The World of Rules

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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 (Schimank 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 Arnauld 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 spokespersons 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 advan-
tages. Wilson posits that the evolution of homo sapiens from nomad to sed-
entary 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 bods 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
coordinate 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 in based on a biological instinct for the common good of the tribe, put in place by group selection, 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 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. Whenever 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. 366f.).

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 no 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

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 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 from 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, typified 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 relativised 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 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 Köttler 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 (šəmagəlle) 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 šəmagəlle 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 šəmagəlle 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 šəmagəlle is above all interested in upholding social order and peace in the community (Mengesha 2008, p. 82f. 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 chieftancy 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 be 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

- **FACE-TO-FACE TIES**
  - Problem viewed as that of whole community/group
  - High degree of public participation
  - Process “voluntary”
  - Informal procedure / flexible rules of evidence
  - Absence of professional representation

- **SOCIAL PRESSURE**
  - Victim central
  - Restoration of social harmony
  - Like cases need not be treated alike
  - Process “voluntary”
  - Law / customary norms considered in reaching solution based on overall context
  - Law / customary norms considered in reaching solution based on overall context

- Victim central
- Restoration of social harmony
- Like cases need not be treated alike
- Process “voluntary”
- Absence of professional representation

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

**FORMAL STATE SYSTEM**

- **WEAK COMMUNITY TIES**
  - Victim sidelined
  - Punishment of rule-breaker
  - Problem viewed as that of the offender

- **STATE COERCION**
  - Public participation minimal
  - Process involuntary
  - Fixed retributive penalties
  - “impartial” judge appointed by State
  - Due Process required
  - Decision based on strict rules of law
  - Strict rules of evidence and procedure
  - Professional representation required

The Plurality of Normative Orders. An Exploration
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 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’ān, 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 marjī’ 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’fārī school [in usul al-Din and fiqh], and this principle will remain eternally immutable. *Other Islamic schools*, including the Hanafī, Shāfī’ī, Mālikī, Hanbalī, and Zaydi, 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’fārī] 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 of 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 (positiue) 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 theologa” 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 compen-
dium 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 *Dece-
tum Gratiani* of 1140, which was a “private collection of legal texts of the

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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 its 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 become 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*.  

The Plurality of Normative Orders. An Exploration
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 coexisting 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.

\[\text{a) Non-State Self-Regulation in Micro-Societies or Governance by Reputation: The Example of Diamond Merchants in New York}\]

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. 53f. 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. 56f. 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 publicity 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.
Augsburg 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 lawmaker 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 seigniorial 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 commonweals, 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, Gralf-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 lawmakers:

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 Wurttemberg, 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 fur-
nished 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 cor-
porative 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:

[When the amendment to the criminal law on personal affronts was under dis-
ussion 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 rime 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 who it largely owed it 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 plausible 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 Kaiserrreich 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 (Frevert 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 Frevert 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 fulfill 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 (Frevert 1995, pp.79–81).

According to Ute Frevert, 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 unimpeached validity** and can assume the appearance of an artificial product, the stabilization of which requires the employment of external means (Frevert 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 “honorary 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,”\(^1\) 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.

\textit{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).
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 ...


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 “avtoritāt” 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 avtoritets 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. 7f. 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 Füser 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 (Füser 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, Füser 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 exampla 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 (Füser 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 Füser 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 legitimation 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 Pictist 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.”