to be correctly understood only if it is based on both protection of the individual and defence of the law. ...

The main argument advanced by proponents of the dualistic approach against a purely individual understanding of self-defence is that the special “forcefulness” of the right of self-defence cannot be explained in these terms. The right of self-defence under Section 32 of the Criminal Code is very far-reaching; according to prevailing opinion it also covers the right to kill an assailant to defend material assets without weighing “proportionality” in the balance between the attacked and defended good. Furthermore, neither evasive action nor the securing of outside help is expected of the party attacked. All this, it is argued, cannot be explained only in terms of protection of the threatened good but is to be understood only against the backdrop of “defending the law” (Kaspar 2013, p. 41 f. Transl. R.B.).

The probably predominant dualistic approach with its stress on the supra-individual aspect of defending the law necessarily finds itself in difficulty when it comes to so-called petty offences, when things of minor value are involved. The critical question is then whether the party exercising self-defence can with good conscience invoke the often quoted statement of A.F. Berner: “it would be wrong if justice had to give way to injustice” (Berner 1848, p. 557. Transl. R.B.). Johannes Kaspar:

Here, too, [the proponents of the dualist approach] abide by the strict principle of permissible defence. Since in the case of petty offences ... we are dealing only with a “diminished” and not with fully eliminated interest in upholding the law, the right of self-defence is given; sparing the attacker is appropriate only with respect to due consideration for his life. Schmidhäuser goes even further as apologist for the purely supra-individual approach, according to which the adult fruit thief who ignores a warning to climb out of the apple tree may be shot. He argues that this is part of the indispensable “struggle for the law,” which depends on the “*defensive willingness of all members of the legal community*.” The fact that many members of the legal community fortunately see things differently will later be shown on the basis of empirical data (Kaspar 2013, p. 43. Transl. R.B.).

The empirical data Kaspar mentions are findings of the so-called Dresden Self-Defence Study by Knut Amelung and Ines Kilian, who looked at the public acceptance of such a far-reaching right of self-defence (Amelung und Kilian 2003; Amelung 2003). The outcome of the study is clear, showing “that the majority of population quite self-evidently assumes that the right of self-defence is limited by considerations of proportionality” (Kaspar 2013, p. 54. Transl. R.B.). Kaspar’s comments on this result is interesting, because it clearly shows that the discussion of the problem of justifying self-defence also has to be conducted as a debate on political culture; to be more precise, on the conflict culture of a society:

The findings of the Dresden self-defence study also offer a strong argument against a positive, general prevention *justification for the forceful right of self-defence*. The argu-

ment of “re-establishing the public peace” – substantively somewhat ambiguous and indeterminate – seeks to guarantee that the population perceives any punishment imposed as a just and reasonable reaction to the offence without this effect being seriously amenable to empirical measurement in any one case. The lawgiver is under obligation to give normative expression to what it regards as a just and reasonable reaction – but always with the goal in mind of taking due account of prevailing views in society. If there is any indication that the population would be content with a lower level of sanctioning or would regard a complete abandonment of sanctions as acceptable, this would have to be looked into in the interest of optimizing the protection of basic rights; otherwise there would be a risk of imposing punishment without any meaningful preventive effect.

Applying this to self-defence, it would mean that warding off an attack with particular force cannot be legitimated on the grounds of “defending the law” if the population does not expect such a reaction in certain constellations but, on the contrary, regards it as excessive and unlawful. The 1962 government bill also interestingly assumed that the right of self-defence was limited “in cases where its exercise would go against the legal convictions of the general public” – and precisely this appears to be the case for homicide to defend material assets. By contrast, the assertion in the same bill that self-defence is “a forceful defensive right rooted since time immemorial in the legal convictions of the people” is clearly obsolete in the eyes of this general public, as is the assertion based on an antiquated bourgeois concept of honour that the party attacked cannot on principle be expected to give way because this would constitute “shameful flight.” According to the study mentioned, this, too, finds no echo among the population. Overall, what we have here is one of the far from rare intersections between criminology and substantive criminal law – that have hitherto largely escaped overarching and systematic examination – where empirical findings are urgently needed in interpreting and applying substantive criminal law (Kaspar 2013, p. 55 f. Transl. R.B.).

The above quotes show that, by granted a broad right of self-defence, the state enforces the legal order against the attacker indirectly through the exercise of self-defence by the party attacked. Self-defence, for the person against whom it is exercised, thus has de facto the character of a sanction whose possible intensity is regulated by prevailing law. The citizen is therefore empowered not only to supervise but also to rigorously enforce the legal order, albeit in a strictly limited corridor that – as we have seen – is always the subject of political debate.

## D. The Plurality of Norm Enforcement Regimes as a Consequence of Functional Differentiation: The Example of the Professions

### I. The Concept of Functional Differentiation

The theory of functional differentiation is a key element of systems theory and associated above all with the name of Niklas Luhmann (1984; 1997; 2000). Whereas in pre-modern societies the main criteria of differentiation were status and rank, in the modern world-society *functional differentiation is the primary differentiation principle*; what is meant by this term is outlined by André Brodocz:

Functional differentiation means that the perspective of unity under which a difference between system and environment is established is the function that the out-differentiated system ... fulfils for the system as a whole ... That is to say that every functional system of society has to have “monopolized” performance of the given function because its “functional primacy,” i. e., the priority of its own function over all other functions, is the basis of its own subsystem formation ... One such functional system is the political system ... The exclusive function of a political system is to “provide the capacity for collectively binding decision-making” ... Other functional systems identified by Luhmann and others are the economy, science, law, and religion, as well as the mass media, education, medicine, art, social welfare, and sport. The functions that the various functional systems perform are thus wide-ranging. The function of the economic system, for example, is to regulate the distribution of scarce goods, which combines sustainable provision with current distribution; the science system finds its function in gaining new knowledge, and the legal system seeks to ensure the precautionary stabilization of expectations, which can be maintained even in the event of disappointment or conflict (Brodocz 2006, p. 509 f. Transl. R.B.).

These social subsystems operate self-referentially; this is the meaning behind the talk of autopoietic systems which operate with a function-specific binary code (true/false, credit/debit, right/wrong, and so forth). These concepts are familiar from every introduction to systems theory and do not require detailed discussion here.

The really interesting question, however, is whether these autopoietic subsystems can be conceived of as operating in actuality. In her essay on “Functional Subsystems in the Theory of Social Differentiation” (1988), Renate Mayntz provides a useful explanation. In the process of social differentiation, she identifies *three stages of differentiation (Ausdifferenzierung)*:

The concept of differentiation refers to a process of system formation in which a number of stages can be identified analytically without ascertaining whether exist-

ing functional subsystems have developed through such a process. The lowest stage is the single action, action situation, or interaction. The special meaning of action must naturally not be idiosyncratic but recognized socially for what it is – religious, economic, or military action, a relationship of intimacy or domination, a situation of healing or necromancy. In the next stage of differentiation there are special functional roles characterized by the continuous performance of an activity that is initially marked off only situationally: physician, researcher, actor, priest, etc. Finally, in the third stage, correspondingly specialized larger social structures develop, which are often but not necessarily formal organizations, and which are inter-linked throughout society to form a special universe of action (Mayntz 1988, p. 20. Transl. R.B.).

Really interesting, however, is the question whether the *“formation” developing in the process of social structural consolidation* can be characterized in terms of a specific mode of conduct. On this question, which administration science addresses under the heading of organizational behaviour (see Schuppert 1994), Renate Mayntz gives two important answers: in the first place the institutions shaping the given subsystem tend to claim a monopoly on their function:

Even after the stage of subsystem formation as defined has been attained, differentiation can vary in extent. Although the fact that a subsystem has primary responsibility for a certain type of action in society is part of the minimum definition of the concept, there are marked differences in the degree of monopolization of the action concerned (e. g., education, medical treatment, news dissemination) by a definable institutional complex. Important for perception of the distinct existence of a subsystem by members of society themselves and for this subsystem’s operation and political controllability is the extent to which those performing a certain category of functional role and/or the relevant formal organizations succeed in imposing the exclusivity of responsibility for a certain service or type of activity... (Mayntz 1988, p. 22. Transl. R.B.).

On the other hand, their behaviour reveals a leitmotif, which we shall be examining in greater detail, namely the claim to represent interests externally and to effective internal self-regulation:

What is important for the degree of a subsystem’s differentiation is whether and to what extent there are actors who can claim authority for internal self-regulation of the subsystem and to represent its interests externally. Although the existence of corporate actors is not fundamental to this capacity, it is so in practical terms. Corporate actors can also better secure access restrictions, claims to competence, and the “threshold of legitimate indifference”... than an amorphous crowd of functional role-players. ...

Societal subsystems that have attained the three stages of differentiation described are generally perceived by the members of society themselves as autonomous and

easily distinguishable systems... The delimitation of single functional subsystems in the perception of members of society is for its part an important precondition for enforcing claims to exclusive responsibility, in particular access conditions or the special attention of the political system. To this extent, interaction between symbolic-cognitive processes of definition and social structural differentiation is mutually reinforcing (Mayntz 1988, p. 22 f. Transl. R.B.).

Having gained a general idea of the theory of functional differentiation, we turn to the example of the professions to examine how the differentiation of subsystems also leads to the *differentiation of norm enforcement regimes*.

## II. The Role of Professions

### 1. The Sociology of Professions Perspective

Chapter 2 examined in detail the type of norm ordering specific to professions, so that a few remarks from the “sociology of professions” viewpoint (see Muzio and Kirkpatrick 2011), notably on links with the theory of functional differentiation, will suffice for our present purposes. This having been said, the following findings are impressively clear:

Professions (on the broader German concept “*Beruf*” see Gispén 1988) do exactly what Renate Mayntz would expect of them: they monopolize knowledge specific to a profession, they act externally as representatives of interests, and internally exercise sometimes very intensive social disciplining. A number of authors have addressed the subject.

- As an introduction, so to speak, Manfred Mai lists the most important ideal-typical characteristics of professions as social and political institutions:
  - A demanding, generally academic training;
  - Close relations with clients, generally marked by great personal trust;
  - Far-reaching autonomy in organizing professional matters such as quality control of the services offered, admission to the profession, training content, and remuneration;
  - A high *social reputation*;
  - Codified professional ethics addressing the common good;
  - Largely monopolistic control of a societal sector of key importance (2008, p. 15. Transl. R.B.).

As this list shows, professions fit almost exactly into the picture of social-structurally consolidated formations produced by processes of functional differentiation.

- The connection between profession formation and functional differentiation is discussed by profession sociologist Michaela Pfadenhauer. With reference to the outstanding position the professions play in the social theory of Talcott Parsons (see already the 1939 essay “The Professions and Social Structure”), she stresses the *conditional relationship between autonomy and self-regulation*:

The structural functionalist model for explaining the occupational division of labour is based on the premise that societies conceived of as systems are subject to the progressive outdifferentiation of the functions and services necessary for the existence of modern societies. They provide the appropriate professional positions and assign individual actors to them who perform specialized services in these positions under the guidance of role expectations. Performance is ensured through socialization and the concomitant internalization of the normative basis of a position and by (primarily positive) sanctions. ...

Optimal performance requires special institutional framework conditions, which, although they give professionals a higher degree of “freedom” in the exercise of their occupational activity, nevertheless demand a great deal of self-regulation and strong orientation on the public interest. Privileges and prestige are, so to speak, the rewards that professionals receive in return for self-restraint (Pfadenhauer 2003, p. 38 f. Transl. R.B.).

Michaela Pfadenhauer goes on to define professions “as self-regulating corporate formations *relatively autonomous and subject to internal collegial regulation in training for and exercising their activities*” (2003, p. 40). As such corporate actors, they are “political collective actors” (2003, p. 55) and pursue a professional policy shaped by their action logic. With respect to professional standards, this policy asserts an optimum of exclusive definitional and interpretative authority (see Mayntz et al. 1988, p. 27 f.), but this privilege of organized autonomy is granted only in return for “the credible promise of self-regulation” (van den Daele and Müller-Salomon 1990, p. 22. Transl. R.B.); Pfadenhauer has this to say about the *link between the claim to autonomy and the claim to regulate*:

The claim of professions to self-regulation generally concern admission to the profession in question, stocks of expertise, and to collegial self-regulation; and the manifest themselves in professional strategies, in professional policy. The claim to regulation is consequently internal, committing members of the profession to pro-



professional standards (scientific and ethical, and in the professional practice), compliance being enforced by formal and informal sanctions. In seeking to ward off “juridification,” the claim to regulated is, however directed outside the subsystem: the principal concern is to reject any form of external control by the state (Pfadenhauer 2003, p. 61. Transl. R.B.).

Thus although the wish is to keep the state outside as much as possible, the state as an authority for guaranteeing the finely balanced governance regime of autonomy and self-regulation is indispensable; in this sense, Pfadenhauer, with reference to Eliot Freidson (1983; 2001) comments on the subject of “regulated self-regulation”:

Freidson even regards “the state” as a condition for professionalism, since it alone can guarantee certain occupations their special status and do so over the long term. In this view, the state creates and secures the basis for professionalism – from the occupational division of labour to the education and training system, the distribution of responsibilities and licensing, up to and including the restriction of competition – without invalidating professional autonomy and self-regulation (Pfadenhauer 2003, p. 54. Transl. R.B.).

## 2. Forms of Internal Collegial Regulation

### a) *From Codes of Professional Conduct to Quality-Assuring Governance Regimes*

Chapter one discussed normative orderings at length, not least the development from canons of professional ethics to so-called *codes of conduct*. Without returning to this at length, one new aspect should be added, namely the growing conception of internal professional regulation as professional quality assurance management (on modern quality assurance law see Reimer 2010; also Schuppert 2011e). What is at issue – and this is, as it were, the price for the grant of autonomy and the durable trust of the clientele – is to *guarantee a certain level of quality for professional services*.

Franz Reimer illustrates this in the case of *accounting law*. “There is a *quality-assuring governance regime* characterized by an interesting mix of statutory and private regulatory components; Section 55 b of the Ordinance for the Public Accounting Profession (WiPro) is, so to speak, the basic norm: “The accountant shall set the rules that are required for the performance of his or her professional duties and shall supervise and enforce their application (quality assurance system). The quality assurance system shall be documented.”

It is interesting to see in which regulatory regimes the standards for this quality assurance system are to be found, namely not primarily in enacted law but, as Reimer shows, in private regulatory regimes of the profession or of private *standard setting committees*:

Reference is taken first to general professional duties such as independence, integrity, confidentiality, and responsibility (Section 43 (1) sent. 1 of the WiPrO), conduct befitting the profession (Section 43 (2)), continuing training (Section 43 (2) sent. 4), and special professional duties (Section 57 (4) 2 f., 5 in conjunction with the professional charter of the Chamber of Public Accountants). In Section 4 (1), the Professional Charter imposes “technical rules”; they supplement statutory rules and address above all the principles of orderly accounting within the meaning of Section 238 (1) sent. 1 of the Commercial Code (HGB), the statements of the Accounting Standards Committee of Germany (ASCG), and the accounting standards, instructions, and comments on accounting and the accounting advice of the Institute of Public Auditors in Germany (IDW) (Reimer 2010, p. 367. Transl. R.B.).

Remarkable about this example is that the point of reference for enforcing professional standards is no longer a professional concept of honour and a professional ethic but the *quality of professional services and its assurance*.

b) *Professional Disciplinary Jurisdiction between Professional Supervision and State Jurisdiction*

Since governance collectives tend to develop a jurisdiction of their own, many liberal professions – such as the law – have long had professional tribunals exercising disciplinary jurisdiction, significantly entitled *Ehrengerichte* in German (literally “courts of honour”): not only military honour, as we have seen in chapter two, but also *professional honour* plays an important role in guiding conduct and contribute to quality assurance.

It was therefore obvious to attach such tribunals to the relevant professional organization, since they ultimately ensure effective professional supervision. In his book on the autonomy of the professions, Thomas Emde remarks:

It has already been indicated that the importance and effectiveness of professional supervision depend essentially on the existence of disciplinary jurisdiction proper to the particular profession. ... organizationally, the systematics of the law pertaining to professional associations attach the tribunals to the relevant organizations; they exercise professional supervision like these bodies, apply the same norms, and are composed of members nominated by the associations. In view of the range and density of connections and interrelationships between professional associations and

tribunals, it is justified to speak of a complementary functional community. While it is the tribunals that render the supervisory activity of professional bodies really effective, the same tribunals would be at a loss without the standard-setting and standard supervision work undertaken by the professional associations (Emde 1991, p. 113 f. Transl. R.B.).

But since the professional tribunals undoubtedly exercise jurisdiction that the Basic Law (Article 92) reserves to the state, the only possibility to avoid unconstitutionality is to let them “sail under the flag” of state jurisdiction. With a markedly critical undertone, Emde notes:

In spite of everything, however, the Federal Constitutional Court treats professional tribunals as elements of the state judicial system. From both the personnel and material point of view, the necessary ties between professional tribunals and the state are given: the state has the right to choose tribunal members from among nominees; the German Judiciary Act applies with binding effect to honorary judges; and in the case of tribunals for the legal profession, qualification requirements for this profession apply. Although the judiciary has deliberately played down the very close functional, organizational, and personnel interdependence between legal, medical, and architectural tribunals and the relevant professional associations to such a degree that justificatory intent can be suspected, we shall leave it at that. Even if professional tribunals had not qualified as state courts within the meaning of Article 92 of the Basic Law, the consequence would not have been to integrate them into the administration of professional bodies but their unconstitutionality, because their material quality as adjudicative institutions is in no doubt. However one judges their status and constitutionality, professional tribunals are thus never an integral part of the administration of a professional association ... (Emde 1991, p. 114. Transl. R.B.).

We, too, do not need to go into the legal status of professional tribunals in any greater detail at this point. We are interested rather in their function, which Thomas Emde has convincingly described as a “complementary functional community between professional associations and professional tribunals.”

## E. Norm Enforcement as Institutionalized Social Disciplining

Consideration of the social disciplining concept can begin with a decision by the Federal Constitutional Court on whether social workers as an occupational group have a right of refusal to give evidence (Decision of the Second Senate of 19 July 1972, BVerfGE 33, 367 – Sozialarbeiter). The court began by stating that recognition of the privilege to refuse to answer questions in a criminal case requires special justification; in the case of public accountants and tax consultants this justification was given, since both professions are subject to professional disciplinary supervision.

In the light of the rule-of-law postulate of upholding the well-functioning administration of criminal justice, granting a privilege of refusal to give evidence on professional grounds requires special legitimation before the constitution. From this point of view, it is not self-evident that the legislator has granted the accounting and tax advisory professions the right of refusal to give evidence. However, it can be justified because their professional training, the professional rules to which they are subject (Ordinance for the Public Accounting Profession, 24 July 1961 [BGBl. I p. 1049] and Tax Advisory Act, 16 August 1961 [BGBl. I p. 1301]), supervision by professional associations, and disciplinary supervision by professional tribunals give a certain guarantee that they will make no inappropriate use of the privilege to refuse to give evidence granted them, that they will invoke it only when essential to meet the obligation of professional secrecy and no overriding public interests oppose this. Granting the right of refusal to give evidence in criminal cases to representatives of the accounting and tax advisory professions is therefore compatible with the principle of the rule of law.

Social workers, by contrast, lack *professional social disciplining*, so that there is no guarantee that they will exercise the right of refusal to testify with responsibility:

Furthermore, the legislator has for good reason granted the privilege to refuse testimony only to representatives of professions in which – owing to the nature of the matter or on grounds of rules of professional conduct considered binding and therefore obeyed – fixed standards approved by the community have been developed where professional secrecy applies and silence is hence called for. This is appropriate because exercise of the right to refuse to give evidence, which depends solely on the decision of the witness, would otherwise be subject to chance and arbitrariness. However, whereas the conditions for all the professions mentioned under Section 53 (1) 3 of the Code of Criminal Procedure are met, for social workers no such standards have been set. Although the concept of “social secrecy” has been current in the literature for some time, it has yet to be satisfactorily defined. What is to be understood by the term is spelled out neither in general professional regulations nor laid down with binding effect in a professional code of conduct recognized within the social work profession ... Unlike in the occupational groups listed in Section 53

(1) 3 of the Code of Criminal Procedure, with the sole exception – albeit for special reasons – of midwives, social workers also lack both public-law representative bodies and professional tribunals, able to raise confidentiality to the status of a professional requirement, to supervise compliance, and to sanction infringements through professional disciplinary law.

It is somewhat astonishing that professional disciplining is not only cited but also considered a precondition for recognizing the privilege of refusal to give evidence; at any rate, the passages quoted rouse our curiosity about what historians and social scientists actually understand by social disciplining.

## I. The Concept of Social Disciplining

Social disciplining, a concept which has doubtlessly passed its prime, is inseparably associated with the name of Gerhard Oestreich, who identified it as one of the *essential structural characteristics of absolutism* (Oestreich 1969). Anyone wishing to learn more about the concept cannot avoid the now classical 1987 essay by Winfried Schulze in which he explains the origin and application of the term and places it in the context of the development of the early modern state (Schulze 1987). We, too, refer to this almost canonical text; three aspects are particularly interesting for our purposes:

### 1. Disciplining as Disciplining within a Governance Collective

In the first part of this book we had spoken about governance collectives and their normative orders and established that *governance collectives* generally also operate as regulatory collectives. But governance collectives can be analysed not only as *regulatory collectives* but also as what we shall call *disciplinary collectives*, in which the internal ordering of a group or a collective is ensured by *discipline specific to the given collective*. Winfried Schulze:

Disciplining in this context does not mean primacy of the state, political, dynastic considerations over culture, the economy, religion, or science. It means forming, shaping, fitting into the smallest social circle or association; it means enabling interaction, simplification of particularities, enhancing the effect through discipline. Even guild orderings not only regulated the occupational organization but also the not yet distinct public and private lives of their members, the *vita civilis*. All members of a guild were subject to an overall professional order. But when their membership sphere broadened to encompass greater areas like the city and later the country (= the “state”), new ordering problems arose. To resolve these, urban public order regulations, dress codes, then corresponding national public order regulations

were introduced, initially in consultation with the groups involved but soon mutating into enacted law as mainly or exclusively bureaucratic orders. The rules on dress and morality of the guild statutes found their way into council and princely edicts (Schulze 1987, p. 275 Transl. R.B.).

## 2. Disciplining as Quality Assurance

Under the heading “*From Codes of Professional Conduct to Quality-Assuring Governance Regimes*” we have addressed a certain development in the role of professions. Schulze takes up this thought, commenting on *quality control through discipline*:

In the fifteenth and sixteenth centuries, the demand for quality work increased markedly. For this reason, supervisory institutions such as public authorities, guilds, and chambers of handicrafts had to monitor work more and more carefully. A tangible sign was the appearance of examinations as precondition for the guild to award the title of master craftsman. Disciplining thus also meant enhancing performance, expertise, quality. Control of the product and regulation of the working process gradually gave rise to a disciplining of work as such, together with the prisons, workhouses, poorhouses, and orphanages, which constituted barracks and disciplinary institutions in the economic field (Schulze 1987, p. 275 f. Transl. R.B.).

## 3. The Churches as Disciplinary Agencies

Among governance collectives whose cohesion was enhanced by discipline, the churches occupy a particularly prominent position. Winfried Schulze has this to say on the subject:

*In the major churches and in sects, the idea of reform was associated from the outset with notions of energetic discipline.* Luther demanded obedience from the lords and princes no less than from the peasants. He rejected self-help and regarded authority and obedience as prerequisites for the Christian life. As religious reformers, Zwingli and Calvin were also reformers of public order and discipline. In the city states of Zurich and Geneva, they established severe and drastic Christian discipline applicable to all, which they energetically intensified. The equality of Christians before God was practised as equality in Christian discipline. *Corresponding to this was the Catholic Church with its disciplined school and monastic systems.* The revival movements, August Hermann Francke’s school curricula, Zinzendorf’s statutes: all had to do with discipline. But the methodical disciplining of life demanded by Calvinism in particular is not to be equated with social disciplining. Social disciplining is a secular process, supported but not determined by religious disciplining. *The church as the agent of the hitherto most far-reaching discipline was the most important factor alongside the secular agents.* In the sixteenth century, the jurisdiction of bishops was transferred to consistories as an element of ecclesiastical power alongside church discipline. The means

available for sanctioning serious public nuisance in the congregation were exclusion from Holy Communion and public penance; these were disciplinary measures, spiritual measures not criminal penalties with legal consequences for the citizen. Church discipline intruding into public life was checked by the modern state (Schulze 1987, p. 279 f. Transl. R.B.).

## II. Social Disciplining at Work: The Example of Church Discipline

This is not the place for a systematic and comprehensive discussion of the phenomenon of church discipline; we limit ourselves to four aspects that are particularly interesting in connection with the *plurality of norm enforcement regimes*.

### 1. The Purity of the Congregation as the Goal of Reformational Church Discipline

According to Hans-Jürgen Goertz and John H. Leith (1990, p. 176): “The Reformation in a broader sense was itself a major effort to restore and maintain order and discipline in Christendom.” Order and discipline were particularly close to the hearts of the reformers Calvin and Zwingli. They sought to impose it in reformational Zurich and Geneva with uncompromising zeal:

A dense network of morality control descended over the territory of Zurich. Just how far it penetrated all areas of life is shown by the Great Morals Mandate (*Großes Sittenmandat*) of 1530/1532. ... The intention underlying the mandate is signalled by the fact that the severest sanction was reserved not for general vices but for offences committed against the church: they could be punished by excommunication. The offender was banished from Zurich. Whoever had committed only a moral offence was fined but not excluded. In a vast “popular educational experiment,” the purity of the congregation was to be secured to ward off the wrath of God from the new reformed polity. The price was high: Zwingli tended to promote rather than prevent the political tendency to discipline the citizenry. ...

Church discipline, although a central concern of the church, was in the hands of a consistory composed of elders, who were also members of the city council, and pastors. In Geneva, the city council had a decisive word to say in appointing the presbytery and preachers and thus fulfilled its duty to preserve the purity of the Christian polity. This is demonstrated by the *Ordonnances ecclésiastiques de Genève* of 1541 ... But the initial impetus for church discipline came from the church, which placed the municipal authorities in the service of spiritual government. Ultimately it amounted to the same: the polity was subjected to religious, moral,

and political / social control in terms of the Christian faith (Leith and Goertz 1990, p. 178. Transl. R.B.).

Under the heading “The Christianization of Social Behaviour as Permanent Reformation,” Heinrich Richard Schmidt also examines the *central role of the congregation*, which is not only the *object of church discipline* (intent on preserving its purity and cohesion) but also operates as *norm enforcement authority*, and, moreover, is *constituted in the first place as a corporation* by the bonds of church discipline. Far more important for the cohesion and purity of the congregation proved to be the so-called “*choir courts*” (“*Chorgerichte*”) whose job as morality courts was not only to ensure “order and discipline” but also *peace* in the congregation and *neighbourly cohesion*. Schmidt concludes:

Town and village demanded of their inhabitants the same peaceful and neighbourly behaviour. At this level of action, the choir court articulated and satisfied the existential needs of both the urban and rural congregation. Common to churches of the Geneva or Zurich type with regard to their social function was that church discipline served the practice of socially disciplined behaviour to maintain the integrity of the congregation as a community of the Lord’s Supper.

The moral courts therefore performed social “services” for the congregation by enforcing the social norms of conduct without which it could not survive. Attaining salvation and both individual and collective well-being was made dependent on socially disciplined behaviour. In a certain sense, the choir court as a “shaping apparatus” (*Prägeapparat*) as Norbert Elias would put it, performed the function of the conscience that reflects on, directs, and guides action. The choir court interpreted instrumentally rational action in value-rational terms by referring it to the unconditional will of God. Social action becomes worship. The church thus entered everyday life, the love of God practised in everyday action as social behaviour (Schmidt 1989, p. 161 f. Transl. R.B.).

## 2. The Jesuits as Disciplinary Teachers

Christian social disciplining takes many forms and uses just as many *disciplinary agents*. The Jesuits played a prominent role in this. In this context we leave aside their great success in missionary history (see Schuppert 2014 with further references) to examine their achievements as highly effective moral-educational authorities. Writing about church discipline in early modern Europe, Heinz Schilling notes:

In comparing Christian denominations it should be remembered that in the framework of Catholic confessionalization, public church discipline was not the only nor even most important or typical form of church control and discipline. The Triden-



tine Reformation, of which the Jesuits were the most determined and successful agents, created a whole spectrum of disciplinary, regulatory, and norm-setting measures that – differently but no less decisively than Calvinist public congregational discipline – influenced the development of modern rational modes of conduct and attitudes. The spectrum of these measures ranged from spiritual exercises, general educational activities in schools and universities, and morality plays, to the sermon, popular catechesis, and confession. The Jesuits have been described as “disciplinary teachers” whose “total regimentation (also in other Catholic schools) led to corresponding supervisory measures” Tridentine confraternities, notably the Jesuit sodalities also had a disciplinary impact, as did the modernized pilgrimage. The renewed pilgrimages of the sixteenth to eighteenth centuries under clerical supervision became an “organized and disciplined venture,” a controlled and standardized sacred exercise; an innovation which is also essentially to be attributed to the Jesuits (Schilling 1994, p. 36 f. Transl. R.B.).

### 3. Differences between Protestant Calvinist and Roman Catholic Church Discipline

In his comparative study of church discipline in early modern Europe, Heinz Schilling notes a number of important differences between Protestant Calvinist and Roman Catholic church discipline that concern the entire direction of disciplining as well as the agents involved:

... [T]he differences cannot be overlooked. There is much to suggest that they had a major impact on the history of both mentalities and of society in general. The first cardinal difference was in the standard deemed attainable through penance and self-discipline, revealing differences in the concept of man. Catholic confessors assumed that spiritual exercises, general confession, and the internalization of repentance could lastingly place a person on the path towards the good and even to veritable sanctity; Ignatius of Loyola and the modern practice of penance attributed essentially him offered a prime example. For Calvinist discipline and for Protestantism in general, by contrast, the irremediable sinfulness of man was constitutive and control and punishment unavoidable for every Christian. There was a Protestant theology of sin and penance. There was no theology of sanctity, which in the Catholic variant of early modern church discipline played an important role. The second cardinal difference between Calvinist and Catholic discipline was in the referential context for the cleansing from sin. Among Calvinists this was the congregation, specifically the congregation in Holy Communion. Penance accordingly had to be public, especially where the sin was public knowledge, but in the case of particularly grave offences even when the “sinner” and the presbyter alone knew about it. The sinful member of the congregation was to seek reconciliation “with the congregation” so that God’s wrath provoked by his offence did not fall upon the congregation sullied by the transgression of the individual. This emphasis on publicness was alien to Jesuit concepts of confession; just as the post-Tridentine confession radically cut the

link between parish and congregation in favour of a quasi private, non-public and subjective interaction between confessor and believer. The post-Tridentine confession was concerned primarily with the *disciplina interna* of the sinner ... (Schilling 1994, p. 38 f. Transl R.B.).

#### 4. Protestant Church Discipline between Church and State

Under the heading of law enforcement as a function of government, we had pointed out at the beginning of this chapter that state and church have a common regulatory interest in safeguarding the law and enforcing the law (constituting an “*ordnungspolitischer Interessenverbund*” see Zabel 2012, p. 38; Brecht and Schwarz 1980). Quite rightly, Martin Brecht therefore asks “Who actually disciplined whom?” He also supplies the answer: “State, church, and society *interrelate*” (Brecht 1994, p. 44). At this point we cannot resist recalling one of our favourite concepts, the “co-production of statehood” (Schuppert 2009); applying the concept to the present subject, we could speak of the “*co-production of order and discipline*.” Martin Brecht:

*The actual means available for church discipline were limited: sermon, personal discussion with admonition, interrogation, public penance, and exclusion. The extent to which this led to acknowledgement and repentance is only sporadically apparent from the records of interrogations. The state participated in church discipline with mandates, interrogations, money, and corporal punishment, as well as the pillory, prison, or banishment. These means of the state could generally serve to maintain the Christian moral order, but given their external coercive nature, they were largely unsuited for the spiritual welfare purposes of church discipline, and, as the often repeated mandates show, were frequently also ineffective. A state-dominated moral discipline should therefore perhaps be distinguished more sharply from real church discipline.*

It would doubtless be far from simple to discover *whether action was being taken against a person as a sinner causing a public nuisance or an offender against the public order*. At the same time, certain distinctions are possible with respect to the alleged offences and their treatment, even though there was a great deal of *overlap between church and state interests* (Brecht 1994, p. 45 f. Transl. R.B.).

We return to the role of the Swiss *choir courts*. Heinrich Richard Schmidt also looked at who the judges were, noting a remarkable continuity that suggested the relationship between state and church went beyond the co-production of order and discipline towards an *overlap of identity between the state and the church congregation*:

The century-long list of names suggests a move-up procedure that itself produced internal village elites from among whom the choir court president (*Ammann*) was successively appointed. The period of service was relatively long. Literally the “eld-

ers” headed the church congregation. The choir court became the “nursery” for the local political elite, but they remained committed to its prime and original function because they never left the court. As far as the dominant institutional position of state and church is concerned, it is almost justified to speak of church predominance: elders became *Ammänner*, not vice versa. In staffing, the church permeated the state. But these arguments should not be taken too far. A personal union in the sense described can at any rate not be captured solely in terms of an “established” or “state” church; it could also be expressed in terms of the identity of spiritual and political community. Significantly, the new matrimonial court statute of 1533 speaks of “our Christian community in town and country.” The concept “*Gemeinde*” [both “community” and “congregation”], to be understood in primarily Christian terms in this context, is applied to the totality of the nation. The state is conceived of as an overdimensioned church congregation (Schmidt 1989, p. 137. Transl. R.B.).

## F. Parallel Orders and Their “Parallel Justice”

The point of departure for our consideration of the plurality of norm enforcement regimes remains the empirical thesis that it is in the functional logic of a normative order designed to be realized to develop institutional arrangements and procedures to enable compliance with and enforcement of this normative order. We call such arrangements norm enforcement regimes: we posit that such regimes will also be found where so-called parallel societies have developed within a majority society. In this connection, the Hanover criminologist Christian Pfeiffer (quoted here from Wagner 2011, p. 11. Transl. R.B.) asserts that: “*it is typical of a parallel society to develop its own justice.*” The reference is to Islam, and the statement is backed by the Berlin juvenile court judge Kirsten Heisig (ibid.): “I feel uneasy when control over the law is relinquished and shifts onto the streets or into a parallel system where an imam or other representative of the Koran decides what is to happen.” Before going into detail on whether “parallel orders lead to parallel institutions for norm enforcement,” it is advisable to consider the appropriateness of the concept “parallel society,” because this semantics involves us inevitably in a largely emotional debate on integration.

## I. The Minefield of Parallel Society Semantics

To use the term parallel society necessarily provokes contention (on the usage of the term see Schiffauer 2008; see also Köster 2009). It is easy to accuse the user of avoiding the discriminatory ghettoization concept only to

embrace the no less discriminatory concept of parallel society formation with the intention – as the subtitle of Köster’s book puts it – of engaging in a *discourse* “to dramatize migration” (see, for example, Lanz 2007). This is not our aim, nor do we wish to take a stand without greater expert knowledge in the debate on integration rekindled by the former mayor of the Berlin’s Neukölln district Heinz Buschkowski in his book “*Neukölln is Everywhere*” (2012).

We therefore prefer to speak of *parallel orders* rather than parallel societies in addressing the broader topic of the plurality of normative orderings and to underline that our interest is more in the sociology of law field than in integration policy. The concept of parallel orders brings us to a study by Karsten Fischer (2011), who describes the Augustan *principat* as a parallel order, since, although Augustus formally maintained the republican system of government, he de facto established a personalized autocratic system of rule. He thus adopted the very strategy his later critic Machiavelli recommends in his *Discorsi*:

He who desires or wants to reform the State (Government) of a City, and wishes that it may be accepted and capable of maintaining itself to everyone’s satisfaction, it is necessary for him at least to retain the shadow of ancient forms, so that it does not appear to the people that the institutions have been changed, even though in fact the new institutions should be entirely different from the past ones (Machiavelli, *Discorsi*, Book One, Chapter XXV).

Fischer himself comments on this policy of deception with reference to Christian Meier (1980, p. 273) and Maria Dettenhofer (2000, p. 215):

In this manner the “appearance of republic” was lastingly preserved. Machiavelli preferred a frank statement to the effect that, on account of the decadence of its bearers, the people, the republic ought to be temporarily replaced by an autocracy – an ideological argument that Machiavelli adopted from Roman republicanism and could also be found in Sallust. Augustus had instead established “a new system for the exercise of political power that permanently undermined public institutions because it competed with them for competencies and to a certain extent operated in parallel to these institutions. Although the basis for this parallel order was the same as for the traditional republican order, given his supremacy ..., Augustus could use the socio-political basis of the Roman order for pretensions to power incompatible with the republican order in a manner that permanently overrode the factual importance of the institutions” (Fischer 2011, p. 49. Transl. R.B.).

We shall go beyond this suggestion of a semantic shift, taking a narrow concept of parallel orders as our basis, as defined by someone who really

considers talk about parallel societies to be nonsense: the migration scholar Klaus J. Bade. In a SPIEGEL ONLINE interview he had this to say:

SPIEGEL ONLINE: The concepts under debate are well-known: *multicultural society, parallel society, lead culture*.

Bade: Those are living corpses that are cropping up again. What's more, development is confused with concept: the outcome of development is that in Germany we now have a multicultural society whether we like it or not. Period. The question is how we deal with it. Critical minds have long since abandoned the romantic notion that multiculti is a kaleidoscopic slide into a cheery paradise. You should never heat up cold coffee. We should talk about the "parallel societies" nonsense – but only to show that "Little Istanbul" is no different from the "Little Germany" in the nineteenth century USA. And at the time the Americans got just as upset about it.

SPIEGEL ONLINE: Politicians, including the federal minister of the interior Otto Schily, have warned against street and place-name signs in foreign languages. Tolerance, says Schily, does not mean tolerating intolerance.

Bade: But social hotspots don't automatically develop where immigrants gather but where migration problems or ethnic problems come up against social problems. In Germany there are no parallel societies in the classical sense of the term. A number of points have to come together: *a monocultural identity; voluntary and conscious social withdrawal – in settlement and everyday life, too; far-reaching economic separation, a doubling of state institutions*. In Germany immigrant districts are mostly ethnically mixed, withdrawal is for social reasons, there is no doubling of institutions. Parallel societies exist in the minds of people who are afraid of them: I'm scared and believe the other guy is the cause. If this simplistic and dangerous talk about parallel societies continues, the situation will deteriorate. So this talk isn't part of the solution but part of the problem (Sternberg 2004. Transl. R.B.).

Following on from these comments, we will be quite specifically examining whether such institutional parallel structures of norm enforcement can be pinpointed – not in our minds but in the reality of society.

## II. Parallel Conflict Resolution Institutions and Norm Enforcement

### 1. The Example of Sharia Courts in the United Kingdom

Karsten Fischer drew our attention to the case of sharia courts in the United Kingdom. In 2008 there was much controversy about their establishment. One prominent contributor was the then Archbishop of Canterbury, Rowan Williams, who caused a stir with his assertion that such courts were possibly unavoidable.

Under the Arbitration Act 1996, several sharia courts had been set up, which at the time made legally binding decisions in civil matters and had heard more than 100 cases, for example divorce cases. Lawyers issued “grave warnings about the dangers of a dual legal system,” and politicians expressed concern about the undermining of the British legal system (Edwards 2008).

Three things make this British case particularly interesting.

- First, it offers a clear instance of *regulated self-regulation*. The *state framework* was provided by the *Arbitration Act 1996*, which regulated not only Islamic but also Jewish arbitration tribunals, the “beth din” (on their function and scope see The Centre for Social Cohesion 2009). The *Arbitration Act* begins as follows:

General principles

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly:
  - (a) the object of arbitration is to obtain the *fair resolution of disputes* by an impartial tribunal without unnecessary delay or expense;
  - (b) the parties should be *free to agree how their disputes are resolved*, subject only to such safeguards as are necessary in the public interest;
  - (c) in matters governed by this Part the court<sup>1</sup> should not intervene except as provided by this Part.

The result was interplay between state jurisdiction and the Muslim arbitration tribunal, which had its own rules of procedure. Abul Taher describes this institution:

Islamic law has been officially adopted in Britain, with sharia courts given powers to rule on Muslim civil cases. The government has quietly sanctioned the powers for sharia judges to rule on cases ranging from divorce and financial disputes to those involving domestic violence. Rulings issued by a network of five sharia courts are *enforceable with the full power of the judicial system*, through the county courts or High Court.

Previously, the rulings of sharia courts in Britain could not be enforced, and depended on voluntary compliance among Muslims. [...] Sheikh Faiz-ul-Aqtab Siddiqi, whose Muslim Arbitration Tribunal runs the courts, said he had taken advantage of a clause in the Arbitration Act 1996. Under the act, the sharia courts are classified as arbitration tribunals. The rulings of arbitration tribunals are *binding in law*, provided that both parties in the dispute agree to give it the power to rule on

1 Part IV, Section 105 (1) states: “In this Act the ‘court’ means the High Court or a country court.”

their case. Siddiqi said: “We realised that under the Arbitration Act we can make rulings which can be enforced by county and high courts. The act allows disputes to be resolved using alternatives like tribunals. This method is called *alternative dispute resolution*, which for Muslims is what the sharia courts are (Taher 2008, p. 2).

- Second, the ground gained by parallel institutions for conflict resolution thanks to the 1996 Arbitration Act is embedded in a legal and religious policy discussion in which not only the Lord Chief Justice but above all the Archbishop of Canterbury, Rowan Williams, participated. The archbishop’s lecture is a remarkable document. With reference to legal theory and legal philosophy, he made a stand against what he sees as the anachronistic *jurisdictional monopoly of the state* since it is incompatible with the *realities of a pluralistic society*. What is needed in a “plural society of overlapping identities” is, he asserts, *recognition of “supplementary jurisdictions.”* He argues that only such recognition can lead existing “communities within communities” out of otherwise inevitable ghettoization:

But if the *reality of society is plural* – as many political theorists have pointed out – this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalised or privatised to the extent that what is produced is a *ghettoised pattern* of social life, in which particular sorts of interest and of reasoning are tolerated as private matters *but never granted legitimacy in public* as part of a continuing debate about shared goods and priorities (Williams 2008).

He bases his demand for recognition of the separate jurisdictional competence of religious communities explicitly on the analogy of the self-regulatory autonomy of professions discussed above: Rowan Williams:

... I have been arguing that a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, as I mentioned at the beginning of this lecture, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the *liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups*: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to “activate” this whenever called upon. Earlier on, I proposed that the criterion for recognising and collaborating with communal religious discipline should be connected with whether a communal jurisdiction actively

interfered with liberties guaranteed by the wider society in such a way as definitively to block access to the exercise of those liberties; clearly the refusal of a religious believer to act upon the legal recognition of a right is not, given the plural character of society, a denial to anyone inside or outside the community of access to that right. The point has been granted in *respect of medical professionals* who may be asked to perform or co-operate in performing abortions – a perfectly reasonable example of the law doing what I earlier defined as its job, *securing space for those aspects of human motivation and behaviour that cannot be finally determined by any corporate or social system*. It is difficult to see quite why the principle cannot be extended in other areas. But it is undeniable that there is pressure from some quarters to insist that conscientious disagreement should always be overruled *by a monopolistic understanding of jurisdiction* (Williams 2008).

- Thirdly and finally, just why the United Kingdom but neither France nor Germany introduced such far-reaching recognition of parallel jurisdictions needs explaining. John R. Bowen (2010) finds such an explanation in Britain's colonial past. Most of the Muslims living in the United Kingdom, he argues, came from South Asia and had been accustomed since the times of the East India Company to the colonial masters practising a policy of legal pluralism, which notably respected indigenous and religious law pertaining to the family and personal status:

This set of ideas and institutions has carried over into the practices and approaches of South Asian Muslims who moved to England. These Muslims brought with them ideas and habits about personal status that had been *developed under British rule of the Indies*. They assumed that Muslims worked out matters of marriage and divorce among themselves, without the need for state intervention. Islamic scholars creating shariah councils in England drew from their own experiences in South Asia. In effect they *brought colonial ideas of personal status back home to their legal source*. ...

The ideas brought to England by South Asians, however, represented a *sharp challenge to English ideas of a uniform English law*. If Muslims handled marriage and divorce themselves, then the civil courts would, in effect, cede territory to them. Yet for some Muslims, doing so flowed from colonial practices. "Why don't they just let us take care of these matters," said one Pakistani scholar to me in London; "after all, that's what they did in colonial days." Understandably, English judges are reticent to take this step. ...

This *double set of post-colonial continuities* – in treatment of religions and of personal status laws – made England a particularly likely place for debates about the possibility of recognizing elements of Islamic family law in a Western legal system. These debates arose because of institutional initiatives taken by Muslim public actors starting in the 1980s (Bowen 2010, p. 417 f.).



## 2. The Second Example: Islamic Conciliation Procedures in Germany

The German example is concerned not with the operation of sharia tribunals accepted by the state but with the resolution of conflicts between Muslims by a circle of persons – whether lawyers, imams, or heads of households – who could be described as *arbitrators* (*Streitschlichter*) or *justices of the peace* (*Friedensrichter*). In *Judges without Law* (*Richter ohne Gesetz*, 2011), Joachim Wagner addresses their activity. The subtitle: “Islamic parallel justice endangers the rule of law” indicates what worries the author. We turn our attention not to whether this thesis – backed by many of the facts presented by Wagner – can really be sustained but to how the trend observed by Wagner and others towards *internal Islamic conflict resolution bypassing state justice* is to be explained. The reasons Wagner advances are worth thinking about.

- A first important aspect is the high value placed on compensation – above all in financial form – in Islamic law and culture. Such compensation is not negotiated between offender and victim – between individuals – but (the second important aspect) *between the families involved*. Wagner:

Compensation is a central concept in Islamic criminal law. For Mathias Rohe, expert in Islamic law, it is an expression of “a social order that is based on economic activity in extended family groups ... without social security ...”

It is astonishing that honour killing and the blood feud have survived in the Muslim parallel society here, even though the preconditions have long ceased to apply. In countries with no state order, *the extended family had to assume the protective function of police and justice*. And the blood feud played a disciplinary role (Wagner 2011, pp. 18, 23 f. Transl. R.B.).

- *The key actors in conflict resolution bypassing the state are the families*. We therefore have to do with what we could call the deindividualization of conflicts. Wagner therefore also writes of offender families and victim families:

*When a criminal offence has been committed, the families concerned decide* from case to case whether they can negotiate directly with one another or have to call on an arbitrator. The initiative is usually taken by the offender family, because it is in their interest to ensure that the son, brother, or cousin escapes punishment. In the event of direct contact, the father or oldest brother turns to his counterpart in the victim family. Generally this does not work if a suspect is in remand custody or the victim is in hospital with severe injuries. Feelings between the families then run so high that the offender family engages a *neutral arbitrator*. The aim of talks is almost always the

same: the victim should under no circumstances inform the police, bring no charge, and if this has already been done, withdraw it. If the police has already been involved, for instance by a charge being brought, the aim is to persuade the victim not to testify (Wagner 2011, p. 30 f. Transl. R.B.).

- This having been said, it is not surprising that the concept of honour that repeatedly comes up in the discussion on the existence and assessment of so-called parallel societies has family connotations: honour is a family matter. Writing about the blood feud, Wagner comments:

In the oriental cultural area there are two aspects to honour: first, public respect for a person who complies with traditional rules and ensures that the members of his family do likewise, and, second, general esteem earned by achievement and merit.

In Muslim countries, “honour tops the list of virtues, ahead of life, bodily integrity, freedom, and wealth.” *The concept of honour has survived to this day as a living guide to conduct in the diaspora.* It is a key to understanding the Muslim parallel society in Germany (Wagner 2011, p. 23. Transl. R.B.).

- These passages invite two conclusions. First, *extended families* must really be counted among the *governance collectives* dealt with in detail in the first part. If this is indeed the case and the concept of honour plays a central role in the governance collective of the extended family,<sup>2</sup> it is clear that – because of the role family members play in compliance with norms – *the family also has to be considered as a norm-enforcement institution.* The wide-angle lens of our broad investigation requires it.

## G. Norm Enforcement through Institutionalized Compliance

### I. Compliance as a Form of Reflexive Regulation

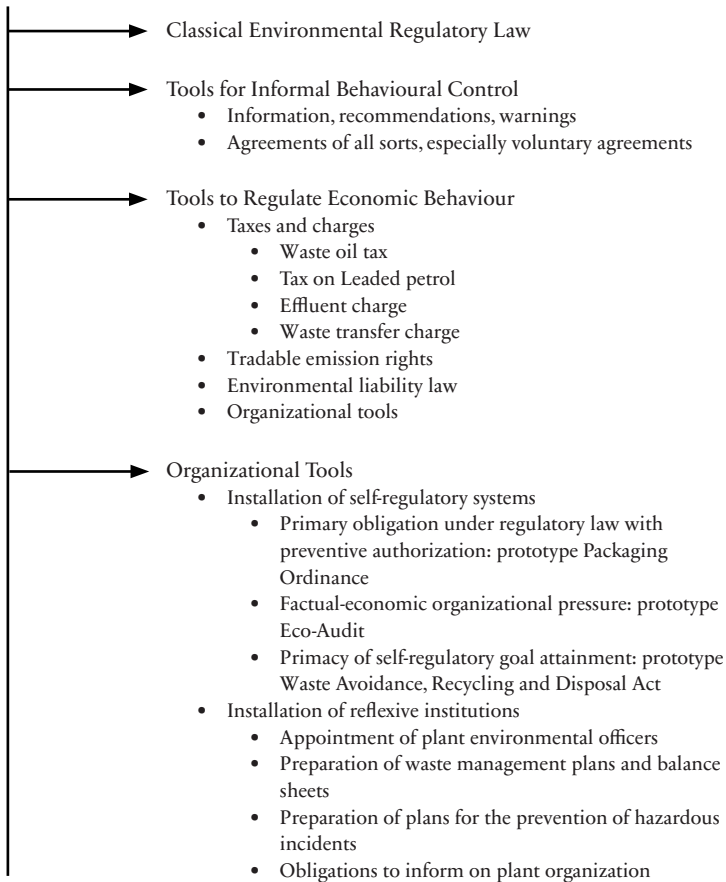
Environmental protection policy has long offered a laboratory for new regulatory tools and has attracted the particular interest of an administrative jurisprudence concerned with regulation theory (see, for example, Schmidt-Aßmann and Hoffmann-Riem 2004). Administrative science and practice has shown great interest especially in the toolbox of environmental law – in section D.I above we had looked at the role of environmental regulation

2 On the role of the so-called officers' corps honour see chapter 2 p. 115 ff.

in European law in mobilizing citizens to enforce this law). Gertrude Lübbecke-Wolff (2001) offers a useful overview, which we have often presented in modified form (see Schuppert 2003b, p. 32):

### Choice of Tools in Environmental Protection

Choice



Within this set of tools, we have always found the *reflexive institution* interesting, which effects what Matthias Schmidt-Preuß calls *reflexive regulation*: the state, he explains, “exposes private economic subjects to internal *informational, learning, and self-regulatory processes* to induce them to contribute to the public good on, as it were, their own judgement.” This is brought about by *self-knowledge, not external regulation* (Schmidt-Preuß 1997, p. 192. Transl. R.B.). Promoting the public good through reflexive regulation is therefore concerned not externally to impose behaviour conducive to the public good on the private economy or sanction misconduct but to implant behavioural incentives in the organization itself and thus, so to speak, drive a tunnel under the boundary between external and internal regulation.

On the entrepreneurial side, the corresponding concept is compliance. Taking the tunnel under the boundary, we can now examine the concept and functions of compliance from the perspective of private enterprise.

## II. Concept and Functions of Compliance

### 1. The Concept of Compliance

It is relatively clear what compliance means:

... [C]ompliance is a self-evidence – the obligation to obey the rules. This universal obligation naturally also applies for all organizations in which labour is divided, especially legal entities. Compliance merely expresses the responsibility of an organization to ensure that it (the enterprise or legal person) does not violate the law. This may be considered a somewhat euphemistic way to define the legality obligation, as an element of the risk management obligation under Section 91 of the Companies Act or even the external relations requirements under this organizational obligation (Section 130 of Act on Regulatory Offences). The substance remains the same: *namely to structure an organization based on the division of labour in such a way that no violation of the law occurs*. There is accordingly agreement that the board of the company has to organize and manage the enterprise in accordance with the law (Spindler 2013, p. 293 f. Transl. R.B.).

Whoever finds this too long-winded might prefer the following definition, which addresses *criminal compliance* (CC), compliance with the rules of criminal justice:

If at first sight, one understands compliance to mean “complying with” (not only legal) norms, CC can be understood as the quintessence of the rules, procedures, and techniques by means of which business enterprises, in particular, seek to ensure

that their employees respect the norms of criminal law and that any violations are brought to light and punished (Saliger 2013, p. 263 f. Transl. R.B.).

## 2. Functions of Compliance

In his study on “Fundamental Questions of Criminal Compliance,” Frank Saliger provided an excellent overview of the function of compliance. He identifies a *main function* and a number of *subfunctions*.

- The main function is the avoidance of all legal liability risks:

There appears to be agreement about the fundamental or main function of CC, namely the avoidance of “criminal liability.” This basic function is in keeping with the core definition of CC. However, there is little mention of criminal liability tends in criminal law. This is to be explained genetically by the fact that the compliance idea in Germany originated in economic law, where it has to do with the more far-reaching function of *avoiding all legal liability risks*, and systematically by the nature of CC as a sub-instance of the general compliance concept. Leaving aside “criminal liability,” the fundamental function of CC can be described as the avoidance of punishable violations of norms (Saliger 2013, p. 266. Transl. R.B.).

- The following three subfunctions can be identified:
  - Prevention
  - Investigation
  - Supervision

Saliger has this to say about prevention:

Prevention is ... the most far-reaching function of CC. It implements the basic function of CC by setting preventive rules designed to anticipate criminal liability. Unlike criminal law, CC is basically prospective rather than retrospective. This anticipatory aspect means that the primary purpose of CC is to indicate the safe harbour in which the addressee of norms can be sure to avoid liability to prosecution. This in turn is possible only if the preventive function of CC takes effect far ahead of any commission of criminal offences. To this extent, CC cannot afford “to enable the enterprise to engage in risky criminal balancing acts.” Its aim is rather, in not unproblematic fashion, to forestall criminal offences by the anticipatory prohibition and structuring of conduct (Saliger 2013, p. 267. Transl. R.B.).

- An effective compliance system must investigate and sanction norm violations; Saliger:

... [S]etting and implementing preventive CC rules in an enterprise will not produce effective compliance if indications that rules are being violated are neither investigated nor sanctioned internally. CC rules, too, need to be enforced within the

enterprise. The investigation and sanctioning of criminal rule violation serves to avoid mere “fair-weather,” merely preventive compliance. Investigation is ensured primarily by formal CC rules covering internal inquiries. Internal sanctioning can be effected by rules under labour and disciplinary law (e.g., warnings, transfers, dismissals (Saliger 2013, p. 267 f. Transl. R.B.).

- Finally, Saliger explains the *supervisory function* of compliance:

There is also consensus on a further function of compliance and CC. It is agreed that effective performance of the investigative and sanctioning function of CC is possible only if management also has to supervise employees. This supervisory function of CC also arises indirectly from Section 130 (1) of the Act on Regulatory Offences. The Act punishes violations of the supervisory duties of business proprietors; among the required supervisory measures are the appointment, careful selection, and supervision of supervisory staff. Although Section 130 of the Act on Regulatory Offences has nothing concrete to say about the type and extent of supervision and there is thus uncertainty with regard to application of the law, appropriate compliance audit programmes or whistle blowing systems are likely to be considered suitable measures for implementing the supervisory function (Saliger 2013, p. 268. Transl. R.B.).

Having gained an idea of what compliance involves (see Roland Broemel 2013 for more on the internal order of knowledge in enterprises as a norm compliance factor), we now consider compliance as a state law enforcement tool – particularly important from the perspective of this chapter.

### 3. Compliance as a Tool in Self-regulation and the Privatization of Law Enforcement

This is the most important and interesting function of compliance: a specific regulatory technique of the state, which we have referred to above as *reflexive regulation*, which makes the enterprise itself an agent for avoiding the criminal violation of norms. Frank Saliger:

For law enforcement by the state, compliance is particularly important as a tool of self-regulation and the privatization of law enforcement. Certain forms of crime in and from companies, businesses, and other subsystems of society have always been difficult for state criminal justice systems to access. This structural problem of state law enforcement has been further exacerbated in the present day by the inadequate material and human resources available to the criminal justice system. To the extent that this calls into question classical external regulation through criminal law control by which individuals are identified and sanctioned by the state, the self-regulation of crime prevention through internal CC programmes, internal inquiries, and disciplinary sanctions will grow in importance. This explains the inflation of sectoral legal norms with a compliance function.

For the state, this promotion of the (partial) privatization of criminal prosecution has two advantages. First, the state reduces the cost of law enforcement by committing enterprises to enforce the law through, for example, supervisory systems or internal inquiries, and thus assume the cost. Second, it is often the (interim) findings of such internal investigations that enable state law enforcement in the first place or at least facilitate it (Saliger 2013, p. 277 f. Transl. R.B.).

## H. Sanction Modes and Criteria not Disciplined by Law: Forms and Actors

### I. Imposing Norm-Conforming Behaviour through Thematic and Linguistic Taboos: *Political Correctness*

#### 1. An Introductory Tale

Our story recounts in a nutshell what we need to know about how *political correctness* works. It is taken from the novel *The Human Stain* by Philip Roth (2000), whose protagonist, the professor of classics Coleman Silk, uses an allegedly racist expression when calling the roll in his class:

The class consisted of fourteen students. Coleman had taken attendance at the beginning of the first several lectures so as to learn their names. As there were still two names that failed to elicit a response by the fifth week into the semester, Coleman, in the sixth week, opened the session by asking “Does anyone know these people? Do they exist or *are they spooks?*”

Later that day he was astonished to be called in by his successor, the new dean of faculty, to address the *charge of racism* brought against him by the two missing students, who turned out to be black, and who, though absent, had quickly learned of the locution in which he’d publicly raised the question of their absence. Coleman told the dean, “I was referring to their possible ectoplasmic character. Isn’t that obvious? These two students had not attended a single class. That’s all I knew about them. I was using the word in its customary and primary meaning: ‘spook’ as a specter or a ghost. I had no idea what color these two students might be. I had known perhaps fifty years ago but had wholly forgotten that “spooks” is an invidious term sometimes applied to blacks. Otherwise, since I am totally meticulous regarding student sensibilities, I would never have used that word. Consider the context: Do they exist *or* are they spooks? The charge of racism is spurious. It is preposterous. My colleagues know it is preposterous and my students know it is preposterous. The issue, the only issue, is the nonattendance of these two students and their flagrant and inexcusable neglect of work. What’s galling is that the charge is not just false – it is spectacularly false.” Having said altogether enough in his defense, considering the matter closed, he left for home (Roth 2000, p. 6 f.).

But the matter was by no means closed. After being hauled before the college authorities, Silk resigns from his position. In the following passage he thinks over what has happened to him and identifies the driving force behind events as the *typically American, tyrannical and unrelenting propriety*:

Appropriate. The current code word for reining in most any deviation from the wholesome guidelines and thereby making everybody “comfortable.” Doing not what he was being judged to be doing but doing instead, he thought, what was deemed suitable by God only knows which of our moral philosophers. ... If he were around this place as a professor, he could teach “Appropriate Behaviour in Classical Greek Drama,” a course that would be over before it began.

... The college’s architectural marker, the six-sided clock tower of North Hall ... was tolling noon as he sat on a bench shadowed by the quadrangle’s most famously age-gnarled oak, sat and calmly tried to consider the coercions of propriety. The *tyranny of propriety*. It was hard, halfway through 1998, for even him to believe in American propriety’s enduring power, and he was the one who considered himself tyrannized: the bridle it still is on public rhetoric, the inspiration it provides for personal posturing, the persistence just about everywhere of this de-virilizing pulpit virtue-mongering that H. L. Mencken identified with boobism, that Philip Wylie thought of as Momism, that the Europeans unhistorically call American puritanism, that the likes of a Ronald Reagan call America’s core virtues, and that maintains widespread jurisdiction by masquerading itself as something else – as *everything* else. As a force, *propriety is protean*, a dominatrix in a thousand disguises, infiltrating, if need be, as civic responsibility, WASP dignity, women’s rights, black pride, ethnic allegiance, or emotion-laden Jewish ethical sensitivity (Roth 2000, p. 152 f.).

What particularly disturbs him is the gross disproportion between the real problems of the century and the luxury of being upset about supposed violations of political correctness:

A century of destruction unlike any other in its extremity befalls and blights the human race – scores of millions of ordinary people condemned to suffer deprivation upon deprivation, atrocity upon atrocity, evil upon evil, half the world or more subjected to pathological sadism as social policy, whole societies organized and fettered by the fear of violent persecution, the degradation of individual life engineered on a scale unknown throughout history, nations broken and enslaved by ideological criminals who rob them of everything, entire populations so demoralized as to be unable to get out of bed in the morning with the minutest desire to face the day ... all the terrible touchstones presented by this century, and here they are up in arms about Faunia Farley [Silk’s lover]. Here in America either it’s Faunia Farley or it’s Monica Lewinsky! The luxury of these lives disquieted so by the inappropriate comportment of Clinton and Silk! ... I’m deprived not simply for having once said the word “spooks” to a class of white students – and said it, mind you, not while standing there reviewing the legacy of slavery, the fulminations of the Black Panthers, the metamorphoses of Malcom X, the rhetoric of James Baldwin, or



the radio popularity of Amos 'n' Andy, but while routinely calling the roll (Roth 2000, p. 153 f.).

The *concern* of political correctness to improve the situation of minorities and excluded groups by drawing attention to hurtful or otherwise harmful categorizations and labels in order to *change ideas and attitudes* deserves our full support. However, activism can easily develop that itself lapses into categorization and premature dichotomization, which is counterproductive since it intensifies opposition to its basically worthy goal. This is the point where political correctness transmutes from a concept of reconciling social inequalities into a rallying cry with the opposite effect. Roth's story reveals three key things about the sword of Damocles that unbridled political correctness suspends over our heads:

- First, disputes on political and social topics are fought out as *semantic battles*: certain things cannot be said at all or at any rate not “like that.” “PC campaigns give expression to an unusually strong urge among activists to *regulate the linguistic and social behaviour of others*. Participants are often conspicuous for their aggressiveness, obtrusive lack of humour, and unwillingness to compromise” (Wimmer 1998, p. 44. Transl. R.B.). *Political correctness*, it can be said, operates as a “*creator of discursive taboos*” (Johnson and Suhr 2003, p. 56); with its tendency to *stigmatize* certain expressions and concepts, political correctness belongs in the larger thematic context of political culture as *communication culture* (see Schuppert 2008b on communication culture as part of political culture).
- The authority that decides what is political correct or not *exercises moral judgement*. In an article in *Die Zeit* on 22 October 1993, Dieter E. Zimmer wrote of a “moral furore” that fires PC and rightly identifies this stance as classical friend-foe thinking:

PC is mercilessly dichotomous: what is not politically correct is incorrect. It admits of no grey zone, zigzag profiles are beyond its horizon: whoever abandons the PC camp on one point is immediately consigned to the enemy camp. It is accordingly thoroughly moral: what is incorrect is not only wrong, it is bad. PC has retained a wonderful innocence: it has never realized that the greatest rectitude can sometimes only do harm and that sometimes harm must be done to prevent greater harm (Zimmer 1993, p. 60. Transl. R.B.).

- Thirdly and finally, the story of Coleman Silk shows that political correctness is clearly difficult to handle, if at all, in terms of the otherwise very helpful *yardstick of proportionality*. Just as mercilessly, Zimmer censures this “mercilessness” and proneness of PC thinking to immoderation:

Just how reliably and precisely – and mercilessly – PC operates in Germany became apparent to everyone when it finished off four writers who had infringed its unwritten rules; four writers who, each in his manner, had themselves for many years contributed to the prestige of PC and who could have expected a certain amount of respect, even if only in form of unprejudiced attention, if they ... once erred from the straight and narrow.

But overnight they were “given up for lost,” to quote a revealing formulation from the PC camp. To put it plainly, they landed on the shitlist of all true political believers. Of course, I’m talking about Martin Walser, Wolf Biermann, Botho Strauß, and Hans Magnus Enzensberger.

Walser was *excommunicated* (nice word: inner-community communication with him was ended) when, the collapse of the socialist camp having already set in, if not yet visibly, he publicly admitted in *Die Zeit* that he had difficulty inwardly accepting the division of Germany in the long run. From then on he was pronounced a “nationalist.” The fact that his crazy and dangerously unrealistic wishful thinking suddenly came to fruition was naturally somewhat embarrassing for the *inquisition*. But this summer at the latest everything was in order again when he explained that one reason for the xenophobic wave of violence possibly lay in the circumstance that these children who had “grown up in a society in which everything national was excluded or unreservedly criticized.” Anyone in this country who pronounces the word “national” without a shudder is immediately branded a nationalist, that is to say an advocate of national arrogance and hegemonistic dreams, if such expressions still have any meaning at all (which is doubtful).

It was Biermann’s turn when in *Die Zeit* he declared that the Gulf War was unfortunately necessary for Israel’s sake. He has been the devil incarnate ever since, before whom every politically upright citizen crosses himself: a warmonger. His question about whether and how Israel’s survival could be ensured was mentioned only in attacking him personally. Suddenly all he was capable of was playing the guitar. The magazine *Titanic* found it good satire not only to treat him to all sorts of epithet from “slimy” to “pig snout” but to plummet the depths of calculated nastiness: “It’s obviously not enough for you that your father was murdered by the Nazis” (Zimmer 1993, p. 60. Transl. R.B.).

So much on the story of Coleman Silk. We now cast a brief glance at the origins of PC thinking and the shifts in the meaning of the concept *political correctness*.

## 2. Origin and Shifts in Meaning of the Concept *Political Correctness*

Its origins are easily traced, namely to left-wing liberal university circles in America, being popularized by Bernstein in a New York Times article that appeared on 28th October 1990 under the heading “The Rising Hegemony of the Politically Correct” (Bernstein 1990). Students were concerned about how disadvantaged minorities and marginal groups of all sorts were handled and – among other things – about the avoidance of hitherto little regarded *language usage* that could be felt to be *discriminatory* by such minorities and groups. Bernstein:

INSTEAD of writing about literary classics and other topics, as they have in the past, freshmen at the University of Texas next fall will base their compositions on a packet of essays on discrimination, affirmative-action and civil-rights cases. The new program, called ‘Writing on Difference’ was voted in by the faculty last month and has been praised by many professors for giving the curriculum more relevance to real-life concerns. But some see it as a stifling example of academic orthodoxy.

“You cannot tell me that students will not be inevitably graded on politically correct thinking in these classes,” Alan Gribben, a professor of English, said at the time the change was being discussed.

The term ‘politically correct’, with its suggestion of Stalinist orthodoxy, is spoken more with irony and disapproval than with reverence. But across the country the term p. c., as it is commonly abbreviated, is being heard more and more in debates over *what should be taught at the universities*. There are even initials – p. c. p. – to designate a politically correct person. And though the terms are not used in utter seriousness, even by the p. c. p.’s themselves, there is a large body of belief in academia and elsewhere that a cluster of opinions about race, ecology, feminism, culture and foreign policy defines a kind of ‘correct’ attitude toward the problems of the world, a sort of unofficial ideology of the university. *Pressure to Conform*“ (Bernstein 1990, p. 1).

The PC movement was primarily concerned with making a stand against what Bernstein called the “trio of thought crimes: sexism, racism and homophobia” (Bernstein 1990). But in pursuing these goals a *surplus of intolerance* was clearly produced that found expression not only in the increasing regulation of language usage but also in the redesign of curricula to conform to PC (Kurthen and Losey 1995; Papcke 1995). This necessarily led to a swing of the pendulum in the other direction: the concept of *political correctness* increasingly became a rallying cry for the American right (Auer 2002) to pillory what they regarded as the unjustified dominance of American East-Coast liberalism. This shift in the meaning of the term makes it advisable to

distinguish between *two usages*. We quote the informative German Wikipedia article on “Politische Korrektheit:”

- Firstly, the concept has been a succinct and well-known slogan in the context of the notably North American, Australian, and European societal tendency since the later twentieth century to defend the interests of minorities more strongly and to avoid discrimination, particularly in language usage, that had in the past been accepted or simply not recognized. To state that something is “not politically correct” or “politically incorrect” is to assert that *a norm has been violated*, that an utterance (or action) *contravenes general moral norms* or even that a taboo has been broken.
- The second context is the rejection of a *societal norm* or critique felt to be a restriction on liberty or censorship, whether against exaggeration in the avoidance of “negative” concepts on the grounds that showing excessive consideration stifles the expression of facts or truths. This criticism of alleged “political correctness” as a battle cry against exaggerated consideration or political opponents is also in use as a political slogan (Wikipedia 2015. Transl. R.B.).

After this brief overview, we turn to a type of actor who plays an important role in creating and enforcing social norms: the so-called moral entrepreneur.

## II. Moral Entrepreneurs as Key Actors in the Creation and Enforcement of Social Norms

### 1. Concept and Forms

In his major essay “The Market for Social Norms,” Robert C. Ellickson distinguishes three types of actor in the field of control: the *norm maker* or *norm entrepreneur*, the *enforcer*, and the *member of the audience*, the dividing line between norm makers and norm enforcers being difficult to draw (Ellickson 2001). Norm formation processes – and their later enforcement – is initiated by norm entrepreneurs, whom Ellickson also calls change agents, and who thus constitute the most important group of actors. A major example of successful change agents, according to Ellickson, are the black religious leaders like Martin Luther King who played an important role in the American civil rights movement:

These factors help explain the prominence of *black religious leaders* in the civil rights movement. Because they were black, they had much to gain from dismantling racial segregation. Because they were religious leaders, they were ideally positioned to

receive early esteem from members of their immediate social groups (that is, members of their congregations), and relatively immune to social opprobrium, economic retaliation, and physical violence on the part of racist whites (Ellickson 2001, p. 12).

One variety of *norm entrepreneur* is the *moral entrepreneur*, a term coined by Howard Becker (1973). Ellickson mentions it briefly (Ellickson 2001, p. 9), but we had hitherto not found it elsewhere. Under this heading, the “Krimpedia” website offers an article that defines the moral entrepreneur as follows:

The ... *moral entrepreneur is a person who is dissatisfied with existing rules and wishes to see them changed* so that everyone else is also obliged to “do what he considers to be right.” If successful, the relevant rules of behaviour will be declared binding by legal enactment. Whoever behaves differently then becomes an “outsider” displaying “deviant behaviour” and is therefore also subject to sanctioning. Moral entrepreneurs thus “produce” not only rules but also – indirectly – deviation and crime (Krimpedia 2008).

Leaving aside the criminal sociology context, this concept is useful because it captures what is particularly problematic about the relationship between sanction modes and criteria not disciplined or difficult to discipline by law: the aura of moral superiority surrounding norm entrepreneurs and the unconditionality of their pretensions. These “moral change agents” therefore need closer examination.

## 2. Norm Formation Processes and Communication Processes and *Change Agents* as their Managers

Already in the introductory chapter of this book we had pointed to the key importance of the communicative dimension of law formation and enforcement processes, and thus to the definition of *legal spaces*. The *change agents* Ellickson describes bring us back to this issue, being prime examples of actors that know how to use the political and societal stages as effective and often highly professionalized *communicators* to create or change norms.

Ellickson identifies three categories of *change agent*: *self-motivated leaders*, *norm entrepreneurs*, and *opinion leaders*, who on closer consideration are endowed all three with high communicative competence:

- Ellickson describes the ideal candidate for *self-motivated leadership*:

To illustrate: A charismatic person faces lower costs of working for social change. A lessening of smoke especially benefits persons with emphysema or other lung dis-

ease. Therefore a charismatic person suffering from emphysema would be an ideal candidate to become a self-motivated leader of an *antismoking campaign* (Ellickson 2001, p. 14).

- Also interesting is how Ellickson defines the qualities of *norm entrepreneurs* and *opinion leaders*; personal charisma and communicative competence are useful for both:

For the remaining two types of change agents – norm entrepreneurs and opinion leaders – external rewards provide an essential carrot. Although leaders of both types are likely to garner some tangible benefits from a norm change, they also need esteem to cover their full costs of supplying a new norm. Norm entrepreneurs are specialists who campaign to change particular norms, whereas opinion leaders are generalists. Ward Connerly, Martin Luther King, Jr., Catharine MacKinnon, Joseph McCarthy, and Carry Nation are norm entrepreneurs. Jimmy Carter, Walter Cronkite, Doris Kearns Goodwin, and Billy Graham are opinion leaders. Both types tend to be endowed with personal attributes, such as *charisma and skill in communication*, that reduce their costs of serving in these capacities (Ellickson 2001, p. 15).

- It is up to *opinion leaders* to give or deny their blessing to the efforts of norm entrepreneurs and self-motivated leaders. Ellickson:

Unlike a self-motivated leader and a norm entrepreneur, an opinion leader is not at the forefront of norm change but instead is located one position back from the front ... An opinion leader evaluates the initiatives of these other change agents (the true catalysts) and then decides which of their causes to endorse. Opinion leaders therefore play a pivotal role in determining whether change agents succeed in triggering a cascade toward a new norm ...

A successful opinion leader tends to have two exceptional characteristics. The first is an usually *high level of social intelligence*, which helps the opinion leader anticipate better than most which social innovations will end up attracting bandwagon support. An adept opinion leader, for example, may be aware that many have been disguising their true opinions about the merits of current norms ... Opinion leaders involved in the Velvet Revolutions in Eastern Europe, for instance, best sensed that support for communism was less genuine than it seemed. Second, an opinion leader is likely to be a person to whom other members of the group are unusually prone to defer in order to avoid being socially out of step. An opinion leader may have earned this *trust* through prior accomplishments in the arena of norm enforcement and change. A village elder is a generic example. *The costs of supplying a new norm fall when someone expects to be followed* (Ellickson 2001, p. 16).

## I. The Multiplicity of Sanction Modes as a Selection Problem: From Regulatory Choice to Choice of Sanctions

In the preceding six sections we have had ample opportunity to examine the wide range of sanction systems and sanction modes – not only in the sense of different norm-enforcement *techniques* but also and above all as forms of *social control*; for governance collectives are not only regulatory collectives (see chapter one), they are always also what Benno Zabel has called “*control and orientation systems*” (Zabel 2012, p. 19).

The multiplicity of norm enforcement regimes really becomes apparent only when one considers the multiplicity of normative orderings – not only state-made law and its legally elaborated sanction system but also and above all *social norms* and the associated *social sanctions* (on forms and sanctioning logic see Ellickson 1991, 2001; Posner and Rasmusen 1999). Here, too, capturing and analysing the diversity of norm enforcement regimes requires a *wide-angle lens*. Two things need to be considered: first, the range of sanction types and how they relate functionally to the various normative orderings; second, the diversity of sanction types has to be examined as a selection problem. We shall be considering a number of examples of the advantages and disadvantages of certain sanction modes: in other words, specific “*sanction costs*.”

We begin with the multiplicity of sanction types (I.) and the need to choose between them (II.).

### I. The Multiplicity of Sanction Types

In Richard A. Posner and Eric B. Rasmusen’s article on “Creating and Enforcing Norms, with Special Reference to Sanctions” (1999), we find a useful overview of sanction types:

A norm is a social rule that does not depend on government for either promulgation or enforcement. Examples range from table manners and the rules of grammar to country club regulations and standard business practice. Norms may be independent of laws, as in the examples just given, or may overlap them; there are norms against stealing and lying, but also laws against these behaviors. The two kinds of rule reinforce each other through differences in the mode of creation, the definition of the offense, the procedure for administering punishment, and the punishments themselves. Laws are promulgated by public institutions, such as legislatures, regulatory agencies, and courts, after well-defined deliberative procedures, and are enforced by the police power of the state, which ultimately means by threat of

violence. Norms are not necessarily promulgated at all. If they are, it is not by the state. Often a norm will result from (and crystallize) the gradual emergence of a consensus. Norms are enforced by internalized values, by refusals to interact with the offender, by disapproval of his actions, and sometimes by private violence (Posner and Rasmusen 1999, p. 369 f.).

Posner and Rasmusen identify six types of sanction, which we assign to the norm enforcement regimes discussed in this and preceding chapters:

Sanction type*	Example
<p><i>Automatic sanctions:</i> The violator's action carries its own penalty because of its not being coordinated with the actions of others.</p>	Failure to comply with DIN standards leads to the incompatibility of products and falling profits for the producer.
<p><i>Guilt:</i> The violator feels bad about his violation as a result of his education and upbringing, quite apart from external consequences.</p>	Feelings of guilt about failing to meet the demands of military courage or religious tenets.
<p><i>Shame:</i> The violator feels that his action has lowered himself either in his own eyes or in the eyes of other people.</p>	The contempt that an officer or the member of another profession suffers if he violates his profession's code of honour.
<p><i>Informational sanctions:</i> The violator's action conveys information about himself that he would rather others not know.</p>	A breach of the etiquette of a social class shows someone up as not belonging to it.
<p><i>Bilateral costly sanctions:</i> The violator is punished by the actions of and at the expense of just one other person, whose identity is specified by the norm.</p>	Exercise of the right of self-defence to protect individual assets or the legal order as a whole.
<p><i>Multilateral costly sanctions:</i> The violator is punished by the actions and at the expense of many other people.</p>	Loss of a firm's reputation among its stakeholders if it violates legal or non-legal standards.

\* This column quotes from Posner and Rasmusen 1999, p. 371 f.



What is interesting about this overview is that it lists either self-imposed sanctions – as in the case of shame and feelings of guilt – or social sanctions such as disapproval or social exclusion either by those directly affected or by the so-called social environment; there is no mention of sanctioning by the state. Interestingly, the types of sanction listed are by no means exclusive but rather – which is likely to be the rule – cumulative: “A norm can be enforced by more than one sanction – indeed, by all six. A drunk driver weaves along the road and crashes into a bus, killing a child. He has wrecked his car, he feels guilty, he knows that all his neighbors look down on him, his employer discovers that he is an alcoholic, the child’s parents condemn him, and he is ostracized by the entire community” (Posner and Rasmusen 1999, p. 372).

Another author who uses a wide-angle lens is Robert C. Ellickson. In his article “The Market for Social Norms” (2001) he discusses representatives of the law *and economics* school like Eric Posner (see above) and Richard McAdams (1997), whom he describes as “new norms scholars,” defining their common approach as follows:

Although the new norms scholars differ on many points, they generally share a common conception of norms and a common methodological approach. They regard a *social norm* as a rule governing an individual’s behavior that third parties other than state agents diffusely enforce by means of social sanctions. A person who violates a norm risks becoming the target of punishments such as *negative gossip and ostracism*. Conversely, someone who honors a norm may reap *informal rewards* such as enhanced esteem and greater future opportunities for beneficial exchanges. A person who has internalized a norm as a result of socialization enforces the norm against himself, perhaps by feeling guilt after violating it or a warm glow after complying with it (especially if the norm is burdensome to honor). A norm can exist even if no one has internalized it, however, so long as third parties provide an adequate level of *informal enforcement* (Ellickson 2001, p. 3).

Interesting about this passage is the strong emphasis on the *informality of social sanctions*: we are thus dealing with the full spectrum of sanction systems comprising a *formal* and a much bigger *informal sector*. This informal sector largely escapes legal regulation (on the relationship between formal and informal statehood see Schuppert 2011b); it is difficult to channel legally, and its effects are often difficult to predict. We discuss this under the heading of *political correctness*.

## II. From *Regulatory Choice* to *Choice of Sanctions*

### 1. *Choice of Sanctions*

*Politics is about choices.* On this basis, we have repeatedly proposed (Schuppert 1994; 2003a; 2011c) distinguishing between three choice situations in the field of political action: *instrumental choice*, *institutional choice*, and *regulatory choice*.

Whereas *instrumental choice* is about different control tools – classical regulatory law, prohibitions and requirements, recommendations and warnings, economic incentives – and *institutional choice* is about various institutional arrangements – from public-law institution to private limited company – *regulatory choice* is about different types of regulation – enacted law or codes of conduct – and different domains of regulation – state regulation or private self-regulation.

Transferring the choice of regulation type to the closely related *level of sanction modes*, we can with Richard A. Posner and Eric B. Rasmusen (1999) speak of a *choice of sanctions*, a concept they introduce as follows:

Two central puzzles about social norms are how they are enforced and how they are created or modified. The sanctions for the violation of a norm can be categorized as automatic, guilt, shame, informational, bilateral costly, and multilateral costly. The *choice of sanction* is related to problems in creating and modifying norms. We use our analysis of the creation, modification, and enforcement of norms to analyse the scope of feasible government action either to promote desirable norms or to repress undesirable ones. We conclude that the difficulty of predicting the effect of such action limits its feasible scope (Posner and Rasmusen 1999, p. 369).

Taking up the concept of *choice of sanctions*, we consider two choice situations.

### 2. *Choice of Sanctions “At Work”*: Two Examples

#### a) *Financial Penalties or Social Sanctions: The Power of Disapproval*

An article in the *Süddeutsche Zeitung* of 16 January 2013 drew attention to this example: under the heading “The Power of Disapproval. Social Sanctions are Stronger than Fines” the author writes:

How can a smoker be induced to light up outside the pub rather than inside? And how can someone be persuaded not to discard rubbish in the street or park in a no

parking zone? The answer is simple: through prohibitions backed by fines. But however effective this pattern is, it has its limits: as soon as no checks are to be feared and therefore no fines, the impact of the prohibition weakens. Psychologists Rob Nelissen and Laetitia Mulder from the Dutch University of Tilburg report that social disapproval has a more long-lasting effect than financial penalties. If conduct is frowned on socially, people keep to a ban even when they are not under observation ...

The scientists had their test persons take part in a game that rewarded selfish conduct in some participants. However, for the group result – test subjects were rewarded with money – it was important that the majority of participants cooperate. One third of test persons could be punished by fining for acting parasitically: the degree of cooperation in this group was particularly high. In another group it was possible to condemn egoists socially in the circle. This, too, encouraged cooperative behaviour, if not as strongly. In a control group, participants played with no threat of sanctioning and ultimately came to be dominated by egoism. When on a pretext the psychologists withdrew the possibilities for sanctioning from the game, cooperation in the financial penalty group collapsed within a short space of time. If good behaviour had previously been achieved through the threat of social disapproval, by contrast, the test persons remained cooperative.

Psychologists Nelissen and Mulder argue that financial penalties tend to encourage cost-benefit analysis. And when no fine threatened, this calculation clearly favoured selfish behaviour. Or the penalty was even treated as buying the right to violate a norm. A meanwhile notorious study on the behaviour of parents examined, for example, whether a fine would induce them to be punctual in fetching their offspring from the kindergarten. The contrary was the case. Parents regarded the fine as a fee for the right to ignore the closing time of the kindergarten. In the long run, public social disapproval would probably have been more effective in disciplining parents (Herrmann 2013. Transl. R.B.).

The article by Rob M. A. Nelissen and Laetitia B. Mulder (2013) referred to in the newspaper report is well worth consideration. The issue they address is how *voluntary compliance with norms* can best be ensured if – which in practical life is likely to be the rule – the regular sanction system of “prohibition backed by financial penalty” does not work all the time; our authors are worried that the fine as a sanction leads people to behave in society purely in terms of costs and benefits, an effect that could be countered by tangible social disapproval:

Voluntary norm compliance is an important issue because sanctioning systems are rarely perfect. Frequently, norm violations will go unnoticed. If people only comply with norms when otherwise facing punishment, a sanctioning system is only as effective as its execution. In spite of their norm-enforcing ability, several studies suggest that sanctions actually undermine voluntary norm compliance. Imposing a sanction may cause people to frame a previously ethical decision (Is it acceptable to

do this?) in business terms (Is it cost-efficient to do this?), which may even result in less compliance ... Moreover, sanctions may negatively affect trust. Under a sanctioning system people ascribe others' norm compliance to the prospect of punishment upon violation, rather than to a desire to cooperate. Consequently, when the sanctioning system is removed, levels of cooperation tend to drop ....

These 'dark sides' of sanctions (i. e., the adoption of an economic decision frame driven by external incentives rather than mutual trust) will impair norm compliance under conditions of imperfect execution; that is, when norm violations are not consistently punished. In the present study, however, we explore the possibility that these drawbacks are an artifact of sanctions usually being modeled as financial punishment. We investigated whether the drop in voluntary norm compliance that is commonly observed after the removal of a (financial) sanctioning system is attenuated in case a social instead of a financial sanctioning system is implemented and subsequently removed. In a social sanctioning system the only form of punishment consists of the mere expression of disapproval with a particular kind of conduct. In the present study the removal of a social sanctioning system is achieved by terminating the possibility for participants to express their disapproval of each other's behavior after each round of contributions in a social dilemma game (Nelissen and Mulder 2013, p. 71 f.).

The experiments conducted by our authors invite the conclusion that social disapproval is a more effective type of sanction than financial penalties if those required to comply with rules cannot be permanently kept under surveillance:

We conclude that, compared to financial sanctions, social sanctions are more likely to elicit voluntary norm compliance even if people's behavior cannot be consistently monitored and their norm violations therefore may go unpunished from time to time as is often the case in real life. In other words, social sanctioning systems are more lenient than financial sanctioning systems to inevitable flaws in their execution. As already stated, we do not claim that people will voluntarily comply with norms indefinitely if violations remain unpunished. When people do not disapprove each other's non-cooperation any more, the norm will ultimately vanish. Although exact statistics on the proportion of an individual's norm violations that go unnoticed are lacking, extended non-punishment seems unlikely. The observed resilience of a social sanctioning system should thus be sufficient to buffer incidental slips of vigilance. Clearly this has important implications for public policy. Our results suggest that successful norm induction requires *public communication of social (dis)approval*, not only because it increases the salience and thus the effectiveness of norms in guiding behavior ..., but also because it makes them stick even if people are not consistently punished for their violations (Nelissen and Mulder 2013, p. 78).

If this is indeed the case, we ought to take a closer look at this so effective type of sanction and clarify its functional logic. Nelissen and Mulder:

In everyday interactions social rather than financial punishment is the default. Expressing disapproval or contempt, gossip, peer pressure, and teasing are informal, non-institutionalized means to punish norm violations. Indeed, social disapproval of non-cooperation ..., but also social approval of cooperation ... boosts cooperation in social dilemmas just like financial punishment does. Ultimately social sanctions hint at the possibility of social exclusion, which probably accounts for their impact ... Studies demonstrate that experiencing ostracism has severe consequences ... and shares the same neural substrate as physical pain ... Some even argue that the threat of ostracism is the key mechanism underlying the development of social norms ... (Nelissen and Mulder 2013, p. 72).

This teaches us that social disapproval is no joke: it is informal and therefore not disciplined by law, it can hit people hard and in extreme cases lead to social exclusion without appeal. We shall be coming back to this.

b) Order without Law: *The Effectiveness of Governance by Reputation*

Robert C. Ellickson's ground-breaking study on dispute settlement mechanisms among farmers in Shasta County under the significant heading of "Law without Order" (Ellickson 1991) shows how effectively governance by reputation (see Schuppert 2010, p. 90 ff.) can substitute for legally binding regulation, which generally takes the form of enacted law. However, we turn to two other examples that we have already considered elsewhere.

- The first is that of Jewish *diamond merchants* in the *New York Diamond Dealers Club* (DDC), who trade in accordance with rules they set themselves under the supervision of the Club, which provides regular information about the business practices of its members, thus influencing their reputation and – in the event of repeated and significant loss of reputation – threatening them with exclusion. Barak D. Richman writes of "*reputation-based enforcement*" (2006) of the self-given rules, what can be in more general terms be called *governance by reputation*. To put it simply, such a mode of governance presupposes two things: a functioning exchange of information about the business practices of certain people (mostly merchants) and the existence of a social group or a social network for which the reputation of its members is important; we shall call such social groups reputation communities.
- The second example is a case study by Lothar Rieth and Melanie Zimmer (2004) on the conduct of transnational corporation in crisis areas – Shell in Nigeria and BP in Colombia – and their contribution

to conflict prevention. The authors come to the conclusion that changes in behaviour are apparent where the pressure of publicity produced by NGOs is so great that a change in corporate behaviour in the sense of assuming “corporate security responsibility” (Wolf et al. 2007) seems advisable owing to company reputation sensibilities. Rieth and Zimmer explain how this reputation mechanism works:

One factor that can contribute to the level of pressure exerted by NGOs on the behaviour of corporations is the reputation of these corporations. The reputation of the company is often reduced to or equated with the brand name. However, reputation is a more comprehensive, relational concept that points to the relationship between a corporation and various groups, so-called stakeholders. The stakeholders of a company are its customers, employees, investors, business partners, governments, international organizations, local communities, and not least NGOs. Through its reputation, a corporation seeks to demonstrate to its stakeholders reliability and dependability as interactional partner. It is thus constantly under pressure to present an image to stakeholders that corresponds to the expectations they have of the company and their conception of it in order to gain or improve a positive reputation. A positive reputation facilitates interaction between a corporation and its stakeholders (Rieth and Zimmer 2004, p. 94 f. Transl. R.B.).

## J. Concluding Remarks

Having intensively measured the *World of Rules* over the past three chapters, discovering one plurality after another, it is time to pause and take stock.

Without exaggerating, we can claim to have gained a far-reaching idea of how the universe of rules is constituted. We have made the acquaintance of a wide range of regulatory regimes from divine law to local tribal law and the code of honour of the Prussian officer corps; we have observed all sorts of norm producers at their work of setting rules, taking a particular interest in what semi-autonomous socio-legal fields they inhabit. Finally, we have sorted through a broad array of norm enforcement regimes, from patrimonial jurisdiction in manorial societies to forms of political correctness.

All this plurality naturally raises the question of how it is to be dealt with. Various disciplines offer answers, such as the theory of legal pluralism, but above all classical sociology of law and legal theory. Common to all these approaches is that they raise the question of what is really to be understood by “law.” There is no eluding this question of the “right” concept of law, or at

least not for someone who, like the present author, has been socialized in the discipline of jurisprudence. The next chapter will accordingly be devoted to finding the right concept of law. The reader is cordially invited to join in the search.





## Chapter Five

### In Search of the “Right” Concept of Law

The plurality discovered in the course of the last four chapters suggests that it will be far from easy to define “law” precisely and draw a reliable distinction between what is law and what is not. A sharp dividing line can perhaps not be drawn anyway, so that other ways will be needed to adequately address plural normative orderings with differing “degrees of hardness,” plural sources of law and norm producers, and plural norm enforcement regimes. The second part of the chapter will consider how to tackle this problem.

The first problem to reflect upon, however, is whether scholarly disciplines that have long inquired into what counts as law can help in distinguishing between law and non-law. Two come into question: the sociology of law and the theory of legal pluralism. We start with legal sociology.

What we can already do in our search for the right concept of law is to exclude two options that lead nowhere and examine how legal sociologists can help.

#### A. Putting Legal Sociology to the Test

We call on three well-known representatives of the sociology of law to testify on what counts as law.

##### I. Eugen Ehrlich or How Bukovina Developed from a Remote Region in the Austro-Hungarian Empire into a Virtual Mecca for Legal Sociologists

Our foray begins with Eugen Ehrlich, generally regarded as the founder of German legal sociology (see Raiser 2009, p. 71 ff.). A brief look at his origins will throw light on his lasting importance and function as the *progenitor of legal pluralism*.

Eugen Ehrlich was born in Chernivtsi in the Duchy of Bukovina, then a border region of the Austro-Hungarian Empire, which in 1919 was assigned to Romania and is now part of Ukraine. In 1910 Ehrlich – meanwhile

professor of Roman law – established a “*Seminar for Living Law*” because he saw it as the task of jurisprudence to consider the whole of living law instead of limiting itself to what can be enforced by coercive legal powers of the state. With regard to Bukovina he noted:

A traditional legal scholar would doubtless claim that all these nations had only a single system of law, one and the same system: Austrian law applicable throughout Austria. But even a casual glance shows that each of these tribes obeys quite different legal norms in all the legal relations of daily life (Ehrlich 1967, p. 43. Transl. R.B.).

Ehrlich’s observations turned the politically insignificant Duchy of *Bukovina* into a *virtual Mecca for legal sociology*. His image of a legally plural Bukovina was taken up and intensified by Guntner Teubner in an essay entitled: “Global Bukovina: The Emergence of a Transnational Legal Pluralism” (“*Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus*”) – the geographical term Bukovina came to stand for legal pluralism. And in “Law without State?” (“*Recht ohne Staat?*”), Stefan Kadelbach und Klaus Günther, mentioned Bukovina no fewer than three times in listing the best-known phenomena of legal pluralism:

- Private law without the state within a state: Bukovina
- Societal law without law in the state: exotic Bukovina
- Law without the state outside the state: global Bukovina

As Raiser rightly remarks (2009, p. 74), the traditional concept of law, which refers to enacted or statutory law, is inadequate for Ehrlich’s research programme. He identifies three types of law: *societal law*, *jurists’ law*, and *state law*, the first being the really relevant type. The hard core of societal law is the *law of societal associations*, that is to say, the totality of norms that regulate the internal ordering of these associations. In 1913 Ehrlich wrote:

*The internal order of human associations is not only the original but even today the more fundamental form of law.* The legal rule (*Rechtssatz*) developed only much later, and to this day is largely derived from the internal ordering of associations. To explain the development and nature of law, the ordering of associations therefore has to be investigated. All attempts to gain clarity about the law have hitherto failed because they set out not from the ordering of associations but from legal rules.

*The internal ordering of associations is determined by legal norms.* The legal norm (*Rechtsnorm*) is not to be confused with the legal rule (*Rechtssatz*). The legal rule is the universally binding, chance version of a legal provision in a statute or book of law. A legal norm, by contrast, is a legal directive that is valid in specific, perhaps quite small associations, even if not put into words. As soon as there are legal rules in a society that have actually come into effect, they also produce legal norms; but in

every society there are far more legal norms than there are legal rules, because there is far more law for individual circumstances than for all similar circumstances, and also more law than contemporary jurists, who seek to put in in words, have realized. Every modern legal historian knows how little of the law applicable in their own time is contained in the Twelve Tables or in the Lex Salica; but things are no different with modern legal codes. In past centuries, all legal norms that determined the internal order of associations were based on the traditions, the contracts, and the statutes of corporations, and still today they are largely to be found there (Ehrlich 1989, p. 43 f. Transl. R.B.).

Whether the norms of this associational law are obeyed by association members is not an arbitrary matter: there are such things as *normative societal constraints*. Ehrlich explains:

We all therefore live in the midst of innumerable, more or less established, but also at times quite loose communities, and our human fate depends mainly on the position we manage to attain within them. Clearly, reciprocity plays a role. Communities would be quite unable to offer every single member something if every individual gave nothing in return. And in fact, all these communities, however organized – whether they go by the name of mother country, home town, place of residence, religious community, trading corporation, or clientele – all demand something in return for what they do for us, and the societal norms that prevail in the given community are nothing other than the generally applicable outcome of the demands they make of the individual. Whoever has to rely on the support of those about him – and who does not? – is well advised to bow at least largely to their norms. Anyone who fails to do so must expect his conduct to damage his ties with his circle; whoever is stubborn in his resistance, who himself loosens existing ties with his fellows, will find himself gradually abandoned, avoided, excluded. *It is in societal associations that we find the source of the constraining power of all societal norms, of law as of propriety, morality, religion, honour, decency, good taste, fashion – at least as far as outward compliance is concerned* (Ehrlich 1989, p. 65. Transl. R.B.).

As far as the demand for compliance is concerned, this binding regulatory regime is a force to be reckoned with. According to the Ehrlich, there are many associations in society that take action just as energetically as the coercive association “state”. He comments on “the power of societal normative constraints”:

People therefore act in accordance with the law primarily because societal circumstances oblige them to do so. In this connection legal norms are not to be distinguished from other norms. The state is not the only coercive association; there are innumerable such groupings in society that can act far more energetically than the state. One of the strongest among them is still the family. In ever growing measure, modern legislation refuses to enforce judgement in matters concerning the conjugal community. But were the entire family law of the state to be repealed, families would certainly not be much different than they are today; fortunately family law

seldom requires coercive action by the state. The worker, the employee, the civil servant, the officer; they all perform their contractual and professional duties, if not from a sense of duty then because they want to keep their position and perhaps even gain a better one. The physician, the lawyer, the tradesman, the merchant are all concerned to satisfy and expand their clientele, and also to consolidate their standing by scrupulously fulfilling their contracts. The last thing they think of is penalties and enforcement of judgement (Ehrlich 1989, p. 65 f. Transl. R.B.).

Although Ehrlich assumes that legal norms in society are often also enforced through social constraints, this is not the most important aspect of his concept of law. As we have seen, he defines every rule as a legal norm that, as a prescription for desirable behaviour, determines the actual conduct of an individual within an association – and thus within a regulatory collective. At a very early date, Ehrlich accordingly severed the traditional conceptual connection between law and the state, introducing a sociological concept of law based on the observation of regulated behaviour. As we shall see, not all his successors in legal sociology followed him in his radical, de-stated understanding of law.

## II. Theodor Geiger or From Embryonic and Incomplete Law to the *Hardening of Social Norms*

The second great German legal sociologist to consider in this context is Theodor Geiger. Thomas Raiser has this to say about him:

Theodor Geiger, born in Munich in 1891, started life as a lawyer, but immediately after the First World War turned to journalism and adult education and engaged in empirical sociological studies, obtaining a chair in sociology at the Technical University of Brunswick in 1928. Emigrating to Denmark in 1933, he taught at the University of Aarhus from 1938 until his death in 1952. His copious oeuvre, to some extent in Danish, covered broad areas of theoretical sociology and empirical social research. His “Preliminary Studies on a Sociology of Law,” (*Vorstudien zu einer Soziologie des Rechts*) which appeared in 1947, contains the essence of his legal sociology, and constitutes the most important work in his later research (Raiser 2009, p. 107. Transl. R.B.).

This work strikes the basic chord of Geiger’s sociology of law from the outset, namely that law can be defined as an *ordering structure of a group*, but that not every group order deserves to be described as law:

*Law is an ordering structure that exists within an integrant of society (“group”). This tells us little and that in very general terms. Not every social ordering is law. It would be at least unusual to describe certain ordering phenomena such as the statutes of a*

society or the practices of a particular social class as law. What particular properties does a social ordering structure therefore require to justify calling it law? *What particular sorts of group can a legal order be ascribed to?* – There is clearly a specific relationship between “law,” “state,” and “enacted law” (Geiger 1987, p. 6. Transl. R.B.).

Law is “*per se*” group law, but rules can be called law only if they are made by the state or recognized as such by the state. The decisive passage is probably the following:

The legal system is never the sole ordering structure prevailing within a differentiated society. Morality and convention also play a major role. We call this phenomenon the *pluralism of the social ordering structure*. From the perspective of the dualistic conceptual model of “state and society,” “state” and “free society” are two social structures shared by the personal substratum “population.” The legal order is then classified as belonging to (if not identical with) the statist form of life, whereas morality is associated with “free society” as a whole – *with single groupings and circles within free society naturally having their own particular ordering structures*. The legal order is thus distinguished by definition in two directions from other ordering structures. Firstly, in terms of differentiation between integrants of society [*Gesellschaftsintegrate*], the law being treated as the ordering structure of a particular integrant, the citizenry of the state (*Staatsvolk*); secondly, in morphological terms, in so far as other non-law ordering structures exist alongside the law within the nation (within the society governed by law) (Geiger 1987, p. 117 f. Transl. R.B.).

There is thus a *pluralism of social ordering structures*, within which, however, it is possible to advance from the “lower division of morality” to the “premier league of law,” a process that is to be seen as follows:

Once again this is a question of genetics: *What causes this differentiation of the ordering structure?* If we set out from the hypothesis that the overall organization of society has developed under a central power and hence that the legal system has formed endogenously within an existing but hitherto decentralized society of the same substratum, it must be assumed that, at a given point in time, a society existed that was ordered solely in terms of morality. Crystallization around a central power within a society also leads to the “*judicialization*” of parts, but only parts, of the previously prevailing ordering structure, whereas other social and economic matters continue to be regulated by spontaneous morality. The regulation of *certain matters is thus elevated to the legal sphere, while that of others is not* (Geiger 1987, p. 118. Transl. R.B.).

Geiger adopts a decidedly processual perspective, leading him elsewhere to speak of *embryonic law* – for instance among “primitive peoples” – or of *unfinished law*:

One thing needs to be stressed from the outset: there is no clear dividing line between legal and other orders in the sense that every concrete ordering phenomenon can be defined as either law or non-law. Not least, this is because law in our

understanding is the product of societal development. *If law develops out of a preceding, pre-legal ordering structure, transitional states are to be expected in which the prevailing order is “not yet quite law” but “no longer merely” what had preceded law.* And since law has a number of characteristic properties, it can be that this or that property will “still be lacking” here or there. We can expect to find a core surrounded by phenomena that are doubtless legal in the full sense of term and concept, ringed by other phenomena that are more or less but not fully and completely law. I call this *unfinished law* (Geiger 1987, p. 87. Transl. R.B.).

In effect, however, this processual perspective does not stop Geiger from insisting that the state and law are coupled, and that other governance collectives (which he calls “integrants of society,” *Gesellschafts-Integrate*) – although equipped with an ordering structure of their own – must, if not attributable to the state, be relegated to the status of non-law. He concludes:

The state ranks first among the notions associated with the idea of (positive) law. Law is conceived of as a social order “applicable to the citizenry of the state (*Staatsvolk*),” which, if not established by the state, is nevertheless guaranteed by it. However, certain autonomous administrative entities, such as municipalities, set rules that we treat as legal norms in the strict sense of the term; but they do so by virtue of empowerment by the state. There is ecclesiastical law – but it is either state law relating to religious societies or it is a system carried by the church itself and described as law precisely because the church is a state-like organization – a state within a state or above states. ...

On the basis of the *conceptual connection between law and state*, we can now attempt to identify the characteristics that distinguish the law from other social systems. It should be noted that this coupling with the “state” points in two directions. *First, it assigns the law to a particular type of ordering integrant of society, if by state we understand an organized manifold of persons belonging together, the “national citizenry” (“Staatsvolk”).* Second, it implies a special structural form of legal activity in so far as the state is conceived of in impersonal terms as an apparatus of power working through institutions (Geiger 1987, p. 87 f. Transl. R.B.).

In Geiger we have a classical proponent of the law = state formula. Although recognizing normative orders as law-like or protolegal, he cannot accept as law what does not derive directly or indirectly from the state. However, he offers no convincing argument why this should be the case. And, as the preceding chapters have shown, there is also much to suggest that non-state normative orderings should be treated as law if only because, except for their authorship, they often do not differ in any way from state law.

As we shall see, Manfred Rehbinder takes a somewhat more differentiated approach to the issue.

### III. Manfred Rehbinder

The third author to be considered is the Zurich legal sociologist Manfred Rehbinder, to whom we owe what is probably the leading textbook on the sociology of law (2009). His work shows a peculiar tension between his concern with the regulatory collective and its given normative order – in this regard he thinks as a sociologist – and his concern with the state and its legal personnel – here he thinks as legal scientist. He is at heart a sociologist but the consequences of adopting a sociological stance bring him to submit to disciplining by the *legal* sociologist in him and finally to come out in favour of unison between the state and the law.

#### 1. Regulatory Collectives and Their Own (Sociological) Legal Order

Rehbinder's point of departure in determining "what law is" is a sociological conception of law that recalls that of Ehrlich. However, he differentiates more strongly in terms of how precisely one establishes what constitutes law in a regulatory collective. For instance, he cites *three paths towards the empirical investigation of law*:

In total, three ways have been proposed for investigating law empirically:

1. Identifying norms regarded as binding for the life of a group, and which for this reason guide the behaviour of addressees (legal consciousness = ideal patterns of behaviour),
2. Identifying patterns of behaviour in the actual lives of groups (legally relevant social life = actual patterns of behaviour),
3. Identifying patterns of behaviour by which legal personnel react in certain social situations (action by legal personnel) (Rehbinder 2009, p. 36. Transl. R.B.).

He then asserts that many societal associations have legal orders of their own in a sociological sense, especially organizations that have their *own disciplinary law*:

Not only the state but also other societal associations have organizations that concern themselves specifically with applying and enforcing norms, e.g., the church, the military, the civil service, the universities; in brief, all groupings that have a special "disciplinary law," as well as clubs, political parties, industrial associations and interest groups, etc. All these groups can have their own organizational apparatus for supervising compliance with their specific group order. In the sociological sense, they all have their own legal orders (Rehbinder 2009, p. 39. Transl. R.B.).

2. A Regulatory Collective can well have its own Normative Order – but this does not yet make it a Legal Order

Rehbinder avoids taking the decisive step; although he concedes that a given group ordering is a legal order *in the sociological sense*, he asserts that this does not allow us to speak of a legal order in the real sense of the term, because such an order can be maintained and enforced only by the state and its professionalized legal personnel. The crunch comes with the question whether legal pluralism can actually exist. Rehbinder denies it explicitly, even though he again emphasizes that group orders also have an autonomous coercive apparatus and that from a functional point of view they do not differ from the state legal order. He cites Karl N. Llewellyn and his study on the law of the Cheyenne Indians, the “Cheyenne Way” (Llewellyn and Hoebel 1941):

But it was *Karl N. Llewellyn* (1893–1962), who with his classic study on the Cheyenne Indians, which he published in 1941 in collaboration with anthropologist E. Adamson Hoebel, established the idea of law in sub-groups of society independent of the law of overall society, and thus the notion of a plurality of legal systems. Looking not at society as a whole but at the individual sub-groups within it, he argues that completely and fundamentally different legal systems can be found in these smaller entities, and that all generalization at the overall societal level about what constitutes the family or a particular type of association is risky. *In every society, the overall picture of the law includes not only that pertaining to the whole but also subordinate or coordinate legal arrangements pertaining to smaller actors* (Rehbinder 2009, p. 41. Transl. R.B.).

But this does not prevent Rehbinder from denying such group orderings the status of legal orders. He advances what we could call a “*gang-of-thieves*” *argument*:

*However, this consideration of smaller actors does not necessarily lead to a pluralistic concept of law.* Even if we ascribe the same character to the coercive apparatus of the sub-groups as to the legal personnel of overall society, there is nevertheless terminological consensus on reserving the term “law” for a means of overall society for exercising social control in order to avoid, for example, having to declare legal the coercion exercised by gangsters. The background is not necessarily, as Pospíšil ... claims, a moral value judgement that seeks to exclude the investigation of criminal gangs from investigation of the law. For organized crime has a major impact on the effectiveness of law and is accordingly a subject for jurisprudential (criminological) inquiry. But if misunderstandings are to be avoided, the organizational and behavioural rules of societal sub-groups, if they are not (even if only by virtue of a reference provision) an integral part of the law of society as a whole, cannot be described as law despite their legal character in the sociological sense. *A state judge*



*ruling on the Mafia could otherwise be accused of perverting the course of justice* (Rehbinder 2009, p. 41. Transl. R.B.).

In the end, Rehbinder remains rooted in a *statist concept of law*, surprisingly evident in his comments on the mainstream German line of argument:

Within the legal system of the Federal Republic, this development is apparent in the stress placed on the state's monopoly of law and in the harmonization of lawmaking and the administration of justice. The theory of this monopoly attributes the grounds for the validity of all law to the state and reserves to the state the enforcement of legal norms by direct coercion. Although the law produced by associations (associational law, ecclesiastical law, collective bargaining law, standard business terms) does not from a genetic point of view arise outside the state, its legal nature now derives from the circumstance that *in certain areas the state grants associations lawmaking autonomy*. The state is therefore entitled to monitor non-state lawmaking (the competence competence of the state legal personnel). It does so increasingly through legislation of its own, which limits the freedom of non-state authorities (e. g., competition and consumer law), and through the limited review of legal norms set outside the state and of the rulings of associational courts (professional and arbitration tribunals). This prevents the legal order from breaking down into completely autonomous particular systems (Rehbinder 2009, p. 74. Transl. R.B.).

#### IV. Taking Stock: A Dualistic Concept of Law – An Unsatisfying Heritage

The floor has been given at such great length to representatives of legal sociology because their arguments show it is one thing to describe and analyse the efficacy of non-state normative orders and quite another to upset the apple cart of a statist concept of law and define such behaviour-controlling normative orderings as “law.” In effect, this amounts to proposing a *dualistic concept of law*, namely a distinction between state-made or at least state-recognized law on the one hand and *law in a “merely” sociological sense* on the other. Although not yet solving the definitional problem, this at least files the issue away under two scholarly headings, dogmatic jurisprudence for state law and legal sociology for law in the sociological sense. This cannot be the last word on the matter for a legal science that in our view ought to be understood as a science of regulation.

There is therefore no option but to continue the search for the “right” concept of law, now calling *legal pluralism* theory to the stand, which some consider the “key concept in a postmodern view of law” (de Sousa Santos 1987, p. 297).

## B. Legal Pluralism: What Does the Concept Really Achieve?

A brief review of the impressive career experienced by the *legal pluralism* concept is needed.

### I. The Theory of Legal Pluralism Enters the Scene

The appearance on stage of this theory was particularly loudly applauded by two groups in the audience. Those who put the case for a decline in the importance of the state or even its withering away, are, so to speak, natural fans of *legal pluralism*; the obvious equation is loss of importance for the state = loss of importance for state law. And this is indeed conceivable, as Stefan Kadelbach and Klaus Günther remark:

For those who see the state withering away, the legal pluralism perspective is intuitively plausible. They turn their attention to possible surrogates for state legislation, which they find in private self-regulation, norm production by supranational and international organizations, or in public-private hybrid norm-setting. The multitude of norm producers who have come into being in the course of time fit easily, it seems, into a new picture replacing the homogeneous will of the state by the fragmentation of society and its law. State law applying within or outside the state would fit into this picture, along with international law, the *lex mercatoria* of international trade, and the corporate governance standards of multinational companies, not to mention more weakly standardized agreements or procedures between governments or between governments and private enterprises, and also the norm-setting activities of many non-governmental organizations (NGOs). The functional differentiation of world society can be described and possibly even explained in legal theoretical terms (Kadelbach and Günther 2011, p. 14. Transl. R.B.).

Not only those sceptical about the state “come out” as proponents of a pluralist concept of law: we could also count “friends of globalization” ruminating on a non-state world order among the exponents of legal pluralism theory. In his much cited essay on “Global Bukovina,” Gunther Teubner declares:

Global law can be interpreted only in terms of a theory of legal pluralism and a corresponding pluralistic theory of legal sources. Only recently, the theory of legal pluralism has undergone a successful change, shifting the focus from the law of colonial societies to the legal forms of various ethnic, cultural, and religious communities within the modern nation state. Today the focus needs to shift once more – from the law of groups to the law of discourses. Similarly, the juristic theory of legal sources needs to turn its attention to novel, “spontaneous” processes of lawmaking,

which – independently of law made nationally or transnationally – have developed in various areas of world society (Teubner 1996, p. 257. Transl. R.B.).

The popularity of the legal pluralism theory is ground enough to cast a brief glance at the three waves of attention that the phenomenon of normative plurality has attracted and which Marc Hertogh identifies in his essay on “What is Non-state Law?” (2007). The first wave, referred to in the literature as “classic legal pluralism,” is a product of colonialism, a form of rule in which the legal ideas of the colonial powers confront the lived legal structures of colonized societies. Hertogh:

The first wave of attention for non-state law is set against the background of colonialism. In Africa, Asia, the Pacific and elsewhere, the colonizer was confronted with a situation of local rules and customs without the presence of a Western-style central state. “Social scientists (primarily anthropologists) were interested in how these people maintained social order without European law” ... This focus on non-state law is associated with ‘classic legal pluralism’ and typically looks at the intersections of indigenous and European law ... Although there was some information available on customary and religious laws in law reports and administrative minutes of the colonial powers, studies specifically conducted on the laws and cultures of pre-industrial societies did not generally much appear before the early years of the 20<sup>th</sup> century ... (Hertogh 2007, p. 4).

Sally Engle Merry (1988) has coined the term “legal pluralism at home” for the second wave of attention, pointing out that normative plurality is not per se an exotic phenomenon, something to be found only in remote corners of the world and among strange peoples, but also at home, for instance in dealing with “immigrant groups and cultural minorities”:

Beginning in the late 1970s, a new wave of attention for non-state [law, G. F. S.] is developing as well. Typical for this second wave is that more and more sociolegal scholars become interested in applying the concept of legal pluralism to noncolonized societies, particularly to the advanced industrial countries of Europe and the United States. This development is sometimes referred to as “new legal pluralism” or “legal pluralism at home” ... This constitutes an important shift in the study of non-state law. It means that in contexts in which the dominance of a central legal system is unambiguous, “this [approach] worries about missing what else is going on; the extent to which other forms of regulation outside law constitute law” (Hertogh 2007, p. 7).

The third wave of attention, which has had a durable impact, can be called the globalization wave: *legal pluralism* developing into *global legal pluralism* (Berman 2009; Michaels 2009). Here, too, we quote Marc Hertogh, who not

only describes this third wave but also names the authors most important in fostering this attention:

The third, and most recent, wave of attention for non-state law is related to globalization. In general terms, this refers to the “movement diffusion and expansion [of trade, culture, and consumption], from a local level and with local implications, to levels and implications that are worldwide, or, more usually, that transcend national borders in some way” ... A growing number of authors claim that these developments also have profound legal implications: “Globalization reminds us that the state is constrained not only by other states and supranational organizations, but also by non-state organizations (e.g. NGOs), communities (e.g. religious groups), and powerful private players (e.g. multinational corporations). All these actors, in one way or another, play roles in the globalizing world that were traditionally reserved to the state. One of these roles might be the role of lawmaker.” It is argued that, after ‘classic’ and ‘new’ legal pluralism, these developments should be interpreted in terms of ‘global legal pluralism’ ... Similar to the Austro-Hungarian empire of the early twentieth century, in which Eugen Ehrlich identified many different social associations with their own legal order, the present social and legal context can be understood as a ‘Global Bukovina’ ... The study of this “global law without a state” or “post-Westphalian conception of law”... focuses primarily on two fields: (i) the development of international merchant law; and (ii) human rights law (Hertogh 2007, p. 14).

This third wave has a particularly strong impact on the part the state plays in law; it is only with the globalization wave, which led to global legal pluralism, that Eugen Ehrlich’s concern – the decoupling of state and law – really takes on serious dimensions and topples the state from the pedestal of legal centralism. This is at any rate the view taken by Marc Hertogh:

The socio-legal literature is characterized by three waves of attention for non-state law, which highlight important changes in law and in society. First and foremost, however, they illustrate the changing role of the state. One of the most significant characteristics of colonialism was the powerful presence of the (foreign) national state. This undisputed presence of the state continued during the second wave of attention, albeit – of course – with important legal, political, and social differences. The third wave of globalization is, however, significantly different from its two predecessors. Here, as illustrated by the examples of the new *lex mercatoria*, Internet law and human rights law, the national state only plays a minor role or has disappeared altogether. Moreover, these latest examples of non-state law are no longer connected with marginalized tribal societies, immigrant groups or cultural minorities, but with large multinational businesses and powerful non-governmental organizations.

This raises all sorts of important questions about law, about the role of the state legislature, but also about the future of legal studies. Writing in the early twentieth century, Ehrlich argued that the legal scholars of his day seriously impoverished the

science of law because they confined their attention to the national state. Today, in the rapidly changing ‘Global Bukovina’ of the twenty-first century, Ehrlich’s plea for a decoupling of law from the state has still lost little of its relevance and a “liberation from these shackles” seems more appropriate than ever (Hertogh 2007, p. 27).

In brief, the inevitable impression is that the previous predominance of the state-centric concept of law has long since begun to erode and that the future belongs to legal pluralism. This can and shall be questioned.

## II. The Troubled Concept of Legal Pluralism

Under this heading, Brian Tamanaha (2008) reveals in almost sympathetic vein the theoretical weaknesses of the concept of legal pluralism, rightly complaining “that legal pluralists cannot agree on the fundamental issue: what is law?” Tamanaha gives expression to his scepticism in describing the wide-angle lens employed by legal pluralists:

John Griffiths, whose 1986 article “What is Legal Pluralism” is the seminal piece in the field, set forth the concept of law that is adopted by most legal pluralists ... After considering and dismissing several alternatives as inadequate, Griffiths argued that Sally Falk Moore’s concept of the “semi-autonomous social field”<sup>1</sup> – social fields that have the capacity to produce and enforce rules – is the best way to identify and delimit law for the purposes of legal pluralism. There are many rule-generating fields in society, hence there are many legal orders in society, including the family, corporations, factories, sports leagues, and indeed just about any social arena with social regulation. In another important and often cited early theoretical exploration of legal pluralism, published in 1983, Marc Galanter asserted: “By indigenous law I refer not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety on institutional settings – universities, sports leagues, housing developments, hospitals” (Tamanaha 2008, p. 30).

Tamanaha then cites one of the most prominent proponents of legal pluralism to show how much this theory is at a loss when it comes to answering the question “What is law?”:

The problem with this approach, as Sally Engle Merry noted almost 20 years ago, is that “calling all forms of ordering that are not state law by the term law confounds the analysis”. Merry asked: “Where do we stop speaking of law and find ourselves simply describing social life?” Galanter was aware of this difficulty at the very outset: “Social life is full of regulations. Indeed it is a vast web of overlapping and reinforcing regulation. How then can we distinguish ‘indigenous law’ from social life

1 See chapter three (“legal spaces”).

generally?” Legal pluralists have struggled valiantly but unsuccessfully to overcome this problem. In an article canvassing almost twenty years of debate over the conceptual underpinnings of legal pluralism, Gordon Woodman, the longtime co-Editor of the *Journal of Legal Pluralism*, conceded that legal pluralists are unable to identify a clear line to separate legal from non-legal normative orders. “The conclusion,” Woodman observed, “must be that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.” Similarly, John Griffiths asserted that “all social control is more or less legal”. Consistent with this view, a recent theorist on legal pluralism suggested that law can be found in “day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors...” Nothing prohibits legal pluralists from viewing law in this extraordinarily expansive, idiosyncratic way, although common sense protests against it. When understood in these terms, just about every form of norm governed social interaction is law. Hence, we are swimming – or drowning – in legal pluralism (Tamanaha 2008, p. 30 f.).

Since it cannot be our intention to swim let alone drown in the waters of legal pluralism, we turn to a seemingly simple example that promises to get us further: the rules of the game.

### C. The Difficulty of Drawing a Line between Law and Non-Law: The Seemingly Simple Example of Rules of the Game

At first glance, rules of the game appear to be a clear case of non-law; after all, Section 762 (1) 1 of the Civil Code unequivocally distances itself from gaming and betting: “No obligation is established by gaming and betting.” This is a clear statement that leaves no room for doubt. However, if norms are regarded as the broader concept for regulations with varying degrees of binding force, things look somewhat different. Von Arnould draws our attention to the following quote from Max Weber:

First of all, the “norm” as such – that is to say: the rules of the game – can be made the object of purely theoretical considerations. ... They may lead to practical value judgements, as for instance when a “skat congress” ... discusses whether it is not appropriate, in the perspective of the (“pleasure”) “values” governing the game of skat, to immediately introduce the rule that, henceforth, a “grand” [contract] shall outrank a “null ouvert” [contract]. This is a question concerning skat *policy*. Or, alternatively, they may be dogmatic and ask whether, for instance, a particular kind of bidding “would” not “have as its natural consequence” a particular rank ordering of those games. This would be a question falling under the general theory of the laws of skat, viewed in the perspective of “natural law”. Other matters belong to the domain of the jurisprudence of skat, as for instance the question whether a game

is deemed “lost” when the player has “played the wrong card”, and any question as to whether a player has in a concrete game played “correctly” (i. e. in conformity with the norm) or “incorrectly”. On the other hand, the question why a player has played “incorrectly” in a concrete game (deliberately?, unintentionally? etc.) has a purely empirical – and more particularly: a “historical” – character (Weber 2012, p. 212).

In his article on the “Normativity of Rules of the Game” (“*Normativität von Spielregeln*”) Andreas von Arnould has been moved by the undeniably normative nature of rules of the game to take a somewhat closer look at the normative status of rules of the game and how they resemble other *behaviour-controlling rules*. He discovers astonishingly many parallels, included the fact the rules of the game normativize the rule-governed behaviour of a group of players:

Now the concept of “norm” is not monopolized by the law: we find it in many different contexts, in connection with human action, in practical philosophy and in sociology. If one approaches all these norms in terms of their (intended) mode of operation, they take on the aspect of *action-guiding propositions*: by means of (at least linguistic) directives they seek to steer behaviour in a desired direction. The *parallels* are clear *between legal norms* imposing behaviour in keeping with a given proposition within the legal order and *rules of the game*, which call for regulated behaviour governed by this set of rules. If one looks at rules of the law and rules of the game “from without,” further commonalities are apparent: legal norms are mostly codified; they are subject to societal change only up to a point, since they are normally set by a special act of creation; the creation of legal norms is not the work of society as a whole but is assigned to certain functionaries; unlike general societal reactions to breaches of norms, the sanctions entailed by the violation of legal norms are institutionalized. Similar observations are to be made, *mutatis mutandis*, in games: the rules of a game, too, are often codified and go back to a special act of creation (*viz.* the rules drawn up by the inventor of the game); breaches can be sanctioned, and disqualification counts as exclusion from the playing community (Arnould 2003, p. 17 f. Transl. R.B.).

Like legal norms, rules of the game also *apply in general* to a general circle of addressees that forms wherever and whenever the game is played:

Rules of the game, too, are in the first place general in the sense that they are to be respected by all players and not only particular ones. They are also general in the sense that they apply to recurrent game situations and thus cover a multiplicity of cases over time – provided that the rules of the game are not changed during play. This corresponds with the players’ belief that a breach of the rules, at least if discovered, will be to their disadvantage; even in games there is “general habit of obedience”... This brings out the autonomous nature of the game, whose “sovereign” is the *playing community* as such, which sets its own rules. Parallels to the popular sovereignty (see Article 20 (2) 1 of the Basic Law “All public authority emanates from the people”) are quite obvious (Arnould 2003, p. 20 f. Transl. R.B.).

A further parallel is that rules of the game, like legal norms, are strongly binding:

It will be obvious that rules of the game are binding *in the same fashion* as legal norms. But the parallels go beyond this: like the law, the rule-governed game is based on the fundamental assumption that all participants are willing to keep to the rules. To this extent we can even say that rules of the game are *just* as binding as legal norms. If the rules are *generally* disregarded, the game will collapse. The fact that this has no consequences for society worth mentioning may initially throw doubt on this observation; but *pacta sunt servanda* is an equally essential dictum for (rule-governed) games and for the law. Taken in isolation, however, a single rule in a game is mostly *not considered to be as binding* as a legal rule. This is due first to the lower degree of social necessity to which the system-specific *opinio necessitas* refers, and second to the role of the player as “lord of the game,” hence to the possibility of changing the rules at any time without any intervention by constitutional institutions. If we take into account that, compared with the legally determined social system, a game is considerably smaller and less complex, and that the existence of the individual rule of the game is in greater “danger” than that of the individual legal norm, we can speak of the “micro-normativity” of rules of the game; but their mode of operation is “genuinely” normative. Rules of the game are at the very least not normative in the legal sense because they do not form part of the legal system. The basis on which to compare legal rules and rules of the game norms is therefore lacking (Arnauld 2003, p. 35 f. Transl. R.B.).

Andreas von Arnauld’s comments on the normative status of rules of the game are extremely helpful; they point to the criteria that could be important in classifying a regulatory regime as law or non-law. These criteria are the following:

- Do the rules have general application?
- Do they have a clearly identifiable source, a “rule-maker”?
- Are the rules codified?
- Is there a specific procedure to be followed in changing them?
- How high is the degree of compliance with them?
- Are sanctions provided for in the event of the rules being breached? If so, what sanctions?

This is a good place to start, and we shall be expanding this catalogue of criteria below.



## D. Capturing Transitions: A Key Methodological Challenge

As we shall see, categorial oppositions and conceptual dichotomies can adequately convey the nature neither of the state nor of the law. As Patrick Glenn has put it, what we need is a “degree-theoretic” approach (Glenn 2013, p. 273), that is to say, thinking in transitions rather than in dichotomies: the key methodological challenge is to convey such transitions. Three examples show why this is so.

### I. The Need to Overcome Thinking in Categorial Dichotomies: Three Examples

#### 1. The Questionable Distinction between Premodernity and Modernity

This was a subheading in an article by historian Steffen Patzhold examining whether it still makes sense in history to assume a dichotomous divide between premodernity and modernity. He sees this question as closely connected to the other standard problem of medieval studies: whether medieval rule can be described in terms of the state (Patzold 2012). He has this to say on the question of “Premodernity versus Modernity?”:

Fundamental categories that the social sciences have used to describe modernity are clearly losing their self-evidence in the course of recent changes in statehood. ... This has also led to reassessment of what a state can be. The discussion in German medieval studies lags behind this more recent development: it is still marked by the criteria established in the nineteenth century – and against which, in the 1930s, New Constitutional History took up arms. But the current political science debate on the state no longer argues only about the “modern state” à la Jellinek or Weber or “no state at all!” Things are no longer only black and white – there is a *broad and subtle spectrum of grey tones*, from the deep anthracite of Somalia to the fresh ash grey of the Federal Republic of Germany (Patzold 2012, p. 420. Transl. R.B.).

Discovery of such a broad spectrum of grey tones invalidates thinking in dichotomies:

To bring it to a point: we ourselves no longer have the “modern state” with full sovereignty and a full monopoly of authority; but this does not mean that we have relapsed into “premodernity.” The dichotomy of “modern”/state versus “premodern”/non-state thus loses plausibility. For medievalists this is a spectacular situation: we have to describe the political orders of the Middle Ages no longer in analogy to the “modern state,” as Georg Waitz and others have done since the nineteenth century, and as Hubert Mordek has done recently in his study of the

Capitulary of 779. But, unlike Otto Brunner in the 1930s, we need no longer describe them as other, premodern, non-state. Our own world knows a broad spectrum of possibilities for and limits to political organization for establishing certainty. Instead of squeezing history into two big drawers, we can compare political orderings in broad diachrony without losing sight of historical differences in the process. This allows us to develop a new, more differentiated typology beyond the dichotomy of premodernity and modernity (Patzold 2012, p. 420 f. Transl. R.B.).

After these preliminaries, he turns to the question whether the governance structures of the Middle Ages can be compared with those in fragile states; an extremely interesting question the present author has looked into with Stefan Esders in “Modern Governance in the Middle Ages or Medieval Governance in Modernity?” (*“Modernes Regieren im Mittelalter oder mittelalterliches Regieren in der Moderne?”*) (Esders and Schuppert 2015).

In concrete terms, this means, for example, that we need no longer discuss whether the territory dominated by Charlemagne around 778 was a state (or only an empire) or not. Instead, we can *ask about grey tones* as we know them in the here and now. We can, for instance, investigate parallels and differences between Charlemagne’s empire and fragile states: Charlemagne organized his power from the mid-790s essentially from a single centre, namely Aachen. In some regions his influence was weak or absent. What medievalists call “nobility” or the “imperial aristocracy” were an interesting parallel to *present-day warlords*: aristocrats operated on the periphery as warlords for their own account – and nevertheless accepted offices and titles from the court. As in current fragile states, we see in the late 770s in Central and Western Europe the political *importance of clan structures*, the meshing of religion and politics, on the periphery omnipresent and persistent, low-intensity violent conflict. It should be noted: this is not to assert that Afghanistan or Somalia are premodern or even medieval. It is a matter of comparing political orderings beyond this duality of epochs in order to achieve a new typology (Patzold 2012, p. 421. Transl. R.B.).

Instead of thinking in terms of “black” and “white,” Pathold plausibly recommends studying the “grey tones” in the search for a typology of governance regimes.

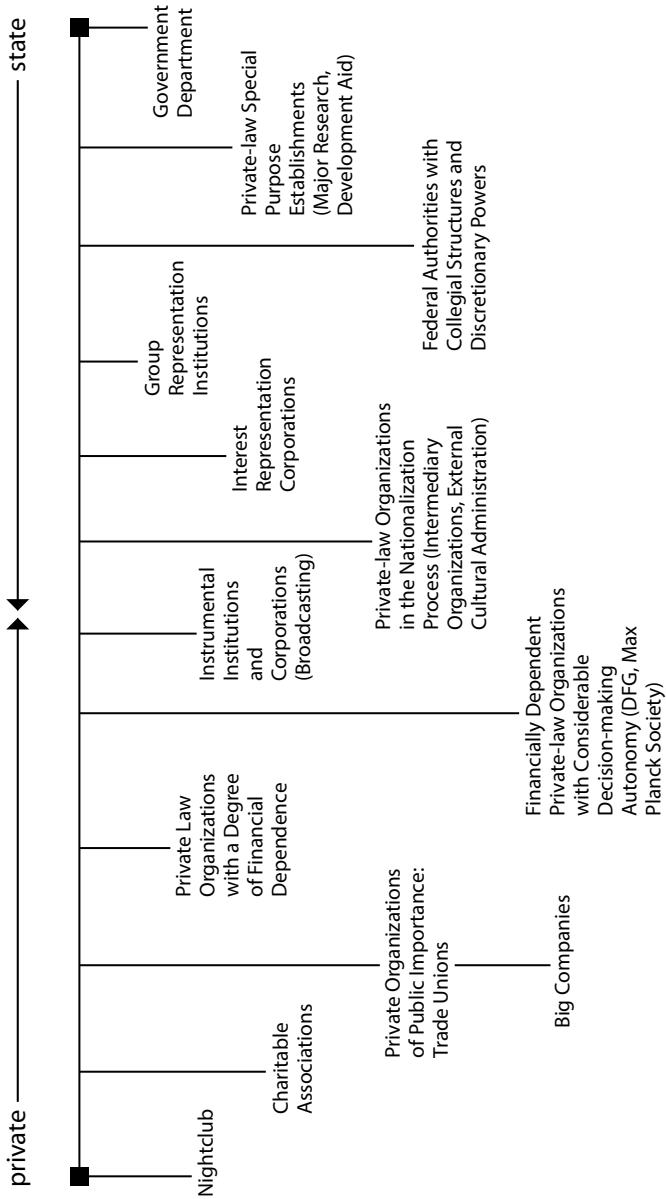
## 2. The Questionable Distinction between Public and Private

We have been addressing the distinction between public and private since my habilitation thesis, which was concerned with the phenomenon of satellites of the administrative system (Schuppert 1981), independently of the question whether a particular satellite was organized under public law – either as institution or corporation – or under private law as association,

private limited company, or whatever. From the administration-science perspective this study adopted, the question of the public status of certain administration satellites could be addressed not in terms of dichotomous oppositions but in terms of *gradation or scaling*:

The literature has less to offer [than with respect to “discovering” the public sphere] on the question of how the public sphere is to be delimited as exactly as possible in concrete and functional terms. In effect, this is not surprising: the problem lies precisely in defining the point at which an organization leaves or enters the sphere of pure privateness or the sphere of public administration. This is a problem that cannot be resolved and would, moreover, be misunderstood if we were to replace the public-law / private-law dichotomy by the trichotomy of public-law, public, and private. To the extent that this would sustain traditional thinking in spheres – with a new dimension added, it represents a small but not decisive step forward. A *problem area of fuzzy transitions* can be handled only by a method of classification that includes such transitions and can also capture the circumstance that organizations can and actually do develop in one direction or another (e. g., by broadening their goals as in the case of civic action groups or trade unions). In other words, only a methodological approach that considers the extent of the publicness of an organization as a question of gradation or scaling will get us further (Schuppert 1981, p. 92. Transl. R.B.).

In keeping with this approach, we have attempted to produce a scaling table (following Schuppert 1981, p. 98; the arrows show that organizations in the state / public sector can also grow into or out of it):



The question of distinguishing between public and private, however, arises not only in administrative organization but also, for example, with regard to whether private and public spaces can be distinguished; this is by no means an arbitrary question: application of the “appropriate” legal regime will depend on the answer: private law or public law. In “Basic Rights in Privatized Public Spaces” (*Grundrechte in privatisierten öffentlichen Räume*; 2007) Jens Kersten and Florian Meinel consider the example of railway stations and airports:

The spatial structure of the public sphere is changing. The political debate on the “public space” is lively: some see a crisis, the “demise of the public space” while others evoke its “renaissance.” There is, however, far-reaching consensus on the *hybridization* of public and private spaces: *the dividing line between private and public space is becoming blurred*. In cities and their surroundings, semi-private and semi-public spaces are coming into being: private spaces are opening up to the general public. For example shopping malls are taking on business district functions. By contrast, previously genuinely public spaces have been privatized: not only inner cities but also railway stations and airports are changing their social functions in the course of the material privatization of public sector tasks. Railway stations, in particular, are becoming consumer temples, “malls and urban entertainment centres with rail access.”

In this new world of urban governance, not only spatial functions overlap but also the once conceptually separate legal regimes of public and private spaces. Thus private means and public ends meet in public-private partnerships. They make it easy to cut through the ties and restrictions of public regulatory and road traffic law by using the flexible tools of house rules and restraining orders to prevent jeopardizing the attractiveness of such models through the stricter rules of public law. However, if restraining orders become a key regulatory tool in the public space, this indicates that the *functional hybridization of public and private spaces* entails convergence between the different regulatory regimes (Kersten and Meinel 2007, p. 1127. Transl. R.B.).

The separation of public and private is made completely obsolete by the Internet, whose social networks have led to the development of a genuine novelty, so-called *personal public spheres* (Schmidt 2009); the phenomenon of digitalized blogs are a particularly striking example (see Schuppert 2015).

### 3. The Questionable Distinction between State and Non-State

#### a) *From State to Varieties of Statehood*

Some time ago the concept of statehood began to gain in popularity, probably because it frees us from the predicament of having to opt for “state” or “non-state”; in “State as a Process” (“*Staat als Prozess*”) I noted under of the heading “State of Statehood”:

These observations on the semantic decoupling of law and the state necessarily bring a parallel process to our attention, namely the increasing use of the term “statehood” instead of or alongside that of “state”. This usage often appears to be unthinking, or at least without decided views on why the one term is to be used rather than the other. ...

And we must admit that we have also failed to define a sufficiently clear distinction between the concepts state and statehood.

But there are lessons to be learned from the “semantic shift” from the constitutional state to constitutional statehood. The most important lesson would seem to be that the terms state and statehood should not be used synonymously, but that statehood can be applied to structures – “*étatique ou non-étatique*” – that are either not states in the legal sense of the word or which only partly or deficiently provide what we normally associate with the concept of state and the type of services that we expect from a state in the modern, Western sense. What the statehood concept thus permits is to enter the whole motley world of “*varieties of statehood*”, to study the various “*configurations of statehood*”, and not to limit oneself to the narrow perspective of the state as defined by the OECD (Schuppert 2010, p. 127 f. Transl. R.B.).

In their ground-breaking article on “The Return of Leviathan: The History and Methodology of Comparing Late Antiquity and Early Modern Statehood” (“*Der wiederkehrende Leviathan: Zur Geschichte und Methode des Vergleich spätantiker und frühneuzeitlicher Staatlichkeit*” Eich et al. 2009), Peter Eich, Sebastian Schmidt-Hofner and Christian Wieland argue in precisely this vein. The key concepts of this article and of the volume edited by the authors under the title *Der wiederkehrende Leviathan* are “statehood and state formation.” They are concerned not with the end product ‘state’ but with “processes of institutional stabilization and consolidation” (Eich et al. 2009, p. 13) and with the development of state structures:

There can be no doubt that the existence of modern statehood cannot be adequately described if the history of premodern state formation is ignored, and that, when describing developments, preliminary phases, climaxes, and processes of decline as such have to be identified and explicitly named. However, precisely this categoriza-

tion of early modern times as “prehistory” always runs the risk of overlooking phenomena that do not point in the direction of modern statehood or – with foreknowledge of what is to come – of treating them as anachronistic. One way out of this “teleology trap” is to compare early modern state structures with contemporary but geographically and culturally remote state structures such as those of the Ottoman Empire, India, or China; another is to compare these structures with chronologically remote ones such as that of the Roman Empire in Late Antiquity. With the help of such comparisons, awareness of the historicity of one’s own perspective is sharpened. The perspective shaped by the “modern state” of the nineteenth and twentieth centuries, too, is precisely this: a vantage point, and consequently needs to be relativized (Eich et al. 2009, p. 16. Transl. R.B.).

There is hardly any mention of the state as such, but of statehood, state formations, or state structures; if the state concept is not or cannot be avoided, it is used only as an extremely capacious conceptual umbrella under which “variable historical political communities” can shelter.

b) *From the State via Governmental Structures to Governance*

Another possibility for escaping the categorial trap of “state or non-state” is to use the governance concept. The charm of the governance approach is that it always presents itself as “free from state,” as we have already discussed in the first chapter of this book – a concept that does not replace the state, but one that relativizes it, being essentially concerned with interaction between state and non-state governance actors. The key concepts of the governance approach are regulatory structures and governance regimes (see Schuppert 2005b), which brings us directly to the article by Peter Eich et al., which is about power *structures* and institutional concentrations. This approaches us to the governance concept.

Christoph H.F. Meyer can be said to have made the connection. He concludes his review essay “The Dispute about the State in the Early Middle Ages” (“*Zum Streit um den Staat im frühen Mittelalter*”) as follows:

[R]eservations about the state concept are quite understandable – at least to the extent that the literature is concerned with early Medieval law per se. If, however, one considers individual sources, the fundamental certainties evaporate. ... There are also findings that do not fit the overall picture. What about societies like that of the West Goths, in which a social enforcement mechanism like the feud played no special role? Obviously, under these circumstances one can come to quite different conclusions about statehood on the Iberian Peninsula, for instance, in Carolingian Friesland, and in Carolingian Northern Italy.

This consideration raises the question of more extensive perspectives. In the conclusion to his overview of the research ... Rudolf Schieffer makes a distinction that is simple but worthy of consideration: “The question of the existence and quality of state theoretical concepts is to be kept separate from examination of the structure and efficiency of the apparatus of power.” If we leave aside terms and concepts, knowledge and ideas and focus on the second point, the possibility of differentiation becomes apparent, and thus the question of “more-or-less” rather than “either-or”. Such a perspective would not only have the advantage of allowing the epochs preceding and following the Carolingian period to be taken more strongly into account. More justice could then perhaps be done to the institutional achievements of the Early Middle Ages in comparison to a prepotent second millennium. This path touches not least on the sort of fundamental questions raised in the dispute about the state in the Early Middle Ages” (Meyer 2010, p. 174, Transl. R.B.).

A recent quite explicit commitment to the governance concept by historian Christoph Lundgreen is to be found in “State Discourses in Rome? Statehood as Analytic Category for the Roman Republic” (*“Staatsdiskurse in Rom? Staatlichkeit als analytische Kategorie für die Römische Republik,”* Lundgreen 2014):

That the state is under discussion cannot be disputed, that its role and “nature” are again being discussed and measured is evidenced not least by the work of two collaborative research centres: “Governance in Spaces of Limited Statehood” (SFB 700 in Berlin) and “Transformations of the State” (SFB 597 in Bremen). Worth mentioning are two lines of debate: the discussion on governance and the talk about statehood. According to Renate Mayntz, governance is “the totality of all coexisting forms of collective regulation of societal matters from institutionalized civil-society self-regulation and various forms of collaboration between state and private actors to the sovereign action of state actors.” This broad definition of the concept is important: governance is not to be seen, according to Schuppert, as a concept that ignores the state but one that relativizes it, a concept that seeks to avoid the risk of adopting too narrow a view that comes with all state-centricity and whose added value lies in the processuality and dynamism of the perspective (Lundgreen 2014, p. 28 f. Transl. R.B.).

Shortly afterwards, he adds, under the heading “Once Again: ‘State’ for (Ancient) Historians?”:

What are the conclusions to be drawn from this sketch? The modern debate shows in all clarity that, although it makes sense to understand “state” as a product of history, it should not be seen as an epoch-bound phenomenon. Statehood should, furthermore, be seen first ... as a process and not as a state. Movements within this process should, second, not be coupled with the figure of thought of rise and fall or other teleological concepts but be treated analytically as weaker or more intensive statehood (with specific advantages and disadvantages). If, moreover, political science sees varying statehood as characteristic of the present day and comparative



history as typical of the nineteenth century, the strict “state/non-state” dichotomy ought to be abandoned in analysing Antiquity, as well – Odysseus in Ithaka and Rome under Diocletian could thus be presented with greater differentiation (Lundgreen 2014, p. 34 f. Transl. R.B.).

#### 4. An Interim Conclusion

The three examples discussed – modernity or premodernity, public or private, state or non-state – demonstrate that, given a complex reality, thinking in categorial oppositions and dichotomies can tell us little about the state, at least not if the subject is tackled, as in this book, analytically rather than normatively. Empirically saturated analysis must take an interest in the grey tones and not in black and white; in our experience this is where things happen, where transformations of statehood become visible in the shifting of sectors and the dissolution of familiar boundaries. We therefore need a methodical approach that is “degree-theoretical” and allows for transitions, scaling, and gradation.

### II. The Need for a *Sliding Scale Approach*

#### 1. Thinking in Gradations and Transitions: More than an Expedient

If this book and particularly this chapter so urgently advocate thinking in gradations and transitions, it is not as a stopgap solution when and where oppositions and dichotomies get us no further. This is illustrated by Markus Meumann’s and Ralf Pröve’s discussion about the ideal type of absolutism and the embarrassment among historians when ideal type and researched governmental practices diverge:

If we ... renounce establishing an ideal type in favour of a more open, phenomenologically oriented heuristics, we soon realize that by no means did Europe consist solely of states under monarchical rule as was still assumed in the nineteenth century. Suddenly we discover a varying landscape of differently constituted polities, which included not only the Western and Northern European monarchies (such as England, France, Spain and Denmark) but also republics like the Netherlands and Switzerland, urban governments (Venice and Genoa), and aristocratic regimes (Poland), as well as the Old Empire. The problem posed by a seemingly inevitable dualistic approach naturally also arises when conceptually classifying divergent findings about the “internal” exercise of authority: that is to say, about participation in or collaboration with government by estates, the commitment of the ruler to nat-

ural law, the failure of regulation to take effect “on the ground,” local resistance, etc. Research committed to the “absolutism” paradigm has yet to find a better solution than filing these phenomena away under the heading “the non-absolutist in absolutism” – a pretty helpless reaction in the 1960s by Gerhard Oestreich to research findings on the subject (Meumann and Pröve 2004, p. 29. Transl. R.B.).

What we want to show with this example is that thinking in gradations and transitions should not come to bear only when black-and-white categorial pictures fail to capture a situation; this approach should be adopted from the outset to ensure the realistic analysis of the realities of state and law, be it examining varying degrees of “*étatisation*” (Chevallier 1999) or rules with varying “degrees of binding force and de facto binding effect” (Röhl 2007 with reference to international standard setting).

## 2. From Binary Logic to Cosmopolitan Logics?

In *The Cosmopolitan State*, H. Patrick Glenn, who like the present author pleads in favour of thinking in gradations and transitions, calls for classical binary logic in “cosmopolitan thought” to be superseded by “cosmopolitan logics” (2013, p. 295 ff.). Although the debate on the right methodological approach is in our view not a problem of confrontation between different logics, his basic concern is highly relevant to the issue under discussion.

He has this to say about *binary logic*:

From the law of identity are logically drawn the two further “laws of thought”: the *law of non-contradiction* and the *law of the excluded middle*. Given A, which is radically distinct from not-A, the two cannot be affirmed at the same time, or overlap, so we cannot have A and not-A: Not [A and not-A], since this would be contradictory, affirming at the same time a proposition and its negation. Given the law of identity and the law of non-contradiction, what we therefore must have, and which is where many current legal problems arise, is A or not-A, which is the law of the excluded middle. There is no middle ground between contradictory positions. Why must we have a logical rule for A and not-A? It flows from the principal of radical separation or identity. Since A exists, independently of that which is not-A, the boundary of not-A begins precisely where the boundary of A ends and there can be no middle ground between them. Not-A is galactic in character and devours any possible middle ground. As recently put, you either have \$3.75 to buy a latte or you do not (Glenn 2013, p. 262).

This binary logic also has its heroes, whom Glenn refers to as “notorious dichotomizers”; in his list he includes Jean Bodin with his sovereignty theory, Thomas Hobbes with his opposition between “amoral anarchy or

Leviathan” and – in the legal field – Hans Kelsen with his legal-philosophical basic norm theory.

This classical binary theory, according to Glenn, cannot capture present-day realities:

There has recently been a “many valued turn” in logic, accompanied by development of “new” logics. It is a turn away from classical or binary logic and towards recognition that the world is a more complex place than that contemplated by Plato’s methodology of *divisio*. It has come about because classical logic was inherently vulnerable as a general intellectual instrument. It inevitably came to be challenged, ontologically, logically, and legally (Glenn 2013, p. 265).

A “multi-valued world” needs a “multivalent logic”. The “turn” to multivalent logics mentioned by Glenn is in fact not as new as all that. As long ago as 1920, the Polish philosopher and logician Jan Łukasiewicz formalized a first multivalent logical calculus and knowledge in this field has since made progress (Gottwald 2015). However, that this insight had not everywhere reached the social sciences is clear. Glenn’s comments are therefore all the more informative and useful for us:

The essential characteristic of multivalent logic is that it is “*degree-theoretic*” in replacing a binary option with one that tolerates degrees, usually expressed as degrees of truth (as in the statement “there is some truth in that”). Where different and contradictory laws are seen in conflict under classical logic, a multivalent logic would admit assessment of relative *degrees of applicability* and more nuanced means of choice ... (Glenn 2013, p. 267).

He then cites a number of authors he considers to be on the right track:

Michael Taggart has decided that contemporary administrative law in New Zealand is no longer well served by dichotomies that have prevailed in the past – appeal/review, merits/legality, process/substance, discretion/law, law/policy, fact/law – and that they should be replaced with a “*sliding scale or rainbow*” of possibilities of review, from correctness review at one end of the rainbow to non-justiciability at the other. Moreover, as in a rainbow, colors or internal categories ‘imperceptibly blur or merge into one another’; there are no ‘jolts’. Joseph Singer has written of the need to create ‘a middle path’ based on reviving the notion of ‘practical reason’, and in a construction of a law of peace or *lex pacificatoria* Christine Bell has written of the need to straddle binary distinctions and to develop ‘*constructive ambiguity*’. Binary distinction in the law of citizenship have been particularly criticized and Neil Walker has expressed dissatisfaction with the “dichotomizing language of membership,” arguing for denizenship as an “in-between concept, one that challenges the series of binary oppositions ... that reflect the political imaginary of the Westphalian system of states.” Linda Bosniak deliberately uses a notion of “alien citizenship” to accommodate an “ascending scale” of the rights of aliens who gradually augment

their identification with a local society. Nick Barber writes of the dichotomy of citizen or subject but prefers to think of them “as poles on a spectrum rather than as hermetically sealed categories” (Glenn 2013, p. 270 f.).

These samples of Glenn’s thinking should suffice to show his intentions. If we want capture the realities of a transnationalizing world, we need a *sliding scale approach*. We fully endorse this finding; but whether new logics are called for remains to be seen.

### 3. Thinking in Terms of Scaling Calls for Plausible Scaling Criteria

The primary example is again the *state*: innumerable authors have concerned themselves with the question of what attributes a political community has to display to be able to describe itself as a state. There is an outstanding overview in the introduction to “Studying the State” by Walter Scheidel in *The Oxford Handbook of the State in the Ancient Near East and Mediterranean* (2013), to which we refer the reader. Instead, we turn once again to the historian Christoph Lundgreen, to his outline of a habilitation project on “Statehood in the (Early) Greek World,” which he has kindly made available.

The first paragraph is concerned with escaping the “state or non-state” trap through use of the statehood concept, which opens up new perspectives for historians:

The question of what counts as a state is pursued by historians and archaeologists, political scientists and lawyers. In recent times, the latter have been debating the role and conception of the EU as well as the phenomenon of “failing” and “failed” states around the world. The resulting categorization problems have led to reassessment of the concept of sovereignty and concepts of *Staatsvolk*, *Staatgebiet*, and *Staatsgewalt* – state citizenry, state territory, and state authority – which have formed a classical triad since Max Weber (and Jellinek). Despite all conceptualization difficulties, this offers a major opportunity for addressing so-called premodernity. Historians can ask old questions quite differently if, as in more recent governance research, a teleological (and mostly positively connotated) line of development by all political entities towards the state of Western pre-nance is superseded by the notion of “the state as a process” and *the dichotomy of “state or non-state” replaced by the concept of “statehood,”* which is concerned (only) with the gradual imposition of key monopolies. In concrete terms, the efficacious notions of the “state as a universally accepted organizational stage for every human community” (inter al. Eduard Meyer) like that of the “state as a genuine product of early modernity” (inter al. Christian Meier following Carl Schmitt) are both overcome or queried anew (Lundgreen, p. 1. Transl. R.B.).

Lundgreen consequently wishes to examine the different dimensions of statehood, and proposes nine indicators that can help define statehood:

III. Dimensions of Statehood

- a) From an external perspective (de facto statehood / measured by: decision-making power, organizational power, legitimation capacity)
- b) From an internal perspective (own perception, symbolic side, “identity”)
  1. Taxes / charges / duties
  2. Civil rights
  3. Military service
  4. Political institutions / legislation / administration of justice
  5. Mintage
  6. Educational / burial regulations
  7. Colonization
  8. Monumental buildings and public space
  9. Cultural and religious festivals (Lundgreen, p. 3. Transl. R.B.).

This is a fascinating approach and fully in line with the proposed procedure for examining the field of “law or non-law.” With this encouragement, we turn to the development of definitional and transitional criteria in the World of Rules.

**E. Developing Gradation and Transitional Criteria in the World of Rules: “If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.”<sup>2</sup>**

Thinking about what indicators invite us to treat systems of rules as law will facilitate orientation in the World of Rules. The focus is therefore not on clear cases recognized by sources of law theory, such as state-made law, customary law, and divine law, but rules whose normative status is uncertain: Should they be regarded as law, and if so, what sort of law? This second question, too, needs to be answered: it is not a matter of simply rounding out the domain of state law with selected cases, only to file away the rest under the capacious heading “law in the sociological sense,” but, within the legal universe, to distinguish various types of law that stand in varying proximity to state-made law. In order to define this *proximity* more exactly, *powerful indicators* need to be developed, a task the present author has

2 This pithy aphorism introduces a study by Andreas Engert on private norm-setting power (2014, p. 301).

addressed under the headings “What is good governance?” and “What are failing states?” (see Schuppert 2010).

When developing indicators, it clearly makes little sense simply to collect them, list and number them: a more systematic approach is called for from the outset. The first step is therefore to consider what should count as law from three different points of view: the *perspective of the addressees of regulation*, the *perspective of rule-setting authorities*, and what can be called the *functional perspective*, since it is concerned with functional similarities between various types of regulation. Following Paul Schiff Berman’s proposal “to treat as law that which people view as law,” we turn first to the perspective of the addressees of regulation.

## I. The Perspective of the Addressees of Regulation

### 1. Why Non-State Law is Obeyed

Law made by the state is legally binding; it demands general obedience from all members of the community of law. But why should the addressees of non-state rules obey them and – to go by actual behaviour (high compliance rates) – treat them as law? Examining “standards” as a type of regulation, Oliver Lepsius (2007) identifies three reasons for compliance:

- first, the binding force of standards can result from societal or economic power concentration, producing what we shall call *factually compulsory compliance*:

We comply with standards that fail to convince us for reasons of *social conformity*: because others comply with them, because we want to stay in business, because we want to be present in certain markets; in brief because we otherwise risk social or economic disadvantages. This form of binding force can also be regarded as classic: action governed by private law has always been shaped by the power relations prevailing in society, which lead to *factual heteronomous obligation* (Lepsius 2007, p. 366. Transl. R.B.).

- Second, there is what we shall call *avoidance strategy behaviour*: non-state rules are obeyed because, if the ordering and control effects expected of them do not materialize, the state is likely to take legal steps to enforce compliance. Lepsius:

However, this presupposes that standards can be made part of the legal order by formal transformation. ... Thus the legally enforceable application of standards need

not result from abstract-general validity in a legal order; it can just as well be the consequence of case-by-case reception in the course of a differentiated process of law concretization as regards institutions and competence (Lepsius 2007, p. 365. Transl. R.B.).

- Thirdly and finally, self-commitment to standards can be due to a belief in their rationality:

One submits to standards because they are developed in a neutral, rational procedure directed by experts and taking diverse interests into account. The decisive factor is the detailed design of the institutions that develop standards and of the procedures that they employ. Does the procedure used to set standards satisfy the demand for neutrality, interest plurality, and representativeness? Is standard development based on the participation of the interested parties or on the specialist knowledge of experts?

The literature on standard setting rightly insists on such aspects, which, however, are difficult to generalize. Not infrequently, standardization organizations rely on the principles of administrative procedural law – such as the American Administrative Procedure Act (APA) – to generate faith in procedural neutrality as a precondition for the binding force of standards. ... Röhl, too, stresses that the structural demands made of international standard setting are also consequences of the democracy principle, so that standard-setting procedures are demanded that compare well with national norm-making procedures in transparency, in the account taken of interests, and in the use of made of expertise. Standardization organizations borrow tools and provisions from state lawmaking to generate faith in the legitimacy of the results they produce, which leads in turn to self-commitment (Lepsius 2007, p. 365 f. Transl. R.B.).

Particularly interesting is naturally the third point. The ‘standards poultry’ clearly assert their membership of the world of ducks by borrowing *tools and provisions from state lawmaking*. Harm Schepel (2005) calls this strategy for promoting the legitimacy of standards “*normative borrowing between the public and private spheres*” (Schepel 2005, p. 6); and, as we saw in chapter 3, the processes of producing standards do indeed resemble the process of producing state law in many points.

## 2. Heteronomy as Proof of Relatedness

In his groundbreaking and convincing study of the standardization of market rules as a form of heteronomy, Andreas Engert (2014) has identified the heteronomy of non-state rules obtaining from the perspective of addressees of regulation as a *criterion for establishing that they relate to law*:

The following inquiry is primarily concerned with gaining theoretical/conceptual knowledge. The aim is to show why rules made by private parties can under certain circumstances be called “norms,” even if they are not legal norms within the meaning of the theory of legal sources ... The decisive characteristic of a norm is considered to be heteronomy, that is to say, the binding effect of the rule on outsiders unable to influence its content. Heteronomy can result from directives under state-made law. But – the key thesis – it can also arise from the need to standardize rules. The economic theory of network effects helps explain that the mere dissemination of a rule can impose a certain constraint to use the same arrangement in private autonomous transactions. *Heteronomy can thus also arise from supra-individual market practices.* In addition, private institutions can influence norm-formation and thus exercise private norm-setting power. The heteronomous effect of private norms gives rise to a common interest in the given ambience. Private norms hence resemble state-made law, for instance dispositive enacted law (Engert 2014, p. 303. Transl. R.B.).

To keep this from remaining too abstract, Engert presents three examples, of which the following is particularly relevant for our purposes (the other two are the rules of the German Corporate Governance Code and the international accounting standards):

A well-known example of a transnational regulatory regime is the rules of the International Swaps and Derivatives Association (ISDA), a worldwide organization of banks, service-providers, and demanders for over the counter (OTC) derivatives. Regardless of the financial crisis, risks continue to be traded in these markets on a massive scale. The ISDA rules are standard provisions for derivatives contracts. The kernel is a master agreement on uniform rules for all derivatives transactions governed by the law of obligations concluded between the contracting parties. It contains provisions on, inter alia, performance modalities, the consequences of default in performance, and clearing and netting. Apart from the master agreement, the ISDA rules include contractual documents on credit guarantees, as well as definitions of individual derivatives describing the risks traded. The ISDA estimates that 90% of all OTC derivatives contracts worldwide are concluded on the basis of their rules (Engert 2014, p. 304 f. Transl. R.B.).

If the addressees of regulation feel that such regimes are heteronomous law, this is, as Engert explains, because of so-called network effects:

A network effect is when the utility of an asset depends not only on its properties but also on *how many other demanders* opt for the same or a compatible asset. An obvious example of network effects is telephony: a telephone on its own is useless; its utility arises only and grows with the connection of other people to the same telephone network (Engert 2014, p. 310. Transl. R.B.).

There are direct and indirect network effects:

Direct network effects arise only when the decision in favour of an arrangement commits the given market participant for future transactions in relation to different



market participants – at least in the sense that using any other arrangement would be more costly (Engert 2014, p. 311. Transl. R.B.).

Still more interesting are indirect network effects, which arise when market participants use certain rules because it allows them to participate in tried and tested collective regulatory knowledge:

An arrangement that has been long tested and tried in the market also offers a strong guarantee of correctness. It can store practical legal experience when the original events have long since been forgotten. For individuals it can therefore be wiser to trust blindly in collective regulatory knowledge accumulated over decades than to check things out themselves. This offers a *parallel to state-made laws*, on whose adequacy the parties often also have to rely blindly. It will therefore prove difficult to dissuade market participants from repeatedly using differentiated, tried and tested arrangements (Engert 2014, p. 316. Transl. R.B.).

In sum, standards seem indeed to belong to the family of ducks.

## II. The Perspective of Rule-Setting Authorities

In this field, too, we have chosen two examples. We shall be taking a look at two rule-setting authorities with a marked will to make “law” for their domain that is binding on their members.

### 1. Sports Associations as Rule-Setters

Whether the rules of competitive sport count as law is not very easy to say, but there are two very good reasons to believe it is so.

As far as the legal situation in Germany is concerned, associational law in the field of sport can hardly be denied the status of law, since the bridges of both contract law and associational law lead to the same result. In chapter 3 we had seen what Klaus Vieweg had to say and here, too, we cite his cogent treatment of the subject.

Since Vieweg sees his work as a study in judicial facts, he rightly places great emphasis on the interests of associations and their self-conception. Over and again, he underlines that internal sports associations in particular regard themselves as autonomous lawmaking and enforcing authorities:

International sports associations naturally do not determine what legal status their rules, sanctions, and other decisions will have in a particular state. This is not surprising, for *most such associations seal themselves off from the law of the state*, largely ignoring its very existence. *They are satisfied with their de facto autonomy in setting and*

*applying rules*, which are imposed not only on their national member associations but also on clubs, athletes, and officials, as well as on external persons. From their point of view, setting and applying norms amounts to making and enforcing law (Vieweg 1990, p. 122. Transl. R.B.).

In brief, we could say that sports associations are rule-making authorities with a marked will to make law, which finds expression, for instance, in the fact that they used the language and concepts of state lawmaking and have also established their own systems of jurisdiction.

## 2. The Catholic Church as a Church of Law

Perusal of the literature on the self-conception of the Catholic Church reveals that three things are constantly evoked as if in abiding harmony: *divine foundation*, the Church as an *idiosyncratic institution* and its *legal constitution*. It is interesting to leave the formulation of this state of affairs to a non-Catholic observer. The Protestant theologian Friedrich Wilhelm Graf has listed everything that is for him particularly Catholic; here an excerpt:

Roman Catholicism thinks quite differently about the Church than the various Protestantisms. The Roman Church is a *legal institution*, which considers itself to be grounded directly in divine law (*lex divina*), and to the present day has claimed normative ethical authority vis-à-vis state and society ... (Graf 2008, p. 137. Transl. R.B.).

But that is not all. In the form of the “Codex Iuris Canonici” the Catholic Church has its own legal order, which is understood as a necessary component of the identity of the institution “church.” The Catholic author Joseph Listl comments:

The Church is ... not a merely external and, as it were, purely additive assembly of two per se heterogeneous elements: it is essentially and therefore necessarily *both a community of salvation and a legally constituted society*. ...

Although canon law by its very nature is spiritual law in the service of the Church and its mission of preaching the Word of God, the fact that the Church is also a hierarchically organized societal association means that, from a phenomenological point of view, canon law has *a structure similar to that of state law*. This means that, as Hans Barion has rightly noted, the provisions of the Codex Iuris Canonici have exactly the same authority for Catholics – not associational but sovereign, not requiring recognition but given – as the provisions of state law for the citizens of the state (Listl 1991, p. 459 f. Transl. R.B.).

In short, sports associations like the Catholic Church are governance collectives, characterized firstly by a marked will to regulate themselves and which

regard the rules set autonomously or semi-autonomously in their respective domains to be binding law for their members.

### III. The Function-Oriented Perspective

#### 1. Functional Equivalence

We can speak of functional equivalence where *non-state regulation substitutes for state-made law* because the state cannot or does not wish to regulate matters itself and therefore does not act as lawmaker. This can, as in the case of transnational rule-setting, be simply because the state lacks the relevant regulatory competence or because it leaves it to private organizations and/or civil society to regulate certain matters that require specific expertise and epistemic authority. Three examples illustrate this.

##### a) Filling the Regulatory Gap I:

###### *Private Normative Orderings as Placeholders for State-Made Law*

The formulation “private normative orderings as placeholders for state-made law” is taken from the study by Nils Ipsen on private normative orderings as transnational law. He has this to say:

Society is in constant development. In its lawmaking, the state cannot keep pace with this development. ... It is therefore only natural that new developments in society or technology are not immediately regulated by the state, so that a *legal lag* occurs. Private normative orderings can close this gap; but in some cases only temporarily (Ipsen 2009, p. 211. Transl. R.B.).

A good example of such a placeholder function for private normative orders is the so-called *Takeover Code*, a set of rules elaborated by the Exchange Expert Commission, and which to a large extent was incorporated in the Securities Acquisition and Takeover Act of 1st January 2002.

It is also interesting to see what Steffen Augsburg has to say about the qualifications of the norm-setting body involved. He notes that prevailing opinion sees the *Exchange Expert Commission* as a purely private organization, while calling this point-blank assignment to the private-informal sector into question, since the commission is something of a “mongrel”:

The code was drawn up by the Exchange Expert Commission, an institution attached to but not part of the Federal Ministry of Finance, whose job it is to advise

the Federal Government on legal matters concerning the capital and the stock markets. The lack of any reference to the Federal Government or the Federal Ministry of Finance stands in the way of classifying the code as informal administrative recommendation from government and ministry; every announcement or report on the Takeover Code names only the Exchange Expert Commission as author. It is therefore the general and apparently undisputed view that the Takeover Code is grounded exclusively in private law. In contrast, it should be remembered that membership in the Commission depends on nomination by the Federal Ministry of Finance. In its function, the Exchange Expert Commission resembles the expert bodies in what Weber called “collegial” administration. It does not act on its own initiative but “on the request” of the Federal Government. Although in the absence of any corresponding legal basis it does not exercise the *powers of a public authority*, its eminent position calls for investing the informal level with greater legitimacy and also rules to be set on organization (especially membership) and procedures (Augsberg 2003, p. 280. Transl. R.B.).

Be that as it may, this *hybrid norm-setting body* issued the Takeover Code, which, as we have seen, was superseded by the Securities Acquisition and Takeover Act, since the Federal Government considered it suitable and right to have the pending EU Directive transposed not into an informal code but into statute law, which, however, largely incorporated the provisions of the code. The adoption of the Securities Acquisition and Takeover Act thus illustrates “*a normative regulatory technique by which the preexisting self-regulatory mechanisms are appropriated by the state and transposed into statute law*” (Augsberg 2003, p. 289. Transl. R.B.).

b) Filling the Regulatory Gap II:  
*Standard Terms of Contract*

In the introductory chapter we addressed this topic under the heading of the gradual decoupling of state and law; we shall therefore be brief. According to Tilman Röder, such standard terms of contract, used above all in insurance and transport, owe their rapid spread to two main factors: the need for standardization in sectors strongly integrated in the global economy, and the lack of legislative regulation, which produced a *regulatory gap* economic actors had to fill. Thus, according to Röder, standardized contractual elements perform “essentially different functions from those of individual agreements between two contracting parties. *Their purposes were in-house rationalization, the exercise of economic power, the systematic displacement of state regulation; and they provided room for permanently updating law.* Only

on the basis of standard form contracts could the more and more complex cooperation, investment, and exchange relations be handled that developed in doing business” (Röder 2006, p. 320 f. Transl. R.B.).

With this in mind, there can be no doubt that these standardization practices have to do with a *process of norm-formation*. Standard contracts steer the behaviour of the market player, who is guided by them and relies on them. What is agreed under them is regarded as the authoritative regulatory regime, which substitutes for, further develops, or even circumvents existing statutory law. We are therefore dealing with a type of rule-setting which recalls “legislative processes rather than contractual practices in industry” (Röder 2006, p. 319. Transl. R.B.).

## 2. Type and Intensity of Regulatory Intervention

### a) *Type of Regulatory Collective*

It is obvious that the intensity of regulatory intervention depends very much on what type of regulatory collective is intervening. It clearly makes a great deal of difference whether one joins a voluntary association to pursue a hobby and socialize – such as an angling or mountaineering club – or enters a “total institution” in the sociological sense of the term such as a prison, monastery or boarding school (Goffman 1961, p. 1 ff.).

Of particular interest in this connection are collectives that depend on and demand a high degree of identification on the part of members with “their” institution or community. We have already discussed this in Chapter 2 under the heading of community-forming normative orders. A contemporary example throws light on the link between *community and regulatory intensity*.

An article from the *Süddeutsche Zeitung*, headed “In the Kingdom of Equality” (“*Im Reich der Gleichen*,” Ulrich 2014) on a fundamental Christian community founded in Tuscany after the Second World War by the Catholic priest Don Zenó, which seeks to present an alternative to capitalist meritocratic society. Ulrich describes the underlying concept of community as follows:

Welcome to Nomadelfia, a community without fences or walls, which wishes to be neither unworldly nor fully of this world. A microstate whose constitution is the Gospel and whose driving force is not competition and consumption but brotherli-

ness. An alternative concept to global capitalism, a microcosm in which there is no unemployment, no pension scheme, no grades or failing at school, no family names, no money, no private property, no careers, and no shops – but also no perfume, no new brand-name clothes, no family vacations, little privacy, and hardly any room for individuality. All have to contribute to the life of the community in accordance with their abilities, all are provided for in keeping with their needs; a van drives through the village distributing toothbrushes, soap, pasta, milk, bread, wine, and olive oil; and 80 per cent of produce is grown locally. No-one is alone, no-one has to feel superfluous. “Neither servant nor master” is the motto of Nomadelfia, where everyone takes a turn at the heavy work, and even the president has to muck out the stable (Ulrich 2014, p. 11. R.B.).

The point that interests us, however is that such close community life has to be organized and regulated. On the subject of organization we read:

If one asks the president of Nomadelfia why his post exists at all in this community of equals and how obedience is to be reconciled with brotherliness, he answers: “Every community life needs a minimum of organization.” That is why he has taken on the job. That is why there is a sort of minister of finance and judge to handle disputes. They are all elected by the assembly of Nomadelfians. And there is also a priest to watch over the heritage of Don Zenò, who has a right of veto over all decisions. He recently vetoed the cultivation of a poisonous African plant to produce biofuel. This just had to be accepted. Francesco, as the president is called, sits at a wooden desk in a cool, bare office under neon lighting. From here he leads the small community in collaboration with a board. They decide who has to do what: take care of the children, run the school, work in the fields, the workshops, or the offices (Ulrich 2014, p. 12. Transl. R.B.).

Above all, *rules* are needed. The communication expert Sefora Sbaraglea reports on her childhood in the community:

An education in the big group had many advantages, she said. You never felt lonely. And there were no “mammoni,” no mummy’s boys in Nomadelfia. Later, as a student in Rome, she managed far better with being away from home than her fellow students from classical families. However, things were not all rosy in her youth. “We children from Nomadelfia felt we were different from the others, and not in a positive sense. As an adolescent you always want to be like the others.” And there were the *many rules and prohibitions of the community*, starting with television. “Often I didn’t understand why I wasn’t allowed to do something.” Pubescent youth rebels in Nomadelfia just as it does everywhere. “Perhaps more strongly because here *there are more rules*” (Ulrich 2014, p. 12. Transl. R.B.).

This Tuscan excursion is instructive. It shows that community life in such social utopias is extremely *needful of regulation* and that such a regulatory regime addresses the *whole human being* and not only individuals in a particular social or professional role. This brings us to the next point.

b) The Object of Regulatory Intervention:  
*The Social Role, the Whole Human Being, the Human Being  
Robbed of Dignity*

Here too, brevity is called for, as much of the subject matter has been already discussed. As we have seen in detail in chapters 2 and 4, *occupational law arrangements*, in particular, affect people only or primarily in their social roles as members of a certain profession (summary May 2008). Such occupational law used to go by the name of “*Standesrecht*” in German and was once closely associated with the concept of honour, whereas nowadays it is understood more and more as a tool of professional quality assurance (see also Schuppert 2011e). *Religious communities*, by contrast, tend to address the faithful not in a given social role but to make their *entire conduct of life* the object of regulation, including rules and prohibitions on dress and food. We need not go into that here.

From the point of view of *regulatory intensity*, rules need to be mentioned that treat people solely as *exploitable labour* and rob them of their dignity with incredible determination and severity. A much discussed example, slavery, will suffice to illustrate this.

Sven Beckert has written a fascinating book on the cotton industry as a prime example of globalizing capitalism (Beckert 2014). Under the heading “privatized violence and the slave trade” he describes the beginnings of the industrial revolution: European states supported merchants and settlers in their search for new sources of wealth, but asserted their own sovereignty over foreign territories and people in remote areas only weakly. Privatized violence (often legitimized by royal warrant), aiming at the dispossession of land and labour, characterized this phase of capitalism. At its heart was slavery (Beckert 2014, p. 51).

As the economic backbone of cotton-produced industrial capitalism, slavery was a legally recognized and well-developed institution, which enable the violent supervision and boundless exploitation of forcibly recruited work slaves. Indeed, slavery was as indispensable for the new cotton empire as good climatic conditions (Beckert 2014, p. 100).

c) *Differences in the Degree of Regulation*

That various sets of norms show differences in the degree of regulation is a phenomenon familiar from national legal systems. In administration science, for instance, it is usual to distinguish between conditional programming, which operates with clear “if-then” propositions and final programming, which works only with targets (see Schuppert 2000). Whereas criminal and fiscal laws require precisely formulated definitions, laws regulating economic affairs generally cannot manage without so-called indeterminate legal concepts, since the complexity and dynamics of the regulatory area would otherwise be unmanageable. This is all well-known and need not be repeated. We have therefore looked for an appropriate example elsewhere, and have found an extremely instructive one in Islamic law, which also provides a bridge to the next point in our study, the sanction system.

As Mathias Rohe writes (Rohe 2009, p. 7), “Islamic law shows varying degrees of regulatory density even at its core.” Family law and the law of succession, as well as religious rules and prohibitions are regulated particularly thoroughly. However, caution is called for with respect to the use of our “concept of law”:

In its broadest sense, the sharia covers all religious and legal norms, the norm-setting mechanisms and interpretational rules of Islam, and thus also the rules on prayer, fasting, and the prohibition of certain foods and beverages such as pork and alcohol, the pilgrimage to Mecca, as well as contractual law, family law, and the law of succession. The corresponding concept of regulation (*hukm*, pl. *ahkām*) also means both legal arrangement / regulation / regime and religious obligation. Thus translating “sharia” by “Islamic law” is a simplification. In substance it would be quite wrong to assume identity with the usual concept of law. “Law” lives essentially from its secular peacemaking function, and in fulfilling this it also makes use where necessary of the coercive authority of the state. What is thus characteristic of law is its enforceability here on earth. This applies to mutual relations between people and other legal subjects and their relations with the institutions of the legal system, nowadays principally the state and its subdivisions.

Compliance with religious rules, by contrast, can be enforced here on earth not through law but at best through social pressure; and contravention otherwise generally has consequences only in the hereafter. This changes only if religious rules are enforced by secular means at the behest of those in power. The essential difference therefore lies not in any claim to binding force – both religious and legal rules are regarded as binding – but above all in the *sanction system* (Rohe 2009, p. 9. Transl. R.B.).



But it is not only this varying density of regulation that characterizes the Islamic normative order. It is also marked by a considerable measure of ambiguity: Islamic law is to be discovered “less in specific provisions than through the theory of legal sources and adjudication (uṣūl al-fiqh)” (Rohe 2009, p. 6. Transl. R.B.). There is therefore often no certainty as to the law:

‘Before the courts and on the high seas we are in the hands of God’ is therefore more likely to apply to Islamic law than to many European legal systems. A Muslim jurist will at any rate not object to the dictum. In applying the law, the notion dear to the philosophy of law that there is only one right decision is generally at odds with reality even where those on the bench have the best of wills and greatest competence. Judicial experience shows that the difficulty of ascertaining the facts of a case and the room for interpretation offered by many norms allows a certain range of possibilities in finding the ‘right’ tenable decision. The more limited the possibilities are for establishing the relevant facts and the less clear the normative situation is, the greater this range will be (Rohe 2009, p. 7. Transl. R.B.).

For this phenomenon, Thomas Bauer (2011a; 2011b) has coined the term *ambiguity tolerance*, which is one of the characteristics and benefits of the Islamic normative world:

Differences of opinion are *inherent in the system* of traditional Islamic law. Within religious norms, too, normative plurality is assumed. Precisely this ambiguity of Islamic law ensures *flexibility*. The plurality of norms facilitates the adaptation of religiously grounded law to changing everyday life (Bauer 2011b, p. 175. Transl. R.B.).

At this point we will do no more than note the importance of the existence of a specific sanction system for determining the “*hardness*” of a *normative system*. Since we have devoted an entire chapter to the plurality of norm enforcement regimes, we refer the reader to that chapter.

## F. Interim Appraisal and Summary

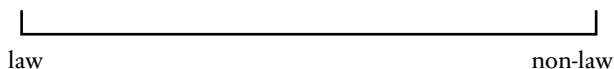
### I. Interim Appraisal: Overview of Indicators

Listing the indicators identified so far in context and weighting them subjectively (● = low; ●●●● = high) produces the following overall picture:

#### Overview of Indicators

<i>Indicators</i>	<i>Counts as LAW</i>
<p><i>Addressee perspective</i></p> <ul style="list-style-type: none"> <li>– Extent of acceptance of non-state rules ●●</li> <li>– Voluntariness of compliance with rules ●●</li> <li>– Perception of rules as heteronomous lawmaking ●●●●</li> </ul>	
<p><i>Rule-setter perspective</i></p> <ul style="list-style-type: none"> <li>– Intensity of lawmaking will ●●</li> <li>– Claimed autonomous or semi-autonomous regulatory power not seriously questioned by third parties ●●●●</li> <li>– Self-assessment of own rule-setting as lawmaking ●●               <ul style="list-style-type: none"> <li>→ Borrowings from state procedures, language, and conceptuality</li> </ul> </li> </ul>	
<p><i>Function-oriented perspective</i></p> <ul style="list-style-type: none"> <li>– <i>Functional equivalence: filling the regulatory gap</i> ●●●●               <ul style="list-style-type: none"> <li>→ Private normative orderings as placeholders for state law; standard terms of contract as substitute for enacted law; transnational regulatory networks as substitute for lacking state regulatory competence</li> </ul> </li> <li>– <i>Type and intensity of regulatory intervention</i> <ul style="list-style-type: none"> <li>→ Type of regulatory collective ●●●</li> <li>→ Object of regulatory intervention: social role, whole human being, human being robbed of dignity ●●●</li> <li>→ Differences in the degree of regulation ●●</li> </ul> </li> <li>– <i>Existence of a specific sanction system</i> ●●●</li> </ul>	

This table is not a subsumption machine, where inputting a certain body of norms produces the only correct answer. It is rather to be seen as a first step towards clarifying what criteria need to be used for locating a body of norms on a continuum:



The distribution of points is merely a suggestion on how indicators could be weighted.

However, it is up to the reader to test the usefulness of the table; we have tried it out on three example and are more than satisfied with the clarity of the results. The three candidates are the following:

- Standards practised and generally complied with on the market, such as the those mentioned by Andreas Engert (2014): the rules of the International Swaps and Derivatives Association (ISDA) and the international accounting standards (independently of their later “promotion” to legal norms of Union law): *they not only look like ducks, they are ducks.*
- *Associational law* such as the rules of international sports associations or the standard terms of contract in the insurance and transport industries examined by Tilmann Röder (2006): *they not only look like ducks, they are ducks.*
- The general principles of the “*lex mercatoria*”: at least at present, their score does not justify classifying them as “law”: they are “ducks” propagated by certain institutions, nothing more.

So far so good.

What still needs to be done is to draw the appropriate conclusions for legal theory.

## II. Conclusions: Summary

In the light of these considerations, we must plea for a broad concept of law that goes beyond state-made law, which nonetheless remains a particularly important type of law. Alongside state-made law, there are undeniably other types:

- Customary law
- International law
- Divine law

If we exclude from the law concept bodies of norms that are purely social norms, such as certain rules of etiquette or social conventions, we are left with the norms “likely” to be law we have been examining the whole time. Our overview table is intended to help investigate the justification of this “likelihood.”

Should it turn out that certain bodies of norms work *in practice* as law – functional equivalence – and are *experienced* as heteronomous legal norms by the addressees, then from an *empirical* point of view we have no problem with seeing them as law. They are manifestations of law different from state-made or customary law, but count as law in the sense of maxims with binding force that control behaviour – the addressee perspective – and order certain areas of life through rules.

Over and above this general conclusion and the oversight table, the reader is owed a definition:

Rules should count as law:

- If they can be clearly attributable to a rule-making authority (rule-setter)
- If the rule-making authority intends them to be law: *intentional lawmaking* (→ use of the language and concepts of state-made law)
- If they are more or less universally *obeyed* by the addressees
- If the addressees *experience* them as law, and specifically as heteronomous law
- If they substitute for state-made law and fill a *regulatory gap*
- If they display a certain regulatory density and certainty
- And if they are backed by a *sanction system* of their own.

We believe that such an empirical, indeed empirically saturated concept of law (Duve 2012) gets us further than merely distinguishing between state-made law to be seen as ‘law proper’ and all other bodies of norms that look as if they could be law to be regarded as ‘law in the sociological sense.’ This also challenges legal science to gain an understanding of itself as a science of regulation – naturally with state-made law as the principle field of study.

This brings to an end our search for the “right” concept of law, in the hope that the reader has been convince that only a broad concept of law embracing various types of law can do justice to the complex and dynamic *World of Rules*.

What still needs to be done is to examine in greater detail a little regarded aspect of governance collectives as regulatory collectives. As we shall be

seeing in the final chapter of this book, communities of law are also communities with specific ideas about justice, and can therefore be understood as communities of justice. We shall be looking at what this means.



## Chapter Six

### Summary and Outlook

#### A. Summary

##### I. Summary 1: Revisiting the Four Key Concepts of Chapter 1

Chapter one introduced four key concepts that were to accompany us over the course of this book:

- Multinormativity
- Governance
- Science of regulation
- Law as communication.

Looking back over chapters two to five will show whether or not this accompaniment has “worked” and the four concepts have proved a feasible conceptual framework for surveying the World of Rules. We believe it to be the case.

- It is quite obvious for multinormativity, which runs like a thread through the entire book. Adopting the multinormativity perspective leads us to consider not only the “usual suspects” presented as evidence of normative multiplicity, but also and precisely such regulatory regimes as the codes of honour of officers and thieves (“thieves in the law”). These examples examined in chapter two demonstrate with particular clarity the key link between the plurality of regulatory collectives and the plurality of normative orders.

The plurality of what we have called “norm producers” – the focal topic of chapter three – ushered different, comparatively “more modern” members of the *World of Rules* on stage, namely the *world of standards* and the *world of codes of conduct*, two realms increasingly flanking the world of state law. Since the entire book is really about normative plurality, no further evidence is really needed to underline the central importance of the key concept multinormativity.

- The governance perspective, whose usefulness the present author has repeatedly lauded, most recently in “Globalization as Governance History” (“*Globalisierung als Governance-Geschichte*,” 2014), has also proved extraordinarily helpful in writing this book. This is particularly true for the ordering and systematizing force of two central governance concepts: regulatory structures and regulatory regimes.

*Regulatory structures* is an especially useful concept where the clear typology of state law no longer adequately captures the diversity of normative orderings. This is particularly true for fields in which the gradual decoupling of state and law – dealt with in chapter one – is strongly evident, for instance in normative orderings usually referred to by such familiar acronyms as:

- www – the regulatory structures of the Internet
- ISO – the regulatory structures of international standardization
- IOC – the regulatory structures of international sport.

These and many other examples show the need for a concept that goes beyond the familiar pattern of primary and secondary legislation, and unfurls an umbrella under which novel and different sorts of regulation find a place that are to some extent “wild,” which, in other words, develop without supervision by some sort of lawmaker. Secondly, the concept of regulatory structures draws attention to the institutional component of rule-making and rule-enforcement, because under the conditions of changing statehood, control through the law operates increasingly in the form of *structural control* (Schuppert 2004a), which steers the the behaviour of chiefly non-state actors not by settling all particulars but by providing a framework for doing so (regulated self-regulation).

*Governance regimes* are task-related institutional arrangements that need not be legally binding in nature. The concept of regulatory regimes has been used above all in connection with the multiplicity of *norm enforcement regimes* examined in chapter four. However, it has proved indispensable where – for instance with the Internet – different types of regulation meet to constitute a regulatory regime in their functional interplay.

- If these comments on the key concepts of multinormativity and governance are even halfway right, they suggest that a new understanding



of legal science is needed for our times: the development of classical *legal science* into a *science of regulation*. If describing and analysing the World of Rules calls for a wide-angle lens, only a science of regulation can ensure the necessary keenness of vision. To be quite clear from the outset, this is not an appeal for the abdication of classical jurisprudence and its dogmatic competence. But the field of vision needs to be broadening to capture the plurality of regulation types and regulatory regimes in their distinctness and interaction. Our concern is therefore not the “everyday” solution of legal problems, for which practice-oriented legal science remains indispensable: we are interested in the conditions for law in a more and more differentiating and globalizing world. The development of legal sociology into a sociology of regulation – a project Max Weber would surely have welcomed – is accordingly indispensable.

We have not been alone in propagating a science of regulation. The Max Planck Institute for European Legal History, as we recently learned, has long been discussing an understanding of legal science as a *science of normativity*, presenting our project in different terminological guise, one perhaps one more acceptable to the legal science community. We shall see.

- The key concept *law as communication* is not as easy as multinormativity and governance to ascribe to specific areas and regulatory regimes. Communication about the law is a more omnipresent phenomenon, although more frequently background music than resounding trumpet solo. Application of the law always involves a multiplicity of interpreters of the law, whether in collegial judicial panels or the successive stages of appeal in the courts, or in dialogue between courts and legal science, which comments on and critically accompanies their rulings. However, there are areas of law production, application, and enforcement in which the communicative dimension of law is particularly prominent. As Thomas Duve has shown, for example, *local law* is made, handed down, and developed communicatively. The cooperative state, which often seeks cooperation with the addressees of its norms, uses the tool of the legislative deal, the phenomenon of negotiated law (e. g., nuclear phase-out).

And in law enforcement – for instance with regard to environmental and climate protection – it is quite usual to discuss the acceptability and feasibility of conditions in advance with the parties affected.

So much for the key concepts introduced in chapter one. Another field also needs to be considered: the justice discourses omnipresent in a pluralistic society. We shall be looking at them in depth in concluding this chapter.

## II. Summary 2: The Close Link between Community Formation and Rule-Setting

One leitmotiv is particularly prominent throughout this book: the link between community formation and rule-setting. Four observations and findings justify this emphasis.

- The double perspective of legal sociology and group sociology reveals that in most cases rule-formation is group-specific rule-formation: groups give themselves rules to stabilize themselves internally while marking themselves off externally. As chapter five has shown at length, the representatives of classical legal sociology are almost unanimous in the view that law has always primarily come into being as *group law* and that it is legal or factual *group pressure* that ensures compliance with these group-specific rules. The example of “thieves in the law” considered in chapter two demonstrates the vital importance of group membership and group solidarity: in more general terms we can speak of the community-stabilizing function of rules regarded as binding by members. This is also why, in the parlance of governance research, we speak of governance collectives and regulatory collectives, since according to our observations every collective constituted in group form has what we could call a *regulatory gene*.
- But it is not only a matter of the community-stabilizing function of rule-formation. Rules also have a *constitutive function for communities*. This can be demonstrated particularly well by two examples: specific personal governance collectives and their constitutive notions of honour (a prime example being the group-specific honour of the officers corps); and community-constitutive normative orderings such as religious orders (a prime example being the often highly elaborate rules of religious orders or of missionary societies such as the Basel Mission).

- Recalling the apt expression “encased in belongingness,” this raises the somewhat communitarian question of how much community people really need. The ubiquitous rule-making in which people indulge suggests that, at least in their capacity as members of groups, social circles (Simmel) or social figurations (Elias), they need not only institutions, as Arnold Gehlen remarks, but also – which often amounts to the same – *rules*.
- This brings us to the fourth and final point of this second summary: the observation that there are many communities that see themselves decidedly as *communities of law*, *communities governed by law*. This is the case – as Paolo Prodi has shown – both for the urban communities that emerged from from “sworn associations/coniurations” (*Schwureinungen*) and for the Catholic Church, which had always understood itself to be a church governed by law.

So much on the link between community formation and rule-making.

What is still missing from this review of pluralities, however, is a look at the justice dimension of every normative ordering, since – it would seem – no normative order can manage without evoking the topos of justice in its particular justificatory narrative (see Forst 2013). But if this is so, the question is whether the World of Rules is also characterized by plural notions of justice, and whether the plurality of legal communities must be seen in conjunction with a plurality of what we shall call communities of justice. It makes sense to turn to this question in concluding this book because considering examples of justice discourses will once again underline the importance of the key concept “law as communication.”

## B. Outlook: From Plural Communities of Justice to Plural Types of Justice

The aim of the following reflections is relatively modest: to consider whether it makes sense to distinguish not only – as in chapter 2 – between different normative orders, each with its own justificatory narrative, but also between variants of justice and injustice as elements in communication about law. The second aim, taking the actor perspective, is to discover who are, or feel themselves to be, affected by various types of injustice, and what they consequently demand of justice in their critique of society.

The objective can therefore not be to contribute to the highly bifurcated debate on theories of justice (see Ladwig 2011 and the Gosepath 2008). The reader is therefore referred to the relevant literature in legal and political philosophy only where it is pertinent to our “lesser” topic: types of justice and communities of justice.

### I. The Plurality of Injustice and its Mirror Image: The Plurality of Claims to Justice

Bernd Rüthers and Christian Fischer point out in their textbook on legal theory that there are “many injustices” (Rüthers and Fischer 2010, p. 25). The various *types of injustice* incompatible with our *notions of justice* of whatever provenance clearly show this. Iris Marion Young addresses the subject in *Justice and the Politics of Difference* (1990): setting out from typical injustice situations, she identifies five “types of injustice.” Her approach is carried by the conviction, which we fully share, that the dominant role played by *distributive justice* in justice discourse risks eclipsing other types of justice and consequently other types of injustice. To counteract this, she chooses as point of departure not ideal conceptions of justice but two societal phenomena that generally lead to certain forms of injustice, namely injustice not towards individuals so much as towards *groups*. These two phenomena are *oppression and dominance*.

While these constraints [through oppression and dominance] include distributive patterns, they also involve matters which cannot easily be assimilated to the logic of distribution: decisionmaking procedures, division of labor, and culture. ...

In this chapter I offer some explication of the concept of oppression as I understand its use by new social movements in the United States since the 1960s. My starting

point is reflection on the conditions of the groups said by these movements to be oppressed: among others women, Blacks, Chicanos, Puerto Ricans and other Spanish-speaking Americans, American Indians, Jews, lesbians, gay men, Arabs, Asians, old people, working-class people, and the physically and mentally disabled. I aim to systematize the meaning of the concept of oppression as used by these diverse political movements, and to provide normative argument to clarify the wrongs the term names (Young 2011, p. 39 f.).

Young lists the following five types of oppression and domination:

- **Classical Exploitation**

According to Young, there are three varieties of “classical exploitation”: since the Marxist conception of exploitation (no. 1) is too narrow, exploitation on grounds of gender (No. 2) and exploitation on grounds of race (No. 3) are included. But these varieties of oppression are only the most obvious. More dangerous are the following manifestations of unjust oppression:

- **Marginalization**

Marginalization is perhaps the most dangerous form of oppression. A whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination. ... [E]ven when material deprivation is somewhat mitigated by the welfare state, marginalization is unjust because it blocks the opportunity to exercise capacities in socially defined and recognized ways (Young 2011, p. 53 f.).

- **Powerlessness**

Powerlessness also designates a position in the division of labor and the concomitant social position that allows persons little opportunity to develop and exercise skills. ... This powerless status is perhaps best described negatively: the powerless lack the authority, status, and sense of self that professionals tend to have (Young 2011, p. 56 f.).

- **Cultural Imperialism**

Exploitation, marginalization, and powerlessness all refer to relations of power and oppression that occur by virtue of the social division of labor – who works for whom, who does not work, and how the content of work defines one institutional position relative to others. These three categories refer to structural and institutional relations that delimit people’s material lives, including but not restricted to the resources they have access to and the concrete opportunities they have or do not have to develop and exercise their capacities. ... [T]heorists of movements of group liberation, notably feminist and Black liberation theorists, have also given prominence to a rather different form of oppression, which ... I shall call cultural imperialism. To experience cultural imperialism means to experience how the dominant

meanings of a society render the particular perspective on one's own group invisible at the same time as they stereotype one's group and mark it out as the Other (Young 2011, p. 58 f.).

- Violence

Finally, many groups suffer the oppression of systematic violence. Members of some groups live with the knowledge that they must fear random, unprovoked attacks on their persons or property, which have no motive but to damage, humiliate, or destroy the person. ... What makes violence a phenomenon of social injustice, and not merely an individual moral wrong, is its systemic character, its existence as a social practice.

Violence is systemic because it is directed at members of a group simply because they are members of that group. Any woman, for example, has a reason to fear rape. Regardless of what a Black man has done to escape the oppressions of marginality or powerlessness, he lives knowing he is subject to attack or harassment. The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation, *solely* on account of their group identity. Just living under such a threat of attack on oneself or family or friends deprives the oppressed of freedom and dignity, and needlessly expends their energy (Young 2011, p. 61 f.).

We have gone into these five variations of oppression in relative depth because they show two things very clearly: the conceptualization of justice as distributive justice is far too narrow, and the people who experience oppression do so not as singular individuals but as members of a *specific group*. As Iris Marion Young puts it in "Five Faces of Oppression" (Young 1990, p. 39 f.) it is about "oppression as a structural concept" and "the concept of a social group." This brings us back to the group-sociology approach that plays such an important role in chapters two and five of this book.

## II. Communities of Justice and their Conceptions of Justice

### 1. The Community-Boundedness of Notions of Justice

The reader is invited at this point to return to chapter two, where governance collectives were examined above all as *regulatory collectives*. The point of departure was the thesis that, without exception, governance collectives give themselves rules to consolidate their internal cohesion and to mark themselves off externally. Generally speaking, governance collectives are also *communication communities*, since collective identity is generated and

perpetuated first and foremost through communication (see Schuppert 2015). But governance collectives are not only regulatory and communication communities, they are also what we could call justice communities, in the sense that “the self-conception of specific communities is important in grounding norms of justice” (Gertenbach et al. 2010, p. 120. Transl. R.B.). In our view, which we share with such authors as Michael Sandel (1982) and Charles Taylor (1989), there is a direct link between “the question of the role of the social context ... in the self-conception of society members on the one hand and the *grounding of norms of justice on the other*” (Gertenbach et al. 2010, p. 125. Transl. R.B.). In what follows we pursue the thesis that notions of justice – we are not speaking about an established concept of justice – are community-determined ideas and values; that justice as we understand it is therefore always *context-dependent justice*. A typology of types of justice demonstrates this.

## 2. Plural Types of Justice – An Attempt at a Typology

A first attempt to distinguish between different types of justice could take the following form:

- Distributive justice
- Procedural justice
- Recognitional justice
- Participative justice
- Retributive justice
- Reconciliatory and compensatory justice

To begin with distributive justice: there are two reasons not to go into any detail here on this variety of justice. First, the concept so dominates all expositions of justice theory that yet another thumbnail sketch would be superfluous. Second, the discourse on the criteria of distributive justice is above all a global one (Hinsch 2001; Rogge 2001); this means that it is a discourse about criteria for universal validity (see Gosepath 2001, p. 153 ff.). An unstructured global arena is too vast a framework for the majority of discourses on justice: what is needed for purposive debate on justice is a common structural and institutional framework.

[I]t is not geographical ties that make a group of people into common subjects of justice but their mutual admission to a common structural or institutional framework; this framework provides the basic rules that guide their social interaction and

shape their mutual life opportunities in the form of advantages and disadvantages (Fraser 2007, p. 361. Transl. R.B.).

After these preliminaries, we turn to the range of generally group-specific types of justice:

a) *Procedural Justice*

Since a generally accepted substantive definition of justice is lacking and indeed impossible for democracy-theoretical reasons, it seems obvious that the justice problem needs to be *proceduralized*. However, proceduralization is not to be understood only as an emergency exit in a compensatory, instrumental sense, but – as social-psychology studies have shown (Bierbrauer 1982) – also has the charm of increasing the *acceptance of distributive decisions* where the people involved feel the procedures used to be fair and reasonable. Recognition of this functional link has triggered broadly based research in the United States into procedural justice and in Germany to a marked upgrading of the procedure concept (Lerche et al. 1984); Klaus Röhl:

In the United States, far-reaching empirical research has developed on “procedural justice.” Studies have shown that the people involved and observers alike judge procedures, regardless of their outcome, as more or less just or fair, and that this assessment is of considerable importance for the question of whether the outcome is accepted as just or not. In Europe, the perspective of proceduralization has been elaborated in the sociological discussion on “reflexive law,” and here as in the USA, “procedural justice” has become an important topos in legal philosophy. It is asserted that modern society lacks any objective or generally agreed yardstick for the just distribution of life opportunities and risks. It often seems easier to reach agreement on procedure than on distribution itself. As a consequence, material distributive criteria are elaborated only during proceedings; or completely replaced by procedures. Last not least, jurisprudence has discovered the “added value” of procedures. One need only recall the buzzword “protecting basic rights through procedure” (Röhl 1993, p. 1 f. Transl. R.B.).

In determining what constitutes just procedure in the eyes of the parties involved, procedural justice research offers two approaches: the *self-interest model* and the *group value model*.

The self-interest model, propagated principally by Thibaut and Walker (1975), assumes the existence of the utility-maximizing individual, familiar under the label “homo oeconomicus,” who faces conflict management procedures in which a third party – a judge and/or jury – settles the conflict; so that the egoistic utility maximizer has little scope for influencing the out-



come of proceedings. The obvious strategy is therefore – as Astrid Epp explains Thibaut and Walker’s argument – to exert as much influence as possible on decision-making proceedings (Epp 1998, p. 28 ff.). This model grounds in ideal-typical notions about American and Continental European legal procedure; the American model under which the parties have considerable control over proceedings is “naturally” given preference over the European model. Astrid App comments:

At the heart of studies ... was a comparison of two types of legal procedure: the adversary model and the inquisitorial model. The adversary model, the “prototype” of American legal procedure, gives parties much of the control over the course of proceedings with respect to the presentation of evidence, the calling of witnesses, and discovery of facts. Moreover, the opposing parties decide themselves when fact-finding is concluded. The inquisitorial model is closer to Continental European legal procedure in the field of public law, under which the court or administrative authority has sole control over proceedings and also decides when to conclude examination of the facts of the case. The decisive difference between the two types of legal procedure lies in the level of influence that parties have on proceedings. The results of this comparison, which shows a marked preference for the adversary model, leads to an instrumental view of what constitutes fair proceedings; proceedings are accordingly fair if the parties are given the opportunity to assert their interests to at least some extent (Epp 1998, p. 29 f. Transl. R.B.).

As the name of this model indicates – and this is the decisive point – it is a question of the values that play a role in assessing the adequacy of the procedure: group values or community-specific values. The parties to the proceedings who are to be treated justly are thus not atomistic individuals but individuals who are members of a specific group or community. In “Intrinsic Versus Community-Based Justice Models: When Does Group Membership Matter?” Tom R. Tyler and E. Allan Lind (1990) clearly state that:

Group-value theory draws on findings from the literature on group identification effects in its attempt to explain when and why people are concerned with procedural justice. Group-value theory argues that people are concerned about the fairness of procedures not only because they care about the outcome of those procedures. They also view procedures as one of the most important defining features of groups and societies: procedures are seen as a manifestation of the group’s underlying values. How a person is treated under a given procedure is thought to be indicative of the person’s status within the group, and people regard receiving unfair treatment as threatening to their status within the group or society. Because group-value theory views group-related variables as especially powerful determinants of procedural justice concerns, it predicts that group membership and a sense of community will be crucial variables in justice-related attitudes and behavior (Tyler and Lind 1990, p. 87).

Some have had serious reservations about this *group value theory* (Epp 1998, p. 36 f.), and “group” does indeed remain a vague concept; however, what is important for our purposes is only to clarify within procedural justice the shaping force of community-specific notions of justice and the importance of respecting them in the given procedures. We shall be dealing with this in greater detail when looking at *recognitional justice*.

b) *Recognitional Justice*

aa) *From the Struggle for Recognition to the Status Injury of Social Groups*

With regard to recognitional justice, Axel Honneth’s important contribution to the subject in *The Struggle for Recognition (Kampf um Anerkennung, 1994)* immediately comes to mind. Rainer Forst sums up Honneth’s line of argument as follows:

Honneth’s interpretation of the struggle for recognition ... is the most comprehensive attempt to distinguish between different stages of reciprocal recognition that develop in a dialectic of interchanges about the mutual recognition claims for autonomy and individuality. These stages correspond – in positive regard – to different self-relationships and – in negative regard – to differing experiences of the denial of recognition, which in the struggle for recognition of equal rights and unique individuality drive each stage attained to go beyond itself. From this perspective, it is possible to distinguish between the following stages: love, mutual recognition as legal person, and the solidary recognition of individuality on which the self-confidence, self-respect, and self-esteem (or self-overestimation) of persons build (Forst 1996, p. 416 f. Transl. R.B.).

Honneth, like Charles Taylor (1989), is primarily concerned with the demand for reciprocal recognition among individuals, that is to say with recognition as a prerequisite for what Nancy Fraser calls *self-realization* (Fraser 1998). With Nancy Fraser, we consider this problem of granted or denied recognition outside the narrow context of personal self-realization, treating it as a justice issue involving above all the recognition or non-recognition of social groups. Nancy Fraser:

On the first question [“Is recognition really a matter of justice, or is it a matter of self-realization?”], two major theorists, Charles Taylor and Axel Honneth, understand recognition as a matter of self-realization. Unlike them, however, I consider it an issue of justice. Thus, one should not answer the question “what’s wrong with disrespect?” by saying that it constitutes an impediment to the self-realization of the oppressed. One should say, rather, that it is unjust that some individuals and

groups are denied the status of full partners in social interaction simply as a consequence of institutionalized patterns of cultural value in whose construction they have not equally participated and which disparage their distinctive characteristics or the distinctive characteristics assigned to them (Fraser 1998, p. 3).

This approach, according to Nancy Fraser, has two main advantages. On the one hand, it becomes clear that a lack of recognition is really a *problem of participative justice*:

What makes misrecognition morally wrong, on my view, is that it denies some individuals and groups the possibility of participating on a par with others in social interaction. The norm of participatory parity is nonsectarian in the required sense. It appeals to a conception of justice that can be accepted by people with divergent views of the good life, provided that they agree to abide by fair terms of interaction under conditions of value pluralism (Fraser 1998, p. 3).

On the other hand, it becomes clear that the “misrecognition” – for example of Blacks, women, Latinos, or homosexuals, is less a problem of individual misrecognition than a question of misrecognition of individuals as members of a given social, ethnic, or religious group. Fraser aptly calls this *status injury*:

Treating recognition as a matter of justice has a second advantage as well. It conceives misrecognition as a status injury whose locus is social relations, not individual psychology. To be misrecognized, on this view, is not simply to be thought ill of, looked down on, or devalued in others’ conscious attitudes or mental beliefs. It is rather to be denied the status of a full partner in social interaction and prevented from participating as a peer in social life as a consequence of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect or esteem. This approach avoids difficulties that arise when misrecognition is understood psychologically. When misrecognition is identified with internal distortions in the structure of self-consciousness of the oppressed, it is but a short step to blaming the victim. Conversely, when misrecognition is equated with prejudice in the minds of the oppressors, overcoming it seems to require policing their beliefs, an approach that is authoritarian. On the justice view, in contrast, misrecognition is a matter of externally manifest and publicly verifiable impediments to some people’s standing as a full member of society. As such arrangements are morally indefensible whether or not they distort the subjectivity of the oppressed (Fraser 1998, p. 3 f.).

#### *bb) The Struggle for Recognition as a Struggle for Respect of Collective Identity*

As a rule, the struggle for recognition is preceded by experience of misrecognition for the individual or collective identity. But what exactly is to be understood by identity?

Identity, according to Hartmut Rosa, is “the specific individual relation of social subjects to themselves and the world. It is not about the external identifiability of a person but about his or her self-image and self-conception, i. e., about a person’s lived and only partly reflected-upon question ‘Who am I?’ Collective identity can similarly be described as the answer to the question ‘Who are we?’ (as cultural, ethnic, religious, or political group) (Rosa 2007, p. 47. Transl. R.B.).

Thus an individual and a collective “sense of identity that provides orientation” can be distinguished (ibid, p. 49). But the two are not unrelated: they interact. Hartmut Rosa:

Whereas individual identity addresses the question ‘Who am I?’ collective identity is concerned with ‘Who are we?’ a question that arises and is expressed in joint practice. The process by which individual identity emerges from collective identity to then shape the latter in return, is a key subject of dispute in the “battle for the self” between liberals and communitarians ... The “we” of the collective self-determination process varies with categories of identity: we “Catholics,” “men,” “students,” “environmentalists,” “ravers,” “Europeans,” and so forth: the categorial building blocks of individual identity always relate to collectives, which are actually or supposedly connected by common experience, practices, language, notions of the Good, etc. At the same time, however, such groups are clearly not to be understood as “super-subjects”: every allegation of unity is potentially ideological and normative in nature, or suppresses or denies differences; every possible definition of “being a Christian,” for instance, excludes deviating self-conceptions. The concept of collective identity is accordingly controversial in the social sciences ... It should, however, be remembered that individual identity formation is not only a process of identifying the particular individual, a process of personal identification, but always one that ascribes a social identity to that individual (“you are a woman,” “a Jew,” “gay”). Individuals and groups are therefore always obliged to engage in dialogistic (and conflictual) clarification of collective identity: What does it mean to be a woman, a Jew, a gay? The result is the struggle in identity politics for the recognition of minorities, which has gathered momentum in the political debate since the 1990s in democratic countries. Authors who incline towards communitarian-republican positions also argue that a discursively open self-understanding about who we are and want to be is a precondition for policy-making in democratic polities ... (Rosa 2007, p. 51 f. Transl. R.B.).

Caroline Emcke (2000) distinguishes two – often overlapping – ideal types of collective identity: “intended, self-identified collective identities and ways of life” (type I), and the “unintended, subjectivizing construction of collective identities” (type II) in which identity is ascribed – willy-nilly – from without. She sees the two types of collective identity as generating different *demands for recognition*:

Type I cultural collectives want to be recognized in this identity. Individual members accordingly want to be recognized as belonging to it. The recognition relationship these groups aspire to is confirmation of their identity and legal protection for their practices and convictions. They wish to be recognized as equal members of society in their capacity as individuals and as members of a distinct group. In this case, recognition consists in affirmation of cultural difference in conjunction with acceptance of parity as morally responsible individuals entitled to cooperate and participate on an equal footing in a culturally differentiated society (Emcke 2000, p. 320. Transl. R.B.).

Things are different in the case of ascribed, heteronomous collective identities:

Type II collective identities, by contrast, do not wish to be recognized as “what they are”: “what they are” is the ambivalent product of acquired offensive description and assessment and rebellion against an alien, humiliating identity and life situation.

To recognize the members of such groups in their cultural distinctiveness in the above sense would merely reproduce the experience of misrecognition that had contributed to forming their identity, and continues to confirm individual persons in identity contexts with which they do not wish to identify. If a recognition relationship requires recognition of the constitutive connection between identity and the “responsive behaviour of the Other,” the members of type II collective identities must be recognized differently than members of type I collective identities. No positive, substantive definition is needed of “who they are.” Wendy Brown fears that the recognition of injured identity serves only to stabilize this unwanted identity, thus driving members to “voluntary” commitment to their own subjection (“assujettissement”).

The danger can be avoided by not recognizing members in the sense of “confirming” their identity as “what they are” but in what has been done to them. To this end, this study attempts to define the various forms of moral injury and social exclusion (Emcke 2000, p. 321 f. Transl. R.B.).

We shall be coming back to the recognition of injustice done under the heading “reconciliatory and compensatory justice.”

### c) *Participative Justice*

Nancy Fraser points out that recognitional justice is closely related to so-called participative justice. It nevertheless makes sense to treat it under a separate heading for two reasons. First, the concept of participative justice takes us into the broad field of participation in democratic decision-making processes, and in this context to the much discussed phenomenon of falling voter turnout and the still unsolved problem of how social selectivity can be

avoided in civic participation, a selectivity that has been discussed in depth by Johanna Klatt and Frank Walter (2011) under the heading: “Superfluous in Civil Society?” (“*Entbehrliche der Bürgergesellschaft?*”). Second, the concept of participative justice leads us to another interesting strand in the justice discourse, namely the so-called *capability approach* developed above all by Amarty Sen (1993) and Martha Nussbaum (2000).

In the current justice discourse, the former chairman of the Council of the Evangelical Church in Germany, Wolfgang Huber, published an article on “Just Participation” (“*Gerechte Teilhabe*,” Huber 2015) that captures the general mood of the present debate. Under the heading “From Distributive Justice to Participative Justice,” he argues in three steps:

First he discusses what is to be understood by “social justice,” addressing the function of *distributive justice*:

[Social justice] is associated with the sort of guarantees the political order gives individuals to ensure a life under fair conditions. The mitigation of serious social differences comes into focus. Distributive justice comes onto the agenda. The state is called upon to overcome social discrepancies, close the gap between rich and poor, and save people from poverty. Some see this as a bottomless pit. Major questions arise: Who are the intended beneficiaries of distribution by the caring state? All citizens or all human beings? Both refugees and the established population? Both young and old? Talk about the “boat being full” or a “Methuselah plot” paint the shibboleth of the overburdened state on the wall. A population under pressure ask themselves when the strain of high taxes and charges will be lifted. When will the demands of the distributive state transmute into restrictions on the freedom of those up front called upon to pay? This, too, is a matter of justice. The people affected must at least be convinced that their money is well invested.

However, Huber continues, distributive measures alone will not bring justice:

Distribution is indispensable to alleviate the consequences of poverty and give people a halfway acceptable standard of living. But overcoming poverty requires more than that. In the long run, the state will manage to preserve its citizens from poverty only if it succeeds in activating them. Taking care of their immediate needs cannot suffice; this depends on enough people being in a position to care for themselves and others. Distribution alone brings no justice; it presupposes that enough people can contribute to the national product by their own efforts. A society can muster the strength for solidarity only if it gives the citizenry opportunities for active participation.

Because redistribution alone does not suffice, it is necessary to move from distributive to participative justice:

The step from distributive justice to participative justice is therefore necessary. Participation is as important as distribution, enablement as important as securing the necessities of life. If we are to understand justice as a community virtue, then it must be above all an activating justice that enables people to make use of their gifts and to contribute to the life of the community. Whoever wishes to escape the revolving door effect of the welfare state must open the way to social participation and prevent it from immediately slamming shut again (Huber 2015, p. 7. Transl. R.B.).

After considering these three frequently discussed types of justice, we conclude our *tour d'horizon* with two further varieties of justice that demonstrate particularly clearly the community-boundedness of notions of justice and the link between collective identity and claims for justice.

d) *Retributive Justice*

aa) *An Introductory Tale*

In “Revenge, Compensation, and Punishment: An Overview” (*“Rache, Wiedergutmachung und Strafe: ein Überblick”*), one of the two authors gives the following account set in Somalia:

In the early 1990s, when an international force was in Somalia in the context of the UNOSOM Operation, a Somali boy once got into the Bundeswehr camp in Beled Weyn and was shot dead by the guards. The local elders insisted that the boy had been unarmed and had had no evil intentions. They demanded blood money from the Germans. The weregild for a boy or man among Somalis was one hundred camels. The Germans refused to pay on the grounds that the boy had entered the camp without authorization and that the soldier who had fired the lethal shot had acted in keeping with regulations and therefore bore no guilt for what had happened. Payment of blood money amounted to a confession of guilt and was therefore out of the question.

In an interview with me, the broadcaster Westdeutsche Rundfunk wanted to learn who was in the right. I explained that blood money had nothing to do with a confession of guilt in the moral sense. In the event of killing or injury through accident, with or without gross negligence, compensation was also claimed. To pay weregild is therefore not dishonourable, and no face is lost. ... The Germans would therefore have to admit to no more than a simple misunderstanding and would have cut a good figure by expressing their regret over the loss of a human life and their willingness to provide compensation. And the hundred camels? Wouldn't that have exceeded the defence budget? They would probably never have had to be paid, for there is room for negotiation or discursive strategies. One could have pointed out that the Germans prefer economic activities other than camel breeding and

therefore have no camels. In converting the compensation to be paid into monetary terms, there would have been a great deal of leeway for reduction. I could imagine at \$ 100 per camel, a total of \$ 10,000 would have been a good, round, symbolically acceptable sum (Schlee and Turner 2008a, p. 49 ff. Transl. R.B.).

Whether one finds the proposed solution convincing or not is beside the point. However, it does away with a number of obvious misunderstandings.

- Since the retribution concept often has an archaic aftertaste, it should be made clear that – with the exception of the blood feud – it rarely involves excessive violence.
- Claims for compensation relate not to guilt but to the consequences of an act that constitute an injury of legal interests; the amount can – not unlike penance – be established on the basis of a scale of rates.
- Compensation is essentially negotiable and offsettable.

This tale having disposed of the bloodthirsty and archaic reputation of the retribution concept, we turn briefly to the functional logic of the principle of retribution; after all, the great legal theorist Hans Kelsen asserted that retribution was the key, essential characteristic of justice (Kelsen 1941, 1953).

#### *bb) The Functional Logic of the Retribution Principle*

In “Operational Contexts of the Retribution Principle in Conflict Resolution” (“*Wirkungskontexte des Vergeltungsprinzips in der Konfliktregulierung*”, 2008b) Bertram Turner and Günther Schlee identify three aspects important for the functional logic of the retribution principle.

- The first is the principle of reciprocity:

The point of departure for modern social-scientific research on retribution rules is realization of the fundamental importance of the principle of reciprocity, of balancing performance and counter-performance, action and reaction. Retribution is a part of this.

Reciprocity is thus the really fundamental axiom. Actors evoke human interaction in every conceivable constellation. In various social fields and contexts of action, it assumes specific form. The balanced or symmetrical exchange of gifts in the form of strongly formalized exchanges of presents and economic forms of cooperation are an expression of this. The ethical norm requires one to “do as one would be done by”. This is often called the golden rule, an expression of mutual respect that provides a basis for modern human rights (Schlee and Turner 2008b, p. 7 f. Transl. R.B.).



- The second characteristic of retribution is the proportionality of injustice and compensation, a relationship that is open to legal regulation:

Retribution is grounded in the proportionality of injustice and compensation – which presupposes the fundamental social equality/equivalence of actors – and not a proportionality of reaction that weighs up differences and takes account of differences in rank. This tension is to be found throughout the sources and contributes to the diversity to be found in the concrete application of the retribution idea.

Since the earliest old-oriental and biblical times, the sources show a consistent tendency towards strict regulation of retributive practices. However, the rules do not indicate whether they apply to a prior state of unregulated retribution. By far the most frequent matters requiring settlement are determining who is party to a conflict, the legitimate aims of retribution, and the compensation due for precisely defined violations of norms (Schlee and Turner 2008b, p. 12. Transl. R.B.).

- The third aspect important for the logic of the retribution principle is that assertion of retribution claims and their execution are a matter for the collective to which the injured party or victim belongs or belonged; to exercise retribution is a matter for the given *solidary community*.

In societies without central political authorities or acephalous societies, responsibility for deviance is, at least largely, conceived of as a collective capacity. What is more, disputes are not settled in anarchy or by bowing to the right of the stronger. Conflicts confront groups or constellations of groups of solidary members in negotiations on potential courses of action ranging from escalation to compromise, and who have to keep public opinion in mind; to take into account what the views of the majority of society not involved in the conflict (Schlee and Turner 2008b, p. 25. Transl. R.B.).

### 3. Reconciliatory and Compensatory Justice

This heading points to a specific case of historical injustice concerned primarily not with claims to justice of persons or groups who have suffered or are suffering this injustice themselves but with claims of later generations who demand amends or compensation for injustice done to earlier generations. This is the topic addressed by Lukas H. Meyer in “Historical Justice” (*“Historische Gerechtigkeit,”* 2005), to which we shall be referring in what follows. Meyer is concerned with a variety of *intergenerational justice*, not with single individuals but with ethnic and/or social *groups* seeking justice. The two groups or communities Meyer looks at are the Sami (Lapps) and the

Sinti and Roma, groups that have played a prominent role in a recent migration debate in Germany (in early 2014).

Meyer outlines the collective identity of the Sami as follows:

The Sami see themselves as a particular ethnic group and wish to retain their identity. As a group they have certain objective characteristics, namely their own language, common descent, and a common material and intellectual culture. Their traditional way of life differs from that of the surrounding population in both socio-cultural and socio-economic regard. The Sami have experienced and are menaced by considerable discrimination and policies that undermine their traditional way of life. In effect, the Sami have always found themselves in an economically and socially subordinate position, namely as non-dominant minority in the national societies in which they live. The surrounding population regard the Sami as indigenous and treat them as such in law and administration. At least in comparison with other indigenous peoples, the Sami have recently been quite successful in attaining a certain measure of internal self-determination or autonomy. In Finland, Norway, and Sweden they have been able to establish elected representative bodies, the Sami parliaments (Meyer 2005, p. 142 f. Transl. R.B.).

Things are somewhat different for the Sinti and Roma:

The majority of the Roma population in Europe lives in Central and Eastern Europe and in the Balkans. Except in Spain, the Roma have never constituted a notable section of the population. However, they are considered a significant minority in most Central and Eastern European countries. In Western Europe, the Roma and Sinti have developed a form of service-oriented nomadism as a way of life and survival strategy. In Central and Eastern Europe, the Roma have frequently been incorporated in the local labour market, which has meant abandoning their nomadic way of life and gathering in large Roma ghettos.

The Roma lay claim neither to a particular cultural affinity with a given territory nor to historical continuity on the basis of descent from earlier inhabitants of the countries in which they live. They do not assert any territorial claims. They differ from other minorities and national minorities in that they have no homeland or “mother country.” The fact that they lack a “Romanistan” has frequently led to the Roma being denied the status of a “people,” a “nation,” or even a “minority.” The concepts “people” and “nation” are closely associated with that of a home country. Even the concept “minority” is understood as requiring a connection with a certain territory or mother country. Only recently have a number of European countries come to recognize the Roma as a legitimate minority.

There can be no doubt that they are a cultural and ethnic minority. The Roma see themselves as a distinct ethnic and cultural group. As groups they display certain objective characteristics. They are of common descent and share a culture. They have their own language, a specific organizational structure, their own legal system, their own literature, music and special customs. How the Roma see their own identity is strongly influenced by their historical experience of the worst forms of exploitation,

discriminatory politics, and forced assimilation, and continuous defencelessness against these and other violations of their rights (Meyer 2005, p. 143 f. Transl. R.B.).

Now that we have more of an idea about the groups involved, we turn to two aspects Meyer addresses that are important for our discussion.

- The first point is that the groups that derive claims from historical injustices done to earlier generations can be understood as *communities of remembrance*; the ties that establish the common collective identity are ties of memory. Meyer:

Living members of transgenerational groups assert claims in their capacity as descendants of the victims of historical injustice. Being an indirect victim is considered relevant for justifying specific claims for restitution and compensation. ... People can have a sense of togetherness on the basis of shared experience. If this is indeed the case, such experience is often one of extraordinary if not traumatic nature. Now it is important that it is the significance given to the event and not the event itself that can create a remembrance community. Collective remembrance is not to be understood as a collection of individual memories but rather as a social practice of articulating and maintaining the “reality of the past.” Often it is the narrative itself, the continuous articulation of the asserted “reality of the past” that forms and shapes a community. Active, shared commemoration regarded as important for the self-definition of the community is needed. This community is defined by the personal importance of remembrance and not by personal testimony to past events. The relevant collective remembrance relates to the shared understanding of the heritage regarded as binding.

Even if remembrance communities do not have to be grounded in a history of suffering, there are some very convincing examples of the supportive force innate in the shared remembrance of oppression. More perhaps than anything else, living commemoration of suffering creates solidarity. The remembrance of oppression and suffering serves to unify the community because of its particular emotional strength and because self-definition as a victim permits the dividing line between “us” and “them” to be clearly drawn (Meyer 2005, p. 137 f. Transl. R.B.).

- The second important point has to do with the content and objectives of the demands made, which range from symbolic justice to material compensation:

It is always a matter of fulfilling historical duties and realizing the corresponding claims. Sometimes symbolic justice has priority for (indirect) victims, who may demand, for instance, that the still dominant group admits its guilt. In other cases, it is about redistributing power and material compensation. In still other cases, (indirect) victims see their low status as a particular ethnic and cultural group and their attitude towards the surrounding, still dominant population as consequences of the historical injustice suffered. They may demand that their just claim to

autonomy and special rights to representation in decision-making and advisory bodies be recognized. Moreover, the group can find themselves illegitimately denied access to their historical territory or denied the exercise of political sovereignty over this territory. The members of the group can call for territorial concessions, for cultural and political autonomy, or for the right to self-determination by secession (Meyer 2005, p. 140. Transl. R.B.).

This brings us to the end of our journey through the various types of injustice and to the end of our exploration of the World of Rules. Our expedition concludes with confidence that we have gained at least some understanding of the diversity and multiple facets of the World of Rules. Many readers will not have agreed with every twist and turn we have taken; yet this book is the outcome of long and not always straightforward cogitation, reflecting what has preoccupied the author for many years. He wishes to thank all his readers for patiently accompanying him on his intellectual perambulation.

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## About the Author

Among his other roles, Gunnar Folke Schuppert is a fellow at the Max Weber Centre for Advanced Cultural and Social Studies at the University of Erfurt. Now emeritus, he formerly held the ‘New Forms of Governance’ chair at the WZB Berlin Social Science Center, where he headed the Rule of Law Center. He held the chair for *Staats- und Verwaltungswissenschaften* (Theories of the State and Administration) at the Humboldt University of Berlin, and he has also taught as an adjunct professor at the Hertie School of Governance.





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