Chapter Three
From Plurality of Normative Orders
to Plurality of Norm Producers

A. What is to be Discussed in this Chapter

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

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

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

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

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

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

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

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

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

It also fits in particularly well with the actor perspective, which is always in the background. Anyone visitor to an arena knows that you have to distinguish between stage, backstage, and audience – the latter responding to the happenings on stage with varying intensity. Relations between actors performing their roles in an arena are *communication relations* and can be described and analysed as such.
II. Sally Falk Moore’s *Semi-autonomous Social Fields*

In “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” the legal ethnologist Sally Falk Moore examines two social fields – the American clothing industry and the tribal society of the Chagga in Tanzania – to discover what *rules of the game* really influence behaviour. There are three possibilities: state-made law, at any rate law from outside the *social field*; rules made in the social field itself; or a mix of the two with variable degrees of authoritativeness. She formulates the issue as follows:

The concept of the semi-autonomous social field is a way of defining a research problem. It draws attention to the connection between the internal workings of an observable social field and its points of articulation with a larger setting. ... Theoretically, one could postulate a series of possibilities: complete autonomy in a social field, semi-autonomy, or a total absence of autonomy (i.e., complete domination). Obviously, complete autonomy and complete domination are rare, if they exist at all in the world today, and semi-autonomy of various kinds and degrees is an ordinary circumstance. Since the law of sovereign states is hierarchical in form, no social field within a modern polity could be absolutely autonomous from a legal point of view. Absolute domination is also difficult to conceive, for even in armies and prisons and other rule-run institutions, there is usually an underlife with some autonomy. The illustrations in this paper suggest that areas of autonomy and modes of self-regulation have importance not only inside the social fields in which they exist, but are useful in showing the way these are connected with the larger social setting (Moore 1973, p. 742 f.).

Her observations indicate that external state-made law naturally plays a certain role as general setting, but that the real *rules of the game* are made and practised within the given social field. They can dominate actor behaviour in the shape of an *informal parallel order*, or a *pre-existing autonomous social group* can confront and more or less “outflank” state reforms with its own normative system.

In the American clothing industry, the well functioning of the sensitive fashion sector appears to depend very strongly on personal relations between designers and retailers, and particularly on the exchange of favours. Moore comments on the functional logic of this informal parallel order:

*A whole series of binding customary rules* surrounds the giving and exchange of these favors. The industry can be analyzed as a densely interconnected social nexus having many interdependent relationships and exchanges, governed by rules, some of them legal rules, and others not. The essential difference between the legal rules and the others is not in their effectiveness. Both sets are effective. The difference lies in the
agency through which ultimate sanctions might be applied. Both the legal and the non-legal rules have similar immediately effective sanctions for violation attached. Business failures can be brought about without the intervention of legal institutions. Clearly neither effective sanctions nor the capacity to generate binding rules are the monopoly of the state (Moore 1973, p. 743 f.).

The case of the Chagga, settled in the Kilimanjaro area, is quite different. In our terminology, the situation is that the governance and regulatory collective of the Chagga has a traditional governance regime for land use; a regime under which neighbourhood and lineage plays a decisive role. However, the government formed after the independence of Tanzania tried to impose a radical change of course:

For example, in 1963, the Independent Government declared that from then henceforth there would no longer be any private freehold ownership in land, since land as the gift of God can belong to no man but only to all men, whose representative was the Government. ... All freehold land was converted into government leaseholds by this act, and improperly used land was to be taken away (Moore 1973, p. 731).

Predictably, these measures met with resistance from the Chagga and were seen as encroachment on their traditional regulatory autonomy:

The second example, that of certain attempts to legislate social change in Tanzania, shows the same principles in a less familiar milieu. Here neighborhood and lineage constitute a partially self-regulating social field that, in many matters, has more effective control over its members and over land allocations than the state, or the “law”. The limited local effect of legislation abolishing private property in land and establishing a system of ten-house cells demonstrates the persistent importance of this lineage-neighborhood complex. The way in which this legislation has been locally interpreted to require only the most minimal changes suggests something of the strength of local social priorities and relationships. The robustness of the lineage-neighborhood complex, and its resistance to alteration (while nevertheless changing) suggests that one of the tendencies that may be quite general in semi-autonomous social fields is the tendency to fight any encroachment on autonomy previously enjoyed (Moore 1973, p. 744).

This suggests that the rules of the game comprise both state-made law and other bodies of norms (social norms, customary law), but that in effect non-state norms predominate:

The law (in the sense of state enforceable law) is only one of a number of factors that affect the decisions people make, the actions they take and the relationships they have. Consequently important aspects of the connection between law and social change emerge only if law is inspected in the context of ordinary social life. There general processes of competition – inducement, coercion, and collaboration – are effective regulators of action. The operative ‘rules of the game’ include some laws and
some other quite effective norms and practices. Socially significant legislative enactments frequently are attempts to shift the relative bargaining positions of persons in their dealings with one another within these social fields. The subject of the dealing and much else about the composition and character of the social field and the transactions in it are not necessarily tampered with. Thus, much legislation is piecemeal, and only partially invades the ongoing arrangements. Hence the interdependence or independence of elements in the social scene may sometimes be revealed by just such piecemeal legislation (Moore 1973, p. 743).

What we find convincing in Moore’s semi-autonomous social field concept is the notion of the graduated autonomy of non-state norm producers. It is this specific partial autonomy – whether based on tradition, network-like social relations, expert knowledge in the sense of epistemic authority, or whatever – that makes the actors in a given field into norm producers. We shall be coming back to this.

III. Thomas Duve’s Fields of Normativity

Duve convincingly shows that legal or normative spaces can be successfully explored and described only if we free our perception from a “container concept” of legal history:

Again, even a cursory look at early modern empires shows that it may indeed not be useful to abide by territorial concepts of space in our research, usually even guided by the ordering of the world into homogeneous areas which originate in the world of the fictitious authority of nation states. Would other frames of reference, like point grids, for example of global cities, settlement centres, and mission stations, or even networks with nodes in the harbour and trading cities perhaps not be more adequate frameworks for research? Do we have to concentrate on secular civil law to (re)construct our traditions? Or could other frames of reference which are no longer defined by territory but by types guide our research? Our “container-concept” of legal history in Europe saves us from asking ourselves these productive questions – by the way questions which might be seen as pivotal for today’s general jurisprudence concentrated on law in a diverse and global world (Duve 2013a, p. 16).

This passage draws attention to what we could term “point grids” or “nodes” of legal spaces, such as global cities, mission stations, or networks. This is extremely important because legal spaces, too, are structured spaces “inhabited” by specific actors who communicate the law and about the law.

But Duve also draws attention to a second important point. To grasp the essence of normative spaces requires first a multidisciplinary approach and second the placing of normative fields in their specific cultural context:
The analytical tools needed by a science that takes a world of “multinormativity” seriously can be ... obtained only through an empirical approach that captures and orders fields of normativity, and thus through an empirically grounded and interculturally validated model of different forms of normativity. This needs cooperation between disciplines that address not only law but various socio-legal arenas – and which are hence not always pursued in faculties of law. The expertise of ethnologists, sociologists, cultural scientists, religious scholars, and others is required.

However, such a transdisciplinary rather than interdisciplinary approach is needed not only for a transnational legal science and its transcultural communication about law. This points to what legal theory and the sociology of law have long demanded anyway: the abandonment of a liberal arts oriented, philosophical, or historicochermeneutic concept of law as the basis for jurisprudence. The focus has thus shifted to science-of-actuality, empirical legal concepts. From a cultural studies point of view, the issue is the analysis of law as a societal system of symbols, with all its historical contingencies. This has important consequences for the links between jurisprudence and other disciplines. Law is then no longer to be seen as a phenomenon somehow embedded in a culture: it is culture itself that produces law. In order to analyse this law, the rules of cultural production have to be understood, which requires a number of disciplines to be drawn on. Legal theory, the sociology of law, as well as legal history as the locus of research into the evolution of law with all its historical contingencies assume a constitutive function for this process of integrating other disciplines (Duve 2013b, p. 10 f. Transl. R.B.).

This is a truly demanding research programme, but one that makes sense and is well worth contributing to.

IV. The Organizational Fields of Paul DiMaggio and Walter Powell

What the organizational field, a concept situated on a somewhat different level, is doing in this context needs explaining. We came across it (DiMaggio and Powell 1983) in connection with one of Thomas Duve’s normative point grids, namely the mission societies and their normative products: so-called mission regulations.

Hartmann Tyrell (2004) has examined the impressive variety of Protestant mission societies, particularly from the organizational sociology perspective. This quite unusual approach allows Tyrell to treat mission societies as organizations of a special type operating in an interesting semi-autonomous social field. On this normative field, markedly distant from both state and established Church, he notes:

[Mission societies] are [a subject of research in organizational sociology] as specialized religious organizations beyond Church and sects, as organized actors with
transcontinental and ... “transcultural” reach; as organizations in a field of mutual observation and imitation, competition and cooperation with one another and within a network of clearly global dimensions; and as specialized religious organizations beyond state and Church. The denominational diversity of Protestantism and a Europe-wide (and transatlantic) network of supra-denominational “neo-pietist” and “awakened” milieus form the social basis of the missionary movement. But the organizational form chosen is that of the “voluntary association” (Tyrell 2004, p. 77. Transl. R.B.).

As voluntary religious associations, which do not see themselves either as extensions of the state or the established Churches, they depend in considerable measure on the motivation of their members and – as fundraising institutions – on the generosity of their supporters:

As far as activation is concerned, [religious associations] depend strongly on moral solidarity and a certain “voluntary” but consensually directed “commitment” on the part of their members. Such inevitable reliance on the motivational resources of members and on the mobilization of the broader “mission community,” which donates and prays ... is particularly typical of mission societies. The enthusiastic beginnings “driven by the spirit of love” are part of the founding legends of almost every society. But then, as their complexity grows, they come under the pressure of multiplying tasks and obligations and consequently find themselves on the road (very much in the sense of Max Weber) to bureaucratization and growth (Tyrell 2004, p. 81. Transl. R.B.).

As professionalized and bureaucratized institutions, they had to operate in an organizational field densely “populated” by other mission societies, which led to growing competition and mutual observation. This unconnected coexistence of mission societies was increasingly felt to be unsatisfying. To remedy the situation, interdenominational and international conferences were convened after 1850 with growing regularity at which the problems facing the shared Protestant faith could be discussed:

Not by chance, this started in Asia: from 1855 in India, from 1872 in Japan, and from 1877 in China. The multifunctionality of these conferences is understandable. Over and above the conclusion of agreements and the resolution of disputes, they were – with regard to information, consultation, and personal contacts – invaluable as venues for “exchanges” among missionaries and societies, and were thus to some

1 In South Africa in 1872, there were, in addition to the Berliners, the Moravian Brethren Mission, the London Mission Society, the South African Mission Society, the Methodists (Wesleyans), the two Scottish mission societies, as well as the Rhineland, Paris, American, and Norwegian mission societies, the Hermannsburg Mission Society, also the Episcopal-Anglican and Finnish missions, and well as the Roman Catholics (Tyrell, footnote 316).
extent resembled markets. Not least of all, it was praying and worshipping together
that furthered a “spirit of unity” and Protestant brotherliness. After 1900, special joint
institutions were established above the individual societies, for example a Standing
Arbitration Committee in India (1902). ... Conferences were then organized at the
national and to some extent at the supranational level, as well as in the home coun-
tries. Bremen, for example, welcomed the Continental Missions Conference, a series
of gatherings at irregular intervals with delegates from French, Dutch, Scandinavian,
and German societies. The national mission councils embarked upon the establish-
ment of an umbrella organization with great hesitancy; ... Germany led the way with a
joint “committee” set up in 1885 endowed with special authority; its task was to
represent the societies vis-à-vis the Colonial Office. Further developments cannot
be gone into here, but it is easy to see that the “isomorphic principle” of learning,

As we see – and this is important – institutions, especially norm producers,
have not only to be placed in their specific cultural context but also exam-
ined against the backdrop of the organizational environment. It is essential
to look closely at this specifically structured organizational field, because it
can explain the organizational behaviour of an institution, which can of
course also influence the nature of its norm production.

After these methodological considerations, we can now look in greater
detail at some of the normative fields we have selected.

C. A Tour through Five Normative Fields and to the
Norm Producers they Accommodate

I. Societal Subsystems and “Their” Law

Two examples will show that societal subsystems tend themselves to develop
the rules necessary for their specific functional requirements – especially
when the state cannot or does not wish to provide what is needed (on the
providing function of law see Schuppert 1993). These examples are the “law
of the economy” and the “law of sport.”

1. The Law of the Economy

One of the most important subsystems whose well functioning is essential to
the well-being of a society is “the economy.” Economic processes are trans-
actional processes, and to keep transaction costs low transactional processes
require a reliable legal environment. The link between economic rationality
and the production of legal certainty by a polity under the rule of law is unlikely to be denied.

Where reliable rules are lacking – for instance, in the transnational domain not subject to national regulation – “the economy” itself takes action as norm producer, giving itself, as it were, the rules that facilitate transactions in global markets or even enable them in the first place. Dieter Grimm describes this sort of norm production as follows:

Beyond states and beyond international organisations, forms of lawmaking are spreading over which the two no longer have any influence. Global markets create legal arrangements quite independently of politics. More and more, multinational corporations, represented by international law firms, are concluding agreements that no longer fall under any national legal order or jurisdiction. In the event of conflict, international arbitration tribunals decide, which are expected to apply transnational law they have largely made themselves in the course of application, and which spreads by analogy to similar cases (Grimm 2003, p. 19. Transl. R.B.).

Thomas Duve argues in the same vein, observing that a veritable market for law practised alongside state structures has developed in recent decades:

A mass of new non-state norms and decision-making institutions has developed – in the field of the Internet, in the economic field, in sport; ...

The importance of this law beyond the bounds of national or even supranational institutions is by no means limited to Europe, to industrial countries, or areas of intensive legal cooperation. On the contrary: the growing integration of so-called developing and newly industrialized countries into the world economy as production locations or raw material suppliers has in many regards subjected local populations to rules and practices that are neither local, state, nor international, but set solely by non-state actors. “Global governance” has produced rules and enforcement tools that in their impact on states or people are comparable to or even surpass the classical control of behaviour and sanctioning of misconduct through law. Safeguards developed in state legal systems against the accumulation of market power, control mechanisms, and legal protection authorities are frequently ineffectual in this space of non-state action, often with serious consequences for people. Owing to hopes aroused by modernization theory (law and development; theories of legal transplant, etc.) and not least because the export and import of law and the associated services have increased substantially since the 1990s, a market for such “law” practised alongside state structures with concomitant communicative and institutional networks has formed (Duve 2013b, p. 6. Transl. R.B.).

But law made by the economy itself is not – as one might think – merely a consequence of transnationalization and globalization, and hence a thoroughly modern phenomenon. As long ago as 1933, Hans Großmann-Doerth had already discussed the relationship between the self-made law of the
economy and state law, taking standard business terms as his example. He described general standard terms and conditions explicitly as “law” and consequently treats the relationship between the self-made law of the economy and state law as an instance of applied normative plurality:

I call standard business terms “law,” in contrast to state law, the self-made law of the economy. This is an extension of the “law” concept: unlike state law, standard business terms do not apply without further ado for the individual contract but only on the basis of a corresponding agreement between the parties, thus by virtue of the intention of the parties. This distinction is certainly not unimportant: the courts have to ensure that in the individual case standard business terms do not come into effect against the intention of the contracting parties; and they have effective – albeit not always sufficiently exploited – means to act against this self-made law. But the practical importance of this distinction from state law should not be overestimated. Agreement on standard business terms as lex contractus of the individual contract is purely a matter of form in many areas of economic life. These legal norms must be in conformity with the intentions of the parties to be effective, but societal powers regularly loom behind them that ensure that these intentions are supplied. Over and above this, standard business terms are in the same position as state-made law. Not drafted by the parties to the individual contract but rather independently of them and often with no provision for alteration, standard business terms, like state law, are a power that determines the contractual relationship from without. In my view, this similarity in societal position justifies calling standard business terms “law.” This is no mere terminological issue. I use this designation time and again, as today, to indicate the true meaning of a development to which jurists usually pay too little attention. I certainly do not call standard business terms law because I approve of this development but, on the contrary, because I consider the coexistence of the two legal orders, state law and economic law, to be a highly problematic matter (Großmann-Doerth 2005, p. 78 ff. Transl. R.B.).

All three authors show that this self-made law is not born without subject, so to speak, nor in the lap of a vague civil society, but that specifiable actors are at work: big international law firms (as we shall see), the communicative and institutional networks identified by Duve, or industrial and business organizations, generally with professional legal “coaching.”

We now move on to standard-setting as a prime example of a semi-autonomous field for the self-production of norms by the economy.

a) **Standards and their Semi-Autonomous Field:**
**Standards as Norms of the Economy for the Economy**

The conviction with which most standard-setters regard their norm production as a service to the economy is revealed by a 2002 article in a Süddeutsche...
Zeitung report on an interview with the then president of the German Standards Institute (DIN) Dietmar Harting under the heading “The Lord of Standards.” Harting explains the link between standardization and globalization and the function of product standards to open up more and more international markets:

The various standards are the precondition for marketing products worldwide and for successful participation in globalization, said Hartung. He is certain that “Whoever sets the standard makes the market.” The president of the institute knows only too well what he is talking about. He is general partner of the Harting Technology Group, which has become the biggest producer of electronic connectors in the world thanks not least to consistent standardization work. ...

For the company head and DIN president, this success is proof that standards open up markets and promote the fast implementation of innovative ideas in marketable products. Standards are set above all by industry for industry. But they are not binding rules but only recommendations based on broad consensus.

The standardization committees, on which some 26,000 experts collaborate, representing firms, testing institutes, public authorities, research and development, as well as environmental and consumer protection organizations, look for common solutions. The cost of this democratic standardization apparatus is enormous. The Fraunhofer Institute for Innovation Research puts the annual cost of standardization work in Germany at some € 700 million.

On the debit side, however, at least € 16 billion are saved by the painstaking harmonization undertaken by the DIN. The work also commands respect abroad. Some 90 per cent of the standards set by the DIN are now used outside Germany, as well (Uhlmann 2008, p. 20. Transl. R.B.).

Situating a certain type of norm in a given semi-autonomous field does not, however, mean that this is for all time. Bodies of norms can, so to speak, “emigrate,” from the private locus of origin into the public sector. One interesting example of such a shift from the private sector to the domain of the state are international accounting standards. Sebastian Botzem and Jeanette Hofmann report on their “migration”:

The second case example is the genesis of transnational private standards for corporate accounting. Emerging from an association-based harmonization project dominated by experts and of initially questionable character as an alternative to state regulation, an effectual private organization developed over three decades whose standards have been accepted almost throughout the world and with increasingly binding status. The development of the originally discretionary standardization project has been marked by the growing integration of important – also critical – actors. On the other hand, it has also been tied into the public hierarchy, above all
where transnational standards have been recognized (Botzem and Hofman 2009, p. 226. Transl. R.B.).

Such cases – Sebastian Botzem and Jeanette Hofmann’s other example is regulation of the Internet infrastructure – therefore involve the interactive dovetailing of private and state actors and the emergence of mixed, i.e., public-private regulatory arrangements:

The \textit{interdependence of private and state actors in transnational rule-making} produces empirical oscillation between private and state-dominated governance arrangements. In other words, our comparison shows that changes in governance structures are not, as often assumed, linear, either as denationalization or more recently as “re-regulation” ... but are rather a process of oscillation between different forms of transnational norm-setting. Empirical comparison reveals different phases in interaction between private and public actors and underlines the dynamism of transnational standardization. However this case comparison also shows that the oscillation involved is not merely a return to the point of departure. \textit{Actor constellations undergo organizational and functional changes in the course of negotiations.} For the present at least, there is a great deal of evidence that actors’ perception of problems, organizational structures, and legitimation strategies tend to harmonize ... This also shows a double dynamic of transnational regulatory arrangements: in the content of regulatory measures and the \textit{design of public-private regulatory arrangements} (Botzem and Hofman 2009, p. 227 f. Transl. R.B.).

\textbf{b) The Norm Producers: Non-State Actors as Standard Setters}

Institutions that produce standards are called standard setters. As Anne Peters et al. (\textit{Non-State Actors as Standard Setters}, 2009c) show, such institutions are predominately non-state actors. In their introduction, Anne Peters, Lucy Koechlin, and Gretta Fennner-Zinkernagel explain this increase in the importance of non-state regulatory actors mainly in terms of the general shift in weight between market and state brought about by transnationalization and globalization, evidenced especially in the erosion of the \textit{state monopoly of regulation}:

On all levels of governance, standard setting (norm formation or regulation), is no longer the exclusive domain of states or governmental authorities. The role and the capacity of increasingly diverse and polymorphous non-state actors involved in standard setting are expanding. Also, the processes by which norms are shaped are becoming more varied. Finally, the rapidly growing number of national, sub-national, and international standards has increased these standards’ diversity, but also regulatory overlap and norm conflicts.
The context in which the proliferation of non-state actors’ standard setting occurs is well known. Globalisation, liberalisation and privatisation waves which swept the globe in the 1980s and 1990s have contributed to shifting the focus away from the state as the sole source of regulation. The result is the often referenced blurring of the public and the private sectors. The integration of national economies into a world economy has diminished or at least modified the authority of the state and has pushed its regulatory capacity to its limits both in substance and in terms of territorial scope. Policy issues that have formerly been treated at the level of nation states, for instance environmental pollution, migration, or organized crime, are increasingly understood as phenomena with global scope and global roots which cannot be tackled in a satisfactory manner through national standard setting (Peters et al. 2009b, p. 1 f.).

For Peters et al., two types of non-state actor play a key role: NGOs and TNCs (transnational corporations). Since these two types of governance actor will be dealt with separately at a later stage, the focus here is on another typology of standard setters displaying the mixture of state and non-state actors mentioned.

Hans Christian Röhl (Internationale Standardsetzung, 2007) proposes four types of standard-setting clearly demonstrating that standards and standard-setters should always be thought about in conjunction, because in this area of non-state rule-making the connection between the two is not nearly as evident as between legislation and legislator, regulation and regulator. Whereas when considering the classical sorts of lawmaking, the author of the norm is always at the back of one’s mind, this is simply impossible when it comes to the multitude of standards and standard-setting actors. This is confirmed by Röhl’s four types of standard-setting, which are rather four types of standard-setting organization:

1. Standard-setting in the framework of the ISO (International Organization for Standardization). Standard-setting here takes the form of private law, which, however, builds on collaboration with national standardization organizations. Such – non-binding – standards are set by a quasi-private institution. Their purpose is above all to coordinate the behaviour of private parties. They are important for European law because the European Committee for Standardization (CEN) bases its standards to a very large degree on ISO standards or sets them in cooperation with the ISO. But CEN standards (and their national transpositions) also play a key role in the context of the European product safety policy “new approach”.

2. Codex Alimentarius: the Codex Alimentarius Commission sets food standards, which are also non-binding. These standards are set with the backing of two international organizations (FAO/WHO). States are formal collaborators. Unlike the ISO, this is an institution under international law. Much more
strongly than in the case of the ISO, transposition into national law is the aim of these non-binding norms.

(3) The third example is rule-making under the aegis of organizations governed by international law that set standards on amendments to appendices to international treaties. This – so to speak – secondary international law is intended to be transposed into national law. This can be illustrated by agreements in the field of transport: the International Civil Aviation Organization (ICAO) established by the Chicago Agreement, and the International Maritime Organization (IMO).

(4) Finally, there is a trend towards standard-setting by exclusive organizations that do not seek general international accessibility. They can be based on cooperation between public authorities, for instance cooperation in the Basel Committee for Bank Regulation, or even be purely private organizations like the International Accounting Standards Board (IASB), which sets the rules of international accounting, International Fiscal Reporting Standards (IFRS) (Röhl 2007, p. 321 f. Transl. R.B.).

2. The Law of Sport

The law of sport is association law. This is simply because, in Germany and throughout the world, sport is association sport. Uwe Schimank:

Sports clubs and sports organizations equivalent to clubs are embedded in sports associations. Sports associations are in the first place organizations of persons who practise sport – usually a particular type of sport. ... they exist for almost every type of sport – one example being the German Football Association (DFB) – and also as overarching organizations – such as the German Sports Confederation (DSB). National associations are in turn embedded in international associations. Sports associations have a number of functions ... They set the rules for the given type of sport and monitor compliance with these rules in competitions, ratify wins and records, organize and coordinate competitions, and represent the sport externally – especially vis-à-vis state authorities (Schimank 1988, p. 191. Transl. R.B.).

Sports associations’ strong position is due mainly to the so-called one-association principle, which gives them a de facto monopoly of rule-making, a constellation that Klaus Vieweg describes as follows:

The one-association principle states that a single association should be exclusively responsible for each sport (specialism component) and that for a defined territory only one association should exist (territorial component). The variants that can be derived from this permit the establishment of specialism/territorial monopolies of international and national sports associations. This facilitates control over a sport practiced in accordance with uniform rules and helps avoid conflicts of competence. The one-association principle has been universally adopted in the statutes of world-
wide international sports associations, continental and regional sports associations and organizations. There are practically no major exceptions (Vieweg 1990, p. 66. Transl. R.B.).

Because all this runs so well, sports associations and their members treat the relevant rules as “their” law, which, as Vieweg stresses, is in keeping with the sociological facts:

The common interests of the association and the typical member is to obtain the status of legal norm for association rules. This is the best way to establish association norms as part of an overall ordering that is binding on all members and cannot be individually negotiated. Acceptance of the rules as legal norms corresponds to the sociological facts of the case. It finds expression in the titles given to the statutes and secondary rules of German sports associations: “Grundgesetz” (“basic law”), “Gesetze” (“laws”), and “Ordnungen” (“regulations”) (Vieweg 1990, p. 323. Transl. R.B.).

The power of sports associations also – until the ruling of the Munich Higher Regional Court of 15 January 2015 – rested strongly on the monopoly they claimed of arbitration; athletes participating in international competitions were required to sign a declaration that they recognized the sole competence of the disciplinary commissions of the given association and the Court of Arbitration for Sports (CAS) in Lausanne as the final court of appeal for all arbitral decisions “to the complete exclusion of the ordinary courts.”

The decision of the Munich court has now toppled this pillar of association power, ruling that any such requirement is illegal because it constitutes an abuse of a market-dominating monopoly position. Recourse to the ordinary courts is now open. This is seen as an important milestone because – as the court convincingly argued – of the structurally predominance of association representatives in these arbitration tribunals.

But the court’s ruling is interesting not only because in the Pechtstein case it put an end to the monopoly of the sports association in dispute resolution but also because, in stating the grounds for its decision, the court argued above all in terms of cartel law, emphasizing the economic nature of the organized practice of sport in a manner that shows the law of sport to be almost a subsystem of the law of the economy. To begin with, the plaintiff Claudia Pechstein was presented as follows: “The plaintiff is an internationally successful speed skater, who earns her living by practising this sport.” Particularly interesting, however, is what the court had to say about the
entrepreneurship of the International Speed Skating Association – the second defendant:

For the purposes of the enterprise concept underlying the Act on Restraints on Competition, an economic activity is any activity consisting in offering goods or services in a given market. If this precondition is met, the circumstance that an activity is connected with sport poses no obstacle to application of the rules of competition law ... Sports associations are to be seen as enterprises in so far as they operate in the market for sporting events ... because they offer the corresponding services.

Substantively relevant in this dispute is the market for organizing world championship competitions in speed skating.

The second defendant holds a monopoly in the relevant market for admission to speed skating world championships, and as market-dominating enterprise is the addressee of Section 19 (1 and 4 (2)) of the Act on Restraints on Competition.

On the market for organizing world championships in speed skating, the second defendant is the sole offeror owing to the one-place principle and due to the lack of competitors therefore dominates the market as monopolist in accordance with Section 19 (1 and 4 (2)) of the Act on Restraints on Competition. Under Section 19 (1 and 4 (2)) of the Act on Restraints on Competition, a market-dominating enterprise is forbidden to demand remuneration or other terms and conditions that deviate from those that would with strong probability prevail in effective competition. The second defendant was therefore not allowed to demand the consent of the plaintiff to the arbitration agreement of 2nd January 2009 (OLG München, partial judgement of 15/01/2015, Marginal no. 77 ff. Transl. R.B.).

In sum, sport and commerce are close companions, united also in their tendency not only to give themselves their own rules but also to withhold legal disputes from the jurisdiction of the state and entrust them to arbitration tribunals.

After this instructive excursion into the apparently close-knit world of the economy and sport, we turn to another normative field, the world of basic rights.

II. Fundamental Rights as Collective Ordering Phenomena and Supra-Individual Fields of Meaning

Thomas Vesting et al. in their treatment of basic rights as phenomena of collective ordering (Vesting et al., 2014) draw our attention to the circumstance that fundamental rights with their protected areas both open up and legally circumscribe specific normative fields. In their preface they state:
In the current view, legal positions protected by basic rights are largely equated with individual freedoms. The guiding principle is the autonomy of the individual subject. From this standpoint, “collective” or “institutional” aspects of fundamental rights protection beyond the individual dimension are only a secondary phenomenon that derives from the primary individual freedom. ... The contributions to this volume put this common conviction to the test. The authors address the extent to which traditional basic rights theory and dogmatics systematically underestimates the trans-subjective societal content expressed in basic rights (Vesting et al. 2014, p. V. Transl. R.B.).

Consideration of the basic rights particularly prominent in this connection – the freedom of organization, the freedom of religion, and the freedom of occupation – shows that such institutionally protected areas can be understood as normative fields, as semi-autonomous social fields in which specific types of norm producer operate. A closer look at the arguments put forward by some of the authors in this volume will throw light on this insight.

1. The Collective Understanding of Fundamental Rights

Thomas Vesting et al. seek to counter the subjectivist understanding of fundamental rights with a collective understanding. Under the heading “the priority of the whole – as rule and institution,” the editors outline their collective or rather institutional approach as follows:

Precisely this [collective] aspect is nowadays largely ignored by prevailing basic rights theory and dogmatics. The individual is taken as a self-evident reality instead of recognizing that all the (necessary) state structuration of basic rights practices is preceded by the self-organization of society through an infrastructure comprising social norms, institutions, practices, conventions, and ways of life, which produces subjects and a collective order among subjects; that is to say, sets rules of co-existence. This way of seeing things objectifies subjects as subjects of freedom only to place them in relation to an (also objectified) collective order of society, which is understood as instituted by the state or democracy.

This overlooks the pre-existing dependence of the individual on rules and institutions. This oversight leads to a misunderstanding of the institutions, which then appear to be merely permanent “institutional complexes” in the public space. Instead of thus narrowing the concept, it should be defined more broadly as a “totality of actions and ideas” that have “completely established themselves”; “institution” accordingly means the sum of the “ways of acting and thinking that the individual finds already in place and which are generally transmitted through education”... Modern society in particular must be conceptualized as depending on an abundance of scattered practices and institutions. In the theoretical language of institutional analysis, we could also speak of norms as decentralized societal mechanisms that regulate behav-

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Thomas Vesting adopts a particularly programmatic stance in his article on the collective understanding of basic rights. First, he rejects the container conception of fundamental rights underlying the view that they are rights of defence: “The notion of defence against encroachment shows the subject of basic rights as a sort of closed container, as an ‘individual,’ who ‘holds’ or ‘possesses’ freedoms like things, whereas vice versa the state faces the abstract and closed individual as a similarly abstract and closed legal personality” (Vesting 2014, p. 62. Transl. R.B.). To counter this approach he proposes the concept of a culturally embedded individual:

The point of departure is now not the freedom of an isolated individual but the notion of a individual who is already culturally embedded, who is for his part already entangled in specific narratives and who, through his own actions, his practical life, himself contributes to reproducing neighbourly forms of basic-law subjectivity: as a father bringing up children, as a consumer of media, as entrepreneur, or as amateur yachtsman. The subject of fundamental rights must be conceptualized as inseparably interwoven with the horizon of human experience and its pre-reflexive components. In this cosmos of basic-rights theory, the self-reflexivity and self-determination of subjects in pursuit of their possibilities and ways of life are naturally included. However it is assumed that a self open to the future and which takes on the social world and its constraints is possible only because individuals are already in norm-controlled relationships with one another, are already part of an existing way of life, already have neighbours before the state comes into play (Vesting 2014, p. 73. Transl. R.B.).

From this basic position, Vesting comes to an understanding of basic rights as fields of meaning. With reference to Husserl, he notes:

The insights of phenomenology undermine the widespread notion in conventional basic rights theory and dogmatics that it is possible to capture basic rights as explicit corpus, an institution laid down in a document and hence strictly separate from all external references – such as moral norms, social conventions, and practical knowledge. Phenomenology redirects basic rights theory. From its perspective basic law theory must emphasize the embeddedness of all fundamental rights in networks of practical relationships, which would mean treating these rights as inseparable from complex social fields of meaning and cultural life worlds – not only because this is in better keeping with the facts, but also because basic-rights normativity is constituted in the first place only through practical (life-world) networks of relations and communication, which are themselves normatively structured. In short: there is no freedom of art without the institutions and conventions of the art world, no freedom of religion without the “particular domain” of lived religions, no freedom of property and contract without a practical culture of market economy, no media freedom
without journalism, publishers, media firms, etc. Basic rights would then have to be construed as primarily impersonal rights, and the individuals that assert them as *interactional participants in a network of relations and communication that always surpasses them* (Vesting 2014, p. 70 f. Transl. R.B.).

These lengthy observations justify use of the term “normative fields” in the sense of semi-autonomous social fields to capture the notion of institutionalized basic-rights fields of meaning in the context of this discussion.

2. Reference Areas for Normative Fields Protected by Basic Rights

In what follows, we look at three reference areas focused on constellations of fundamental rights “not limited (solely) to protecting the individual subject of basic rights” but which have an overarching impact dimension and/or presuppose a supra-individual concretization component” (Augsberg 2014, p. 165. Transl. R.B.). Such an “overarching impact dimension” is particularly well illustrated by our first example, the freedom of association and organization.

a) The Freedom of Association and Organization

The collective character of these basic right guarantees is especially evident in the freedom of association. Under the heading “the collective element in economic basic rights,” Steffen Augsberg (Augsberg 2014) notes:

- Obviously, the *freedom of association* directly concerns the concept of people joining forces to form collective entities. Even if associations themselves are not regarded as protected under Article 9 of the Basic Law, the separate but by no means normatively singular (see, e.g., Art. 4 (140) of the Basic Law) emphasis on organizationally consolidated and stabilized human contacts is not to be understood only as strengthening protection of the individual personality; as a “principle of free social group formation” it has an intrinsic value recognized by constitutional law, but attributed functionally to democracy governed by the rule of law.

- Furthermore, the *institutional guarantees that are to some extent read into* Art. 9 of the Basic Law can (also) be developed in collective regard. ... This means not only an obligation on the part of state institutions to provide “a sufficient diversity of forms of law” (BVerfGE 84, 372, 378 f.) but is also implicitly to be understood as including the creative potential of norm addressees that can be exploited only together with others (Augsberg 2014, p. 168 f. Transl. R.B.).
The freedom of organization is a normative field of largely autonomous private law production protected by basic rights. Steffen Augsberg:

- This brings us already to a field of law that, while shaped by constitutional law, also has an intensive life of its own and is subject to active development by the courts: *collective labour and industrial action law*. This not only provides a particularly drastic example of the general debate on relations between the first and third branches of government; *precisely in this context there have recently been complaints about a “loss of constitutional thinking”* ... Criticism has been directed against a line of development in adjudication and literature under the heading of “new law of industrial action,” which, although recognizing the individual and collective guarantees under the freedom of organization nevertheless neglects the institutional dimensions ...

- Finally, the *legal institution of the declaration of general application of collective agreements* should be mentioned as an example of the application of a concrete organizational/procedural effect dimension. This institution allows the state to extent the binding application of agreements to non-participants. This form of “private lawmaking,” which replaces individual by collective legitimation or at least supplements the first by the second, is acceptable (only) because there is not only a long, pre-constitutional tradition to this effect in collective bargaining law but also because Article 9 (3) of the Basic Law provides a specific basis in constitutional law for this form of cooperative lawmaking (Augsberg 2014, p. 169 f. Transl. R.B.).

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*b) Freedom of Occupation*

The freedom to choose an occupation or profession protected by Article 12 (1) of the Basic Law does not stress the collective component so strongly, first because the Federal Constitutional Court has emphasised above all the importance of practising an occupation for developing the individual’s personality, and second because the phenomenon of professional organizations and their law production is measured above all against the yardstick of the freedom of association. But from the functional point of view, the professions and their law – from canons of professional ethics to codes of conduct – undoubtedly belong within a broad normative field of freedom of occupation.

Steffen Augsberg has his sights on another interesting topic, namely how job profiles arise and who has the right to “invent” them:

It is also recognized ... that not only occupations that present themselves in specific, traditional, or even legal prescribed occupational descriptions are protected. The
freedom of occupation also covers atypical activities chosen and shaped by the individual subject of fundamental rights; the concept of occupation or profession is accordingly broad and regarded as in principle “open (to development).” What is therefore required is a model that builds on the creativity of the practitioner, a model that takes account of the factual plurality and diversity of occupational forms and does justice to the basic-rights interest in maintaining and protecting this variety. Given the tendency in legal practice to fix occupational descriptions permanently through normative, particularly statutory requirements, the preferability of such a liberal approach should be underlined. This does not preclude the state from defining professions and occupations; but such definition must be recognized as a restriction of liberty and not be accepted as mere demarcation of protected areas. But it would also be wrong to understand as solipsistic a return to an open conception of the freedom of occupation and the concomitant autonomous right of practitioners to shape and invent occupations. On the contrary, it offers a collective, interactive element in the sense that the right to design and invent occupations regularly and implicitly presupposes the societal recognition of a certain activity, thus tending to oppose unilateralism (Augsberg 2014, p. 173 f. Transl. R.B.).

In short, the normative field of the freedom of occupation has strong internal dynamism.

c) Freedom of Religion

But the prime example for the correctness of an (at least also) collective understanding of fundamental rights is the freedom of religion. We cite three authors on the subject:

- The first, Stefan Korioth, has this to say about the collective character of the freedom of religion (Korioth 2014):

  Like the other fundamental rights of communication ... the freedom of religion depends particularly strongly on an infrastructure of societal habit and communication opportunities. What distinguishes the freedom of religion from fundamental rights of communication is the collective framework. Religion has a collective proprium; it is about the freedom to act in a common context and on the basis of shared convictions. A private religion as the sum of individual convictions that no-one else shares is not a religion. The freedom of religion as an individual right addresses a space of self-determination derived from religious groups and collectives and which in the event of conflict has to be rendered plausible by reference to them (Korioth 2014, p. 233 f. Transl. R.B.).

- The second author to be cited is once again Thomas Vesting, who backs Korioth as follows:
... this position would also mean recognizing the freedom of religion as a basic right addressing a supra-individual field of meaning from the outset. “The individual believer does not constitute the faith anew; he finds his way into a pre-existing body of rules, patterns of behaviour, and common convictions. In this sense, individual belief is a downstream effect, made possible only on the basis of a religion conceived of as a collective phenomenon” (Vesting 2014, p. 72. Transl. R.B.).

• The third author, just quoted by Vesting, is Ino Augsberg, who in an essay entitled “If you want to believe, you have to pay?” (2013) comments on the collective nature of the freedom of religion: “In brief, it can be argued that such a thing as a ‘private’ religion cannot exist. Religion is directed from the outset towards a collective form of practice ... In the nature of things, collective religious determination therefore has primacy over individual, self-determination” (Augsberg 2013, p. 518. Transl. R.B.).

The ecclesiastical right of self-determination lies primarily in the power of the Church to give itself a legal order of its own, with the consequence that the individual believer is subject to two different legal orders at the same time:

... above all, the special emphasis on the collective dimension of the freedom of religious belief is in keeping with an understanding of religious constitutional law which regards its mechanisms and approaches as a reaction not to an individual problem but to a fundamental legal-pluralistic conflict. The individual believer is accordingly not subject only to obligation arising from his private convictions. As a member of a religious community he is rather subject to the legal orders of both the state and his religious community. He must therefore address the problem of possible divergence between normative commands, not only in the narrow field of morally decisive decisions of conscience but also in relation to modes of behaviour that, looked at from outside, may seem neutral and banal (Augsberg 2013, p. 521. Transl. R.B.).

Ino Augsberg’s observations are particularly interesting for another reason, too. He associates his reflections on religious constitutional law with general conclusions in the domain of fundamental rights theory, which we see as confirming our own thoughts on the conceptualization of normative spaces. Looking at the freedom of science and art, Augsberg rightly insists that a spatio-static notion of the domain that basic rights protect needs to be replaced by a model that defines the object of such protection in processual terms:
The exercise of fundamental rights in these fields cannot be convincingly described in terms of possession and the use of pre-existing communication possibilities. What is decisive is protection of acts that break out of pre-existing communication routines and open up new, hitherto inconceivable possibilities. Such a model can be described as creative rather than possessive. It is grounded above all in the reflexive structure of science and art. It posits that what is to be recognized as art or science is not a quasi-ontological datum but is itself the necessary, always provisional result of a permanent process of artistic or scientific preoccupation. An exclusively “objective” definition of protected areas must therefore fail. Art and science are discursive products: what the scientific community or art scene recognizes as art or science. The spatio-static concept of the protected area is therefore replaced by a model that defines the object to be protected by basic rights in processual terms (Augsberg 2013, p. 528 f. Transl. R.B.).

Still more importantly, he understands this processual event as communicative event:

From the point of view of religious constitutional law and its conceptualization of the conflict between the individual and collective dimensions of basic-law protection, this model with its implicit assumptions can be still further radicalized. ... discourse participants qualify as such only in and through discourse. Who is a scientist is decided by the scientific community – for example, by specific rites of initiation, that is to say, specially designed admission procedures subject to defined conditions, but also in more informal but no less effective fashion. In analogy to Lindbeck’s description of the connection between religion and subject constitution it can be said that in both science and art the subjects of basic-rights protection do not precede it; they are produced through communicative processes within a specific social sphere. The specific scientific language game and its rules precede the individual player and his moves. Basic-rights protection that sets in at this point can accordingly relate neither to an ostensibly objective protected area nor to ostensibly pre-existing discourse participants. The primary point of reference is the given communication sphere within which individual communicative acts and communicative subjects themselves come into being (Augsberg 2013, p. 529 f. Transl. R.B.).

This confirms our view that normative or legal spaces cannot be defined in spatial terms but are produced only through processes of communication. This is an important insight.

Leaving the issue of normative fields under the protection of fundamental rights, we turn to a quite different arena with quite different norm producers: international institutions.

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III. The International Arena and “Its” International Institutions

1. The Arena of International Institutions: An Arena with High Change Dynamics

a) The Growing Importance of Transnational and International Institutions: From Rule to Authority

The indisputable increase in the importance of international institutions is understandable against the backdrop of the growing “denationalization of problems” (Zürn 1998): the challenges posed by denationalized problems demand denationalized institutional solutions, that is to say, the establishment of new international institutions or the strengthening of existing ones. International institutions will thus become not only more important – in terms of the problem-solving competence vested in them – but also more political; a process that Michael Zürn, Martin Binder und Matthias Ecker-Ehrhardt rightly call the “ politicization of international institutions” (2012). This is comprehensible and not particularly surprising.

However, our interest at this point is another: we want to examine a process that Michael Zürn has recently described as the path “from rule to authority” (Zürn 2014). By this he understands an observable shift in importance from the classical, rule-determined exercise of power typical of Western constitutional states with norm-setting parliaments to a form of governance in which national governments and their parliamentary institutions do not have the primary say but where command is taken by transnational or international institutions, institutions that rely not on the classical legitimation resource of democratic elections but on their specific authority, fed by their special expertise, impartiality, and independence.

On closer inspection, the process “from rule to authority” consists of two sub-processes: first, shifts of power within institutional structures, and, second, changes in the legitimation basis of political decision-makers.

- The former can be illustrated by the consequences of the euro crisis for the institutional structure of the European Union. Michael Zürn:

   First, the current institutional outcome does not point at all towards a renationalization of European politics. In spite of growing public skepticism, the European institutions seem to emerge from the crisis with more competences than ever. The neo-functional logic of European integration seems to prevail again. Earlier deci-
sions written into the Maastricht treaty make further integration necessary, thus creating a demand for the strengthening of European institutions.

Second, the institutional losers are parliaments on both the national and the European level, the winners are expert bodies on both levels such as courts and central banks. Very telling is the episode with the German Constitutional Court: Here, a non-majoritarian national institution was asked to protect the rights and competences of the majoritarian German parliament against non-majoritarian European institutions. While rhetorically taking the side of the German parliament, in substance it decided for very good reasons in favour of the European institutions. And what is even more telling: It was neither Merkel nor Sarkozy, but the European Central bank that sent the decisive signal to the markets (Zürn 2014, p. 2).

There are, as we learn, institutional losers and institutional winners and international and transnational institutions appear to be among the winners.

- Following Michael Zürn’s formulation, the second process can be described as progression from constitutional rule to loosely coupled spheres of authority. Denationalized problems are no longer coped with primarily through the showpiece institutions of modern constitutional statehood, that is to say parliaments and national governments, but through constitutional institutions of a different type like constitutional courts, central banks, and regulatory agencies, to mention only the three most important. This movement from constitutional rule to loosely coupled spheres of authority can be described in still relatively abstract terms as follows:

Leaving the era of neatly separated territorial states does not lead us to a world state, to a moving up of the constitutional state to a higher level. It rather seems that segmentary differentiation as the fundamental principle of politics is partially replaced by functional differentiation in absence of a meta-authority that can coordinate from above. There is no constitutionalized place for the final decision. It may be too far-fetched to talk about full-scale institutional fragmentation, yet it is an institutional architecture which lacks centralized coordination – which is why we move from encompassing constitutional rule to plural and only loosely coupled spheres of authority ...

The depicted institutional developments on the domestic and the international level are often analyzed separately, both within their subdisciplinary niche. They have however a lot in common. Most obviously, their empowerment took place in parallel. Both non-majoritarian domestic institutions within democracies and international institutions became more powerful especially in the last three to four decades. All of these institutions, moreover, represent a type of public power which is limited in scope and often stands in competition with other institutions. In this
sense, they are different from the constitutional state and indicate a shift toward plural spheres of authority. Finally, all the mentioned national and international institutions show similar patterns both with respect to the justifications they use and to the level and sources of social acceptance (Zürn 2014, p. 10f.).

We must accordingly investigate what constitutes these spheres of authority and who operates in them.

b) The Institutional Architecture of Spheres of Authority

The first question to ask about spheres of authority is naturally what sort of authority is actually meant (on the variants of authority, especially in comparison between legal and religious authorities see Schuppert forthcoming). The classical types of personal, e.g., charismatic authority or the institutional authority of constitutional institutions are increasingly being joined by what can be called epistemic authority, based above all on trust – in the expertise, independence, and integrity of an institution. Michael Zürn:

The other basic type of authority [as opposed to political authority, G. F.S.] can be labeled epistemic authority. This type of authority is based on expert knowledge and moral integrity. In this case, the views and positions of an individual or an institution are adopted because they appear at the same time to be knowledgeable and nonpartisan. Epistemic authority is based on the assumption that knowledge and expertise are unequally distributed, but that there is a common epistemological framework which makes it possible to ascertain inequality. An epistemic authority need not in all cases convince people factually and in detail. It is therefore not the quality of the specific argumentation, but rather the general reputation of an institution or person which is decisive. What is involved is governance by reputation ... (Zürn 2014, p. 7).

What sort of institutions “populate” this sphere of epistemic authority and give it its distinctive character? Michael Zürn has coined the term “politically assigned epistemic authorities” (PAEAs), what we might call a “new institutional trinity” of constitutional courts, central banks, and independent regulatory agencies:

A special version of this type of public authority arises when an epistemic authority is assigned to that status by political institutions. Then we may speak of politically assigned epistemic authorities (PAEAs). And it is especially this type of authority which has gained enormously in importance and has changed the constellation in the exercise of public power.
On the one hand, *three developments* in the domestic realm need to be mentioned.

- As Ran Hirschl has pointed out: “Over the past few years the world has witnessed an astonishingly rapid transition to what may be called *juristocracy*. Around the globe, in more than eighty countries and in several transnational entities constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.”

- *Independent central banks* in the Western world also have uniformly become more important. They have gradually been introduced in many countries and their independence has been strengthened. Between 1990 and 2008 no fewer than 84 countries passed legislation to enhance the formal autonomy of central banks. At the same time, the importance of monetary policy tools in the general economic control toolbox has generally increased with the spread of monetarism. Central banks thus became more autonomous and more important at the same time.

- Ultimately, however, central banks are only the manifestation of a broader development: the *increase in so-called “independent agencies.”* On average, according to a quantitative study “autonomous regulatory agencies” play a role in 73 per cent of all policy areas in the countries under investigation in a study by Jacint Jordana and Levi-Faur. The study shows steady quantitative growth between 1966 and 2007, becoming almost exponential in the 1990s and declining slightly only after the turn of the century (Zürn 2014, p. 8 f.).

So much on this key context for understanding the growth in the importance of international institutions.

c) Norm Production and Norm Interpretation as Components of the Governance Functions of International Institutions

Norm production and interpretation are increasingly integral components of the governance function of international institutions. In “International Authority and its Politicalization” (2012), Zürn, Binder and Ecker-Ehrhardt write:

> We first show that international institutions exercise authority to a significant degree. They do so across a wide range of governance functions including rule formulation and decision making ..., monitoring and verification of rule implementation ..., interpretation of rules ..., rule enforcement in the case of non-compliance ..., and direct implementation by international agencies ... In this sense, international institutions exercise authority in that they successfully claim the right to perform these functions and in that member states recognize – at least to some extent – the right of international institutions to do so (Zürn et al. 2012, p. 89).
The authors go into detail about these governance functions:

(1) Rule setting and majority decisionmaking

International institutions that set rules via majority decision-making exercise political authority. ... Majority decision making increases the ability of international institutions to act by nullifying the vetoes of individual states and overcoming blockades. Majority decision making is not a practice limited to just a handful of well-known organizations like the EU, the UN Security Council and General Assembly, or the World Bank. Today, roughly two-thirds of all international organizations with at least one participating great power have the possibility to decide by majority. ...

(2) Monitoring and verification

[T]he need for independent actors who process and make available information on treaty compliance is growing steadily. Such information is increasingly provided by the international secretariats of treaty systems ... and autonomous organizations such as the World Health Organization (WHO) or the International Atomic Energy Agency (IAEA), to name just two prominent examples ... These are cases of politically delegated epistemic authority. NGOs may also function, more or less informally, as monitoring agencies. Amnesty International and Human Rights Watch, for instance, are important actors for monitoring compliance with human rights standards. In general, Jonas Tallberg and colleagues have shown that, since the 1980s, the access of NGOs to international policy processes has increased significantly. ...

(3) Rule interpretation

Regarding rule interpretation, we find a significant increase in the number of international judicial bodies dealing with collisions between international and national law, and between conflicting international regulations. In 1960, there were only 27 quasi-judicial bodies worldwide; by 2004, this number had grown to 97. If we narrow the definition and include only those bodies that meet all of the pre-requisites for formal judicial proceedings, then only five such bodies existed worldwide in 1960, their number climbing to 28 by 2004 ... For example, the World Trade Organization’s Dispute Settlement Body (WTO-DSB) decides in matters of controversy over the application of rules in international trade, while the ICC has jurisdiction over genocide, war crimes, and crimes against humanity. These institutions produce legally binding decisions that cannot be easily revised by their members. In this sense, they exercise a form of political authority that claims to be epistemic authority. ...

(4) Rule enforcement vis-à-vis states

Only a few international institutions have the capacity to enforce their own decisions, thus exercising the strongest form of political authority. Nevertheless, we can observe that the practice of levying material sanctions against violators has
increased. For example, jus cogens (independent and binding international law not requiring the consent of states) in the meantime reaches beyond the prohibition of wars of aggression to include inter alia the prohibition of crimes against humanity, genocide, and apartheid. In the same vein, under Chapter VII authority, the Security Council makes use of coercive measures against the will of affected governments or parties to a conflict [...], including military humanitarian intervention, economic sanctions, or “robust” peacekeeping operations [...]. From 1946 to 1989 only 3.4 percent of Council resolutions were adopted under Chapter VII of the UN Charter. This number rose to roughly 38 percent between 1990 and 2008. By 2008, about 62 percent of all Security Council resolutions were adopted under Chapter VII authority. ...

(5) Implementation

The implementation of international regulations is frequently left to member states. Nevertheless, some institutions such as the World Bank or the WHO implement their policies directly [...] and therefore exercise a strong form of political authority. Likewise, UN agencies in the field of humanitarian assistance or development aid have gained significant implementation authority. Transitional administrations that were set up after the end of the Cold War in Eastern Slavonia, Kosovo, or East Timor, for example, represent a special type of implementation authority; to establish them, UN took on far-reaching executive, legislative, and judicial powers (Zürn et al. 2012, p. 90 ff.).

Given the background material provided by this overview, we turn to the question of what sort of rules international institutions make, interpret, and/or enforce.

2. Modes of Rule-Making by International Institutions

a) Exploring the Regulatory Diversity of International Institutions

When exploring difficult, highly diversified terrain, it is advisable to secure the services of a guide familiar with it. José E. Alvarez is such a guide. In *International Organizations as Law-makers* (2006) he has investigated the “varied forms of international institutional law” and classified the types of regulation IOs produce on the basis of ten different international institutions. We cannot go into this material in depth but will have to be content with a simplistic overview:

- **The Codex Alimentarius**
  The Codex Alimentarius der FAO (Food and Agriculture Organization) comprises more than 200 Standards “[that] deal with maximum
limits of pesticide, food hygiene, food additives, and even labeling. The Codex’s legal status is a matter of some doubt” (Alvarez 2006, p. 222). Although the standards are not legally binding in the strict sense, they are de facto so:

Even though many states have not filed their acceptances and the Codex is formally only a “recommendation” in such cases, there is abundant evidence that its terms are widely accepted by those engaged in the food trade as well as governments, and that the pressures of the market (as well as those imposed by the WTO as described above) render its standards binding in practice, irrespective of whether governments have formally consented to them (Alvarez 2006, p. 222 f.).

- **ICAO Standards and Recommended Practices (SARPs)**
  The case of the International Civic Aviation Organization (ICAO) is also concerned with whether the standards and recommendations it issues can claim binding force. For members of the ICAO “merely undertake to “collaborate in securing the highest practicable degree of uniformity” with respect to such standards and only undertake to notify the organization should they find it ‘impracticable’ to comply in all respects with such standards and procedures” (Alvarez 2006, p. 223). Alvarez therefore speaks of rule “existing in a motherworld between binding and non-binding.”

- **IO “Advisory” Material**
  Alvarez cites amongst others the “continuous stream of opinions” issued by the Secretariat of the International Labour Organization (ILO) as an example of such “advisory material”:

  That Office has given, when requested by states, hundreds of advisory opinions relating to both general legal matters, such as whether reservations are permitted to labor treaties adopted within the ILO, to interpretations of specific ILO conventions. Such interpretations, ... have established a considerable body of ILO institutional law that is difficult to disentangle from the substantive international labor law produced by ILO conventions (Alvarez 2006, p. 225).

- **ILO Recommendations**
  ILO recommendations, too, which explain and interpret the ILP conventions, are “halfway houses” between binding and non-binding regulation:

  ILO recommendations are adopted by its General Conference in the course of adopting labor conventions that only bind members that ultimately ratify them.
The uses and effects of such recommendations need to be examined alongside the labor conventions that they are meant to elucidate or interpret. Under the ILO Constitution, such recommendations are, upon adoption by the General Conference, to be communicated to all members for their consideration with a view to giving them effect and to be presented not later than eighteen months after the closing of the Conference before the domestic authorities that might be expected to enact appropriate legislation or otherwise take action (Alvarez 2006, p. 227 f.).

- **IAEA Standards**
  On these standards of the International Atomic Energy Agency, Alvarez notes: “IAEA recommendations, like some ILO recommendations, perform a gap-filling role by providing the elaborate, context-specific, and changing implementation details that are impossible or impractical to achieve via treaty” (Alvarez 2006, p. 231).

- **The FAO and UNEP Prior Informed Consent Regimes**
  The concept of prior informed consent (PIC) is about protecting developing countries against unregulated imports of hazardous chemicals and pesticides. To this end, the FAO adopted an *International Code of Conduct on the Distribution and Use of Pesticides* in 1985, and the United Nations Environment Programme formulated the *London Guidelines for the Exchange of Information on Chemicals in International Trade*:

  These codes made it illegal for states to export banned or severely restricted pesticides or chemicals without the explicit agreement of the importing countries. These two soft law approaches relied on comparable approaches and procedures thanks to joint expert and governmental consultations and close coordination between the two organizations (Alvarez 2006, p. 232).

- **WTO Soft Law**
  Alvarez uses this term to draw attention to the fact that even in an institution like the World Trade Organization, which normally has to do with “hard” contract law and its “harder” enforcement, declarations in the sense of “deals” occur whose legal status is not clarified:

  A knowledgeable observer of the WTO concludes that the legal status of these two Doha Declarations is ambiguous given their text and negotiating history since they could be viewed alternatively as (1) merely political commitments no different from G-7 declarations, (2) binding decisions whose provisions may or may not be subject to interpretation and enforcement under the WTO’s dispute settlement scheme, or (3) a new kind of secondary law emerging from the ‘constitutive process of decision-making of the WTO as an organization’ (Alvarez 2006, p. 233).
• The WHO Code on the Marketing of Breast-Milk Substitutes
The background to this code was a bitter dispute between various NGOs like Oxfam, Christian Aid, and Third World First with the Nestlé group, which was accused of marketing breast-milk substitutes very aggressively and misleadingly to induce mothers to wean their children and to develop an artificial dependence on milk substitutes. In 1981 this led to adoption by the WHO Assembly of the Code of Marketing of Breast-Milk Substitutes, which contained guidelines on the sale, effect, and labelling of such substitute products. Alvarez comments on the process by which this code was produced:

The circumstances surrounding the adoption of the WHO Code suggest a law-making process very much at odds with the positivist conception of traditional sources of law. In that instance, states, ostensibly the only actors with authority to make international law, were only one group of actors in creating the relevant rules of conduct. To a considerable extent, these rules emerged as a result of the work of non-state actors: IOs, NGOs, and multinational corporations. These other actors, to a great extent, took the initiative, served as the venue for negotiations, and drafted the relevant rules. To a considerable extent, these non-state actors were responsible for enforcement and even on-going interpretation (Alvarez 2006, p. 235).

• The World Bank Guidelines
The “World Bank Guidelines” are another interesting case. They have nothing to do with interpreting and applying bank’s charter but address only the staff of the bank, imposing certain behavioural obligations of a mostly procedural sort; but even such internal organizational rules of conduct, as Alvarez shows, can develop into law:

The World Bank’s ombudsman, its Inspection Panel, created in 1993 by resolution of the Bank’s Board of Executive Directors, receives and investigates complaints from those adversely affected by the Bank’s activities and enforces compliance with the Bank’s standards on the Bank’s staff. The adoption of an internal “disclosure policy” that made its policies accessible to the public at large and the creation of the Inspection Panel, nowhere explicitly authorized in the World Bank’s charter but which “judicialized” its policies by empowering private guardians to ensure compliance with their terms, transformed the Bank’s Guidelines effectively into law, at least in terms of general perceptions (Alvarez 2006, p. 236 f.).

• IMF Conditionality
The last item in this overview is the conditionality regime of the International Monetary Fund (IMF), the IMF practice of setting con-
ditions for loans – particularly to developing and newly industrialized countries:

By 1997, the Fund was following in the path of the World Bank and broadening its concept of appropriate conditions to embrace good governance generally. Its new guidelines indicated that it would now take note of a broad range of institutional reforms “needed to establish and maintain private sector confidence and lay the basis for sustained growth” (Alvarez 2006, p. 242).

Critics of the conditionality regime complain that it places borrowing countries under economic and legal guardianship and transferring regulatory power from the developing countries to the industrial countries.

We have briefly presented all ten of the cases Alvarez deals with because we need a concrete idea of what sort of law-making and law interpretation actually takes place in international institutions. Without an adequate empirical basis neither informed normative judgements let alone – as Thomas Duve demands – the development of empirical legal concepts is conceivable. Our review allows general consideration of the concept and function of so-called soft law.

b) The Eroding Distinction between Binding and Non-Binding Norms, between Hard Law and Soft Law

As the cases presented show, the question of “law” or “non-law” cannot be avoided here, either. Given that guidelines and standards are in practice followed and treated as law by those involved, are they already law or are only rules made or recognized by the state admitted to the table of the law? One way out of this dilemma is simply to posit two fields of law, the world of hard law and the world of soft law. But on closer inspection this seemingly practicable solution more and more frequently leads nowhere because in practice the clean cut distinction often proves impossible, and because soft law can harden – for example, when in hard law cases reference is taken to originally non-binding rules, as in decisions of the WTO or other international organisations. Alvarez describes what this adds up to in practical terms:

Examples whereby more than one IO is involved in law-making are becoming ever more abundant. The Convention on the Law of the Sea (UNCLOS), for example, incorporates by reference “generally accepted” international “rules, standards, regulations, procedures and/or practices.” This effectively transforms a number of the IMO’s
[IMO = International Maritime Organization] codes, guidelines, regulations, and recommendations (dealing with such matters as pollution control measures to be obeyed by vessels while traveling their international straits or exclusive economic zones, for removal of installations to ensure safety of navigation, or relating to sea lanes or traffic separation) into binding norms, even for states that may not have approved of these standards within the context of the IMO but have become parties to the Law of the Sea Convention. Even though the IMO formally has no power under its constitution to take formally binding decisions, UNCLOS, a treaty whose scope and history suggest its comprehensive impact on general customary law binding even on non-parties, has remedied that handicap at least with respect to some of the IMO’s work products. Similarly, ... the World Bank makes use of a wide number of non-binding instruments produced by other IOs, such as FAO’s Code of Conduct on the Distribution and Use of Pesticides, in effect turning such instruments into binding rules for its staff, and when incorporated into its loan agreements with states, perhaps even into binding forms of international or national law (Alvarez 2006, p. 220).

c) The Concept and Functions of Soft Law

Although we essentially know what soft law is, it could be useful at this point to summarize the generally accepted criteria:

Soft law ... refers to regimes that rely primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance arrangement. Although the parameter of “primarily” permits some ambiguity (as well as flexibility), the key characteristics of a soft law arrangement are clear, in contrast with a hard law arrangement. First, in a soft law regime, the formal legal, regulatory authority of governments is not relied upon and may not even be contained in the institutional design and operation. Second, there is voluntary participation in the construction, operation, and continuation. Any participant is free to leave at any time, and to adhere to the regime or not, without invoking the sanctioning power of state authority. Third, there is a strong reliance on consensus-based decision making for action and, more broadly, as a source of institutional binding and legitimacy ... Fourth, and flowing from the third, there is an absence of the authoritative, material sanctioning power of the state – police power as a way to induce consent and compliance (Kirton and Trebilcock 2004, p. 9).

More interesting are the various functions of soft law. In Soft Law in Governance and Regulation, Ulrika Mörth identifies six:

- Soft law may precede hard law
- soft law has the potential for independence
- soft law can be disguised
- soft law is closely linked to politics
international organizations can modernize themselves through the use of soft law
soft law provides room for flexibility and unintended consequences (Mörth 2004, p. 19).

With the help of Mörth, we shall take a brief look at three of them:

First, soft law can be a precursor to binding legal instruments, which means that it is not always linked to network governance; rather it can be more closely linked to the traditional steering mode of government. The regulatory status of soft law is, however, a complex issue. Several authors in this volume have emphasized the difficulty of determining if soft law develops into hard law, given the close connection between these two types of law. Indeed, there are fuzzy boundaries between regulations. ... Several cases in this book have demonstrated different ways of transforming soft law into hard law. In Aldestam’s on EU’s state aid policy, for instance, *the transformation of soft law into hard law* is often a function of the Commission, which issues guidelines, recommendations and letters to the Member States. According to Aldestam, the Commission’s position has even been interpreted as having the power to establish rules with or without the agreement of the Member States. The chapter on state aid also showed that soft law can be transformed into hard law if the national administrations believe that the rules are hard. Thus, the *perception of rules* is an essential mechanism in deciding whether soft law will be transformed into hard law. ...

A fourth conclusion is that soft law is closely linked to politics. ... In the EU policy cases on employment and state aid, one might expect a less powerful position for the European Commission. This is especially striking in the case of State aid as outlined in Chapter 2. According to conventional wisdom in the EU literature soft law is presumed to be useful because it preserves national sovereignty. In practice, however, the autonomy of the Member States seems to be relatively weak. One explanation for this discrepancy between the formal and informal processes is cosmetic. It is important for the politicians to retain national sovereignty, however symbolic it may be, if they are to co-operate on politically sensitive domestic issues.

The fifth conclusion is that international organizations use soft law because they see it as a characteristic of the modern way. Göran Ahrne and Nils Brunsson suggest that soft law is not only the most readily available regulatory mode for modern organizations, particularly for meta-organizations, but also the most attractive way of compelling members to comply with the rules. Modern organizations are less prone to use their hierarchical authority, and so become advisory rather than directing. Even organizations like the European Union with the potential and the ability to use hard law seem to follow this modern trend toward soft law. Thus, soft law is an attractive form of regulation and governance because it is considered to be modern (Mörth 2004, p. 191 ff.).

She concludes:

... soft law is sometimes an independent form of regulation that fits well into a system of governance characterized by networks, horizontal relations and voluntary
rules. Whether soft law is an independent form of regulatory mode or a step in a process of hardening the rules depends on several factors and mechanisms. One factor and mechanism is the way in which the actors perceive the rules and to what extent the organization wants to identify itself with hierarchy and coercion. The political will and context can also determine whether the rules will lead to a more formal legislation process or if the rules will stay soft. Another factor has to do with the organizational authority and capacity. Rules do not float freely. Meta-organizations – organizations that have other organizations as their members – often lack a clear authoritative centre, common resources and the right to issue legal sanctions (Mörtth 2004, p. 195).

IV. The Global Administrative Space and its Regulatory Agencies

We had briefly addressed the question of how legal spaces can actually be identified, described, and analysed. In the course of the repeatedly – often in very general terms – evoked transnationalization processes, one such legal space is increasingly taking shape. Richard B. Stewart (2012) calls it the global administrative space:

The growing density of international and transnational regulation, which in part reflects the inadequacies of uncoordinated national systems of regulation as means to address global interdependencies in fields that include market activities and their spillovers, security, and human rights, has created a multifaceted “global administrative space” populated by several distinct types of regulatory administrative bodies together with various types of entities that are the subject of regulation, including not only states but firms, NGOs and individuals (Stewart 2012, p. 4).

According the Stewart, four types of regulator operate in this global administrative space:

*Formal intergovernmental organizations*, established by states (or and in some cases other international organizations), typically through treaties that impose obligations on states parties but whose ultimate aim is often regulation of private actors (e.g., Kyoto Protocol) and include a variety of administrative bodies operating under treaty aegis but often exercising very significant lawmaking and discretionary and administrative powers, including lawmaking powers.

*Intergovernmental networks of national regulatory officials* responsible for specific areas of domestic regulation (banking, money laundering, etc.) who may agree to common regulatory standards and practices which they then implement domestically. These bodies are increasingly becoming strongly institutionalized with significant administrative components.
Hybrid intergovernmental-private bodies composed of both public and private actors, such as the Global Partnership for HIV/AIDS and the global sports regime complex, a type that is becoming increasingly significant in contemporary governance generally and private bodies exercising public governance functions, such as the Forest Stewardship Council deciding on criteria for products from sustainably managed forests to be certified and labeled, or the International Olympic Committee deciding where the Olympic games should be held and under what conditions.

Domestic administrations forming an integral part of global regulatory regimes represent a fifth type of body involved in global regulation. These agencies implement global regulatory law through a distributed system of administration, and in so doing (and in other ways) shape it (Stewart 2012, p. 4 f.).

This transnational legal space has taken shape with the emergence of a global administrative law (Kingsbury 2009; Cassese 2005; Cassese et al. 2008), which the relevant scientific community affectionately calls GAL, and which, unlike national administrative law, consists less of concrete legal provisions and legal institutions than of a bundle of very general principles:

... diverse forms of global regulatory administration and their interactions are (or can be) organized and shaped by principles of an administrative law character. A growing body of global administrative law, based on largely procedural principles of transparency, participation, reasoned decision, review, is emerging in global regulatory administration to promote greater accountability and responsiveness to affected actors and interests, including developing countries and civil society interests (Stewart 2012, p. 5 f.).

We are naturally particularly interested in how to conceive the emergence of such global administrative law and who can be regarded as the producer of this legal regime. Stewart shows that there has been no master plan behind the “creation” of the GAL and that a plurality of producers have contributed to the development of the legal principles that have shaped it:

The development and spread of GAL practices and norms has been accomplished by many different types of institutional actors, motivated by a variety of objectives. There has been no overall plan or system. Rather GAL has accreted through the accumulation of discrete decisions by the different generative actors responding to the need to discipline the exercise of administrative power occurring in certain recurring structural modes ... These actors include not only domestic regulatory authorities, business firms, NGOs, and private and public/private networks or actors. Some of these actors, such as courts and tribunals and international investment arbitral bodies, review the legality of global administrative decisions and norms (including those of their distributed domestic components) as a condition of their validity and enforcement. In other cases, a domestic agency or another global regulatory body, in deciding whether or not to recognize or validate a global
regulator’s decisions or norms may give weight to whether or not it followed GAL practices in decisionmaking. As discussed below, these decisions are instinct with the need to channel and regularize the exercise of authority through law. In still other cases, private actors are deciding whether to conform to the decision or norm in order to enhance their reputations, become credible partners in business or other transactions or ventures, or otherwise further their interests. In all of these contexts, the extent to which the global regulator has followed GAL practices of transparency, participation, reason giving, and opportunity for review in making decisions is often a substantial and in some cases a controlling factor in the decision of the validating or recipient authority or actor in deciding whether or not to validate, recognize or conform to the decision or norm in question (Stewart 2012, p. 7).

The conclusion is that legal spaces can perhaps be conceived of less as spaces characterized by the validity of a common, detailed legal regime than as spaces that – at least in the early stages of their development – come into being on the basis of common, recognized legal principles to which the “population” feel themselves committed. Legal spaces could then be conceptualized as spaces of common legal principles – such as the principles of the rule of law. We shall be returning to this at the end of the present chapter.

V. The Transnational Legal Arena and its Norm-Entrepreneurs

As when dealing with the norm-producing role of standard-setters and international institutions, we are concerned here with the nature of the playing ground on which norm entrepreneurs (see Flohr et al. 2010; Wolf 2011) are to be found. Returning to our arena concept, this playing ground can perhaps best be described as a transnational legal arena.

1. The Transnational Legal Arena as Field of Operation for Norm-Entrepreneurs such as NGOs, TNCs (Transnational Corporations) and Big Law Firms

As noted elsewhere (Schuppert 2008c; 2010), we are witnesses to an ongoing process of the transnationalization of law. This process, too, is accompanied and promoted by a number of actors for whom operating in spaces beyond the state is a matter of course and, moreover, for whom the given transnational space is where they are at home. This is particularly the case for
transnational corporations and for international law firms, as well as for many NGOs that use to world stage with great professionality.

It therefore seems obvious to relate the transnationalization process of law to the actor perspective in order to gain an idea of a transnational legal arena. With reference to Buaventura de Sousa Santos (1995), Klaus Günther and Shalini Randeria provide the following, very informative description (2001, p. 87) under the heading “The Transnationalization of Law.” We take the liberty of replacing this title by the formulation “The Transnational Legal Arena,” giving the following overall picture:

The Transnational Legal Arena

<table>
<thead>
<tr>
<th>Transnational actors</th>
<th>Normative and institutional context</th>
<th>Consequences for the state</th>
<th>Type of legal pluralism</th>
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<tbody>
<tr>
<td><strong>Transnational-</strong></td>
<td><strong>ized state law</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IWF; World Bank; WTO;</td>
<td>Regulation deregulation structural adjustment</td>
<td>Heterogenization of the state</td>
<td>Development of semi-autonomous</td>
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<tr>
<td>TNCs; States; legal</td>
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<td>fields of law within state</td>
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<td>advisers</td>
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<tr>
<td><strong>Regional Integration</strong></td>
<td><strong>(EU)</strong></td>
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<tr>
<td>States; supranational</td>
<td>Regional institutions</td>
<td>Overlapping sovereignty (“sovereignty pooling”)</td>
<td>Supranational law</td>
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<tr>
<td>political institutions</td>
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<tr>
<td><strong>Lex mercatoria</strong></td>
<td>TNCs; US law firms</td>
<td>Erosion of sovereignty</td>
<td>Law parallel to the state</td>
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<tr>
<td><strong>Cosmopolitan law</strong></td>
<td></td>
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<tr>
<td>(environment, human</td>
<td>International treaties and arbitration tribunals</td>
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<td>rights)**</td>
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<tr>
<td>NGOs; social movements;</td>
<td>International tribunals and conventions; alternative NGO</td>
<td>Limitation of sovereignty; cosmopolitan</td>
<td>Universal rights beyond the nation</td>
</tr>
<tr>
<td>states; UN system</td>
<td>treaties</td>
<td>legal culture</td>
<td>state</td>
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<tr>
<td><strong>Transnational-</strong></td>
<td><strong>ization of infrastate law</strong></td>
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</tr>
<tr>
<td>Social movements; NGOs;</td>
<td>Group rights</td>
<td>Local self-government</td>
<td>Complementary/ competing legal</td>
</tr>
<tr>
<td>UN system</td>
<td>Self-determination law</td>
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<td>orders in the state</td>
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Going a step further, we could perceive not only certain institutional actors in this transnational legal spaces but also the people operating in them, such as the stressed manager so brilliantly and ironically portrayed by Martin Suter (Suter 2014); administrative networkers commuting between Washington, Brussels, and Berlin; or the familiar international lawyers, who can
be regarded as the personification of transnational legal knowledge and a transnational legal elite.

In “Governance by Practitioners” Sigrid Quack describes the role of international law firms as *carriers of transnational legal knowledge*:

Law firms operating internationally are big business enterprises. As such, they seek to satisfy the needs of their clients and to maximize income in subsidiaries throughout the world. Lawyers working for them also serve as development platforms for solving the legal problems their clients face. Marc Galanter ... takes the view that the working style in mega law firms differs qualitatively from that in “ordinary” law firms. According to Galanter, thorough investigation of different legal options and creativity in problem-saving approaches and in court-room tactics are characteristic of such firms. Because they work for many clients in similar areas, lawyers in mega law firms gain good insight into current developments. They are “repeat players” and often take a leading role in new developments. Owing to their strategic position, they can better understand emerging organizational problems and find suitable legal solutions ... The knowledge acquired in various projects is thus stored in accessible form, so that over time law firms become *sources of valuable legal knowledge*. Owing to their size, international law firms cover both different national jurisdictions and many special legal fields. For this purpose, they employ lawyers from different countries and with different specialties, who can profit from one another’s experience and. These international firms consequently have unique access to “application of the law at the stage of its development” and can use this knowledge in many fields of transnational law. Robert Nelson’s ... assertion that the business of American mega law firms is to change the law is more true today than ever before. Like 25 years ago, “the intellectual impact of big law firms exercises a permanent influence on the jurisprudence of our times” (Quack 2009, p. 582 f. Transl. R.B.).

Taking an image from the world of soccer, the biggest of these international law firms constitute something of a “Champions League” among translational legal actors. Quack:

The Americans and British dominate the top bracket of international law firms. This Anglo-American predominance is attributable to the enormous size of the American market and to British history shaped by colonialism and the commonwealth, the economic influence of the American economy, and the importance of the London and New York financial centres. The case law that applies in the USA and Britain offers law firms domiciled there more liberal possibilities in *creating innovative contractual arrangements* than the more restrictively codified legal systems on the European continent. British and American law firms have accordingly had a head start in the internationalization process. ... The social stratification of law firms in terms of membership of the “magic circle,” the opening of foreign subsidiaries of these firms in a limited number of metropolises in proximity to other professional service providers, the hierarchy of lawyers in international mega law firms between those
from the US or Britain and those from elsewhere: these are typical aspects that influence membership of the new cosmopolitan legal elite, whose members contribute to resolving problems of cross-border coordination and intercultural communication (Quack 2009, p. 583 f. Transl. R.B.).

2. Three Types of Norm Entrepreneur at Work

a) NGOs

The role of non-governmental organizations (NGOs) in norm production and diffusion has often been described. Klaus Günther and Shalini Randeria provide a particularly striking portrait of such organizations:

NGOs are important, hardly researched new actors in law production, law diffusion, and monitoring. The making of new transnational norms in the field of human rights and environmental protection and their global diffusion is to be counted among their achievements, as well as the establishment of a general and public awareness of injustice in the face of violations of the law. They influence national and supranational lawmaking and thus often call the legal sovereignty of the state into question. To be seen in this context are the new coalitions between NGOs, certain governments, and some private sector actors which cooperate in formulating and implementing human rights and contribute to changing the state monopoly in this field. This new sort of public private partnership constellation is also becoming more important in global environmental policy. In climate policy, for example, strategic alliances between NGOs, international organizations, and business enterprises set new environmental standards and push their implementation. This type of “privatization of world policy” offers opportunities for the just and effective resolution of global problems, but it also endangers the democratic control of policy decisions. Nevertheless, the state is not deprived of its rule-setting function. Not only must it subsequently embed international norms and treaties in the national context but also ensure their implementation (Günther and Randeria 2001, p. 63 f. Transl. R.B.).

Following this first overview, we turn to a particular field of NGO activity, looking over their shoulder as they work at the law, participating in the setting of standards. Anne Peters, Till Förster and Lucy Koechlin (2009c) identify three variants defined in terms of the type of standard involved.

- In the first, the contracting states are the actual standard setters and NGOs are only lookers-on, reduced to lobbying:

  First, NGOs are engaged in the elaboration of ordinary inter-state international conventions ... Here NGO involvement is largely informal. NGO forums are held in parallel to and separate from the intergovernmental standard-setting conferences,
such as the Rio conference of 1992. So NGOs do not have any negotiating role whatsoever here. However, their *direct lobbying at those conferences* can be crucial (Peters et al. 2009a, p. 493).

- **In the second variant of participation, NGOs are involved above all procedurally in the process of norm production:**

  The second type of standard setting occurs within international organisations or quasi-organisations, in particular in the framework of the highly institutionalized multilateral environmental agreements. Here, the governmental bodies or conferences of the parties create secondary law for the implementation of the respective regimes. To most of these bodies, NGOs are *accredited in formal procedures* and thus enjoy an observer (or in the Council of Europe: “participatory”) status. This legal status is an intermediate one *between exclusion and full participation as co-law makers.* It entails various rights to be invited and to sit in meetings, to obtain information (agendas, drafts), speaking time, the allowance to distribute documents and the like (Peters et al. 2009a, p. 493).

  As Anne Peters et al. note, international lawyers do not agree whether customary law meanwhile permits NGO participation in setting international standards. The authors believe this not yet to be the case, but that things are moving in this direction:

  Among international lawyers, it is controversial whether NGOs have, as a matter of customary law, a general entitlement to participate as observers (and thus to be heard) within the law-generating international institutions. Such an NGO right to be heard would come to bear in institutions which have no or only deficient special rules of procedure. We submit that a customary right of NGOs to participate in the international legal discourse does not yet exist, because practice and *opinion iuris* have not sufficiently matured. But NGOs already enjoy a legitimate expectation that – once an institution has admitted them – the participatory conditions will entail two core components: oral interventions and written submissions. Refusal of these rights must be specifically and concretely justified. In the current international legal system, the NGOs’ voice is thus the functional equivalent to the formal law-making power which other actors (the international legal subjects) possess. Because of *this legal function of NGOs’ voice,* there is a need to legally structure NGO participation (Peters et al. 2009a, p. 494).

- **In the third and final variant, NGOs are directly involved in norm setting in that they produce their own draft texts and formulate concrete proposals for norms:**

  Finally, NGOs sometimes *draft private texts or propose norms* (often in conjunction with academics), such as codes of conduct and guidelines, interpretative treaty commentaries, or principles, in the hope that they will be adopted by other international actors, cited, and accepted as contributing to the corpus of international law.

Despite this broad range of NGO activity in the norm-setting field, states still have “a tight grip on the formal law-making processes” in the view of Peters et al. Even in those areas where NGOs have had greatest impact, states control the agenda and the access to the law-making arenas, in particular through the accreditation procedures (Peters et al. 2009a, p. 494). We have our doubts about the general accuracy of this assessment, suspecting that it underestimates the potential for networked NGOs with a sovereign command of the Internet to at least strongly influence the political agenda. But we cannot go into this question here.

b) Transnational Corporations (TNCs)

There is abundant evidence of and research into the important role that transnational corporations play in the “rule-making business.” We call two authors to the witness box.

In her often quoted book A Public Role for the Private Sector: Changes in the Character of Business on the phenomenon of industry self-regulation, Virginia Haufler (2001) examines the extent to which TNCs play a public role apart from their private one as money-making stock corporations, and therefore assume public responsibility. This double role of transnational corporations, their commitment to profit-oriented “shareholder value” and their assumption of “corporate social responsibility,” can be seen as one of the most important consequences of globalization, because both the composition of governance actors and transnational corporations’ understanding of their role have changed as globalization has proceeded.

On the change in the governance scene, Haufler notes:

The character of international relations has changed in the past 50 years from one in which the global agenda was established by the most powerful countries, to one in which powerful commercial and activist groups shape the debate and often determine outcomes. Industry self-regulation is just one more piece of evidence regarding the changing nature of efforts to govern the global economy and establish collective mechanisms for resolving global policy issues (Haufler 2001, p. 121).
According to Haufler, this change in the governance scene has been accompanied by a change in the role of big companies, which manifests itself above all in a new conception of their role (see Schuppert 1998). On this new public role of transnational corporations, which ties them through their self-regulation into what we could call a system of shared responsibility, she comments:

The voluntary adoption of social standards by an increasing number of companies presents a different picture of the role of the corporation in world affairs. Observers and participants alike point out that the standards these companies establish are often higher than national or international ones. They address contentious public issues and not just technical standards that only concern industry. When companies establish their own rules and standards in socio-political areas, these can complement or supplement government regulation, especially in countries with weak capacity to regulate. International standard setting fills in the gaps where national regulatory systems conflict or remain silent. Where governments do not govern, the private sector does – often in response to the demands of public interest groups who find themselves unable to move national governments. And when governments are unwilling or unable to govern effectively, potential leaders may see private governance as a valuable tool to achieve public ends.

National policy makers are beginning to pay attention to the possible benefits of industry self-regulation. They may hope that as business improves its behavior abroad then government will be under less pressure to act against the private sector at home or abroad. They may also hope to use corporate social responsibility as a tool to promote “soft” foreign policy goals, such as human development (Haufler 2001, p. 29).

Doris Fuchs (2005), our second witness, has systematized the “channels of influence” used by TNCs in her book Understanding Business Power in Global Governance (2005). She distinguishes between “instrumentalist, structuralist and discursive approaches.” We are particularly interested in the structural power of business, within which she differentiates as follows:

- “Channels of the Structural Power of Business
- Mobile Capital: The Agenda-Setting Power of TNCs ...
- Quasi-Regulation: The Agenda (and Rule) Setting Power of Coordination Service Firms ...
- Public-Private Partnerships: Participation in Rule-Setting ...
- Self-Regulation: Increasingly Autonomous Rule-Setting Power ...” (Fuchs 2005, p. 120 ff.).

But what is behind these three variants of rule-setting? What Doris Fuchs calls “quasi-regulation,” has to do with the development of standards set by
private, profit-making corporations and which perform a – sometimes worldwide – control function. Two actors take the scene: rating agencies and the big multinational law and accounting firms. As far as rating agencies are concerned, she has this to say:

Quasi-regulation provides the second mechanism through which business actors exercise passive structural power in global governance today. Quasi-regulation, in the context of the present analysis, refers to the ability of coordination service firms to indirectly set standards for policies and practices worldwide. At the core of this debate is the role of rating agencies and their ability to determine the acceptability of national policies. In this context, quasi-regulation is related to the passive structural power exercised by corporations vis-à-vis national governments delineated above, the only difference being that rating agencies do not threaten that one company will move its investment out of a country, but rather influence the investment decisions of the entire global financial market. To the extent that these standards are made explicit, moreover, this passive structural power comes close to an active one (Fuchs 2005, p. 124).

But the big international law and accounting firms also play an important role in developing transnational standards:

Next to rating agencies, other coordination service firms have obtained substantial structural power in global governance. Multinational law and accounting firms as well as management consultants exercise transnational rule-setting power by determining and enforcing standards for the behaviour of business companies ... Again, this structural power reaches into the realm of active structural power to the extent to which these rules are made explicit. While these actors do not influence public policy as directly as rating agencies, they do have a substantial impact on corporate conduct and economic organization. In consequence, similar criticisms pertain to their structural power as to that of rating agencies (Fuchs 2005, p. 125).

With regard to participation in rule-setting in the framework of public private partnerships (PPPs), Fuchs sees the participation of firms in PPPs as an avenue to collaboration in setting “transnational rules”:

PPPs, then, provide business with an avenue to exercise active structural power. In PPPs, business actors directly participate in decisions on rules and regulations. The extent of this power, however, differs across PPPs. While in some PPPs, business may dictate agenda- and rule-setting, in others, public actors enforce strict limits on the decision room of business actors. Moreover, public actors still are in control to the extent that they can decide with whom they want to sit at the table. This may be more so in the national arena, however. In the international arena, PPPs can provide large business actors with considerable leeway in agenda- and rule-setting due to resource scarcity among public actors and a frequent lack of transparency in decision-making processes (Fuchs 2005, p. 127).
Turning finally to *industrial self-regulation*: it is not a new phenomenon – the *lex mercatoria* inevitably comes to mind, in our view a “legal phantom” difficult to pin down (see also Ipsen 2009) – but, owing to its growing diffusion, it is attracting more and more attention (see, e.g., Cutler et al. 1999):

Partly, however, the rise in interest results from the dramatic increase in quantity and influence of self-regulatory arrangements as well as new facets to self-regulatory practices. *Private actors today define regulations across a wide range of policy arenas*, including environmental issues, human rights, or the international financial system. Developments are particularly noteworthy in the *area of standards and codes of conduct*, which now exist at the level of individual companies such as Levi-Strauss or Karstadt; at the sectoral level such as the Responsible Care Program of the Chemical Industry; and at the global level, such as the regulation of transport of dangerous goods by the International Air Transport Association, the ISO 14000 or SA 8000 standards for environmental management and social accountability ..., or the advertising code of conduct developed by the International Chamber of Commerce. Importantly, much of this activity extends beyond core activities of business (Fuchs 2005, p. 129).

To sum up, what interests Virginia Haufler and Doris Fuchs – among many others – is the role of corporations that, in the absence of a transnational lawmaker fill existing *regulatory gaps* and substitute or supplement state law. To this extent we can indeed speak of norm-setting by corporations and thus of a type of coproduction of law.

### c) International Law Firms (Mega Law Firms, MLFs)

If we now cast a brief glance at the role of international law firms in setting norms, we are interested less in their concrete activities than in explaining why they have acquired so dominant a position in the *transnational legal arena*. There appear to be two main reasons: a growing market for legal advice and a type of legal advice practised by such firms that is referred to in the literature as *creative lawyering*.

#### aa) The Growth of the Legal Advice Market

The thesis that – chiefly as a consequence of transnationalization and denationalization – there is a growing market for legal advice, is in keeping with
our own observations. This thesis is advance particularly strongly by Klaus Günther and Shalini Randeria:

In the sectors of the world in which the economic system is transnationally differentiated, there is a growing market for legal advice in which law firms can successfully operate that also organize themselves transnationally, usually in the form of a network-like groups of locally more or less autonomous law firms, which do business under a common name. They can therefore serve as an example of organizations that Rudolf Stichweh has called “engines of globalization.” He describes them as follows: “They are membership associations that, through personnel mobility within the organization, their ability to establish branches and subsidiaries in many different places, and through facilitated communication flows in the organization, can develop considerable globalization effects, effects that can be held within the organization or impact the societal environment.” This question is likely to be an important research topic particularly with regard to transnational law firms because they interact closely and intransparently with the international capital market and are integrated into the dynamics of global competition between transnational corporations.

Law firms have become such organizations through the high demand for legal advice, legal organization, and out-of-court conflict settlement competence that necessarily accompanies the process of economic transnationalization. Compared with early periods, legal problems to do with the international exchange of goods and services have increased only in number. However, new sorts of legal problem have arisen with the privatization of state enterprises (e.g., Deutsche Telekom AG), with long-term borrowing by transnational corporations and growing investment activities by transnational investment funds and pension funds on the international capital market, with transnational mergers (German examples: Daimler/Chrysler, Vodafone/Mannesmann), and with international joint ventures (e.g., dam projects in India and China, oil pipelines from the Caspian Sea to Germany) (Günther and Randeria 2001, p. 52 f. Transl. R.B.).

Not only the need for legal advice is growing but also the need for regulation to be satisfied by lawyers – which brings us back to the function of filling regulatory gaps:

Law firms can ... become important actors in global locational and regulatory competition when advising their clients in “forum shopping” about the production and distribution locations that offer the most favourable tax, social, competition, labour, and company law conditions. Ultimately, however, lawyers also become actors in law generation beyond the state everywhere where global markets have to rely on legal rules to coordinate activities and on conflict settlement mechanisms that a national lawmaker and state judiciary cannot provide alone or not fast enough – or where such rules are more favourable for everyone concerned without state intervention. Finally, political measures for deregulation by transmuting public-law forms of regulation into private-law forms and through privatization con-
tribute for their part to increasing the demand for private-law regulation to be satisfied by lawyers (Günther and Randeria 2001, p. 53. Transl. R.B.).

\[bb\) Assumption of Creative Legal Functions – Creative Lawyering\]

The increasing importance of international law firms – particularly in Europe and in Germany, where the legal profession is still considered an “independent institution of the judicature” – can really be understood only if the type and style of legal advice that such firms practise are taken into consideration, whose lawyers are either themselves from the Anglo-American legal system or have undergone at least some of their training in the United States.

In an interesting working paper on “The The Role of International Law Firms in Cross-Border Commerce” (2006), Fabian Sosa and John Flood offer reflections that deserve our attention for two reasons: they describe first the creative form of legal advice practised and the semi-autonomous legal fields created and dominated by such mega-law firms:

The discourse about international lawyering focuses mostly on Anglo-American mega-law firms, whose services are usually limited to the large multinational companies. The prevailing opinion assumes that only these law firms are able to provide effective legal support at the global level. Most of these firms have their headquarters in the US (with subsidiaries in many areas of the world). They have hundreds of partners and often over a thousand associates. Trubek et al. ... describe this ‘American mode of production of law’ and the decisive role played by these multi-purpose, commercially-oriented law firms in the common law. US lawyering known as “legal entrepreneurialism” has lead to a pro-active strategy in structuring, negotiating and drafting contracts, requiring an understanding of legal as well as economic and management competences. Lawyers advise their clients, draft complex contracts, influence the lawmakers procedure and file class actions. Law firms exercise an enormous influence on cross border commerce through this creative form of lawyering ... According to some authors, the mega law firms have created a largely autonomous system of private ordering which is of much greater importance for global commerce than the legal structures provided by nation states (Sosa and Flood 2006, p. 1 f.).

What Sosa and Flood have to say about American research into this specific style of legal advice is also interesting. How international law firms function is described in a fashion that makes their central role in the transnational arena very plausible:
In the context of the law firm literature, those approaches are of interest which focus on the function of lawyers and the effect of their work. Well known concepts from this literature are the concept of creative lawyering ..., the concept of the lawyer as legal entrepreneur or legal engineer ..., or the lawyer as manager of uncertainty ... However, despite their relevance for the present project, these approaches seem to be too specific for a basic general approach.

A more general approach can be derived from the works of Lawrence Friedman, who has argued that the significance of lawyers and their indispensability increases the weaker and lumpier existing legal structures are ... This argumentation has also been used to explain the dominance of Anglo-American MLF in the global context and the growing Americanization in the global legal field ... The fragmentariness of the global legal system leads to a comparative advantage for US law firms because these firms are familiar with the openness of the legal system in the common law and the coexistence of different legal systems. In this context they were able to develop a particular style of lawyering, much more creative and business oriented than in the civil law countries (Sosa and Flood 2006, p. 4).

These reflections on the three types of norm-entrepreneur encourage us to bring a concept into play that we have found useful elsewhere (Schuppert 1994), namely “institutional competence.” Both NGOs and transnational corporations, and especially international law firms, have their own specific competence, which enables them to play an important role in the norm-setting processes of the transnational legal arena. For NGOs, apart from their enormous agenda setting power, it is the critical scrutiny of existing normative regimes in global justice discourses and their role as carriers of local and alternative regulatory knowledge. The institutional competence of transnational corporations for participating in norm production in arenas beyond the state is, so to speak, innate to them. Global players by definition, they operate in the framework of transnational regulatory structures and – if other regulatory authorities fail to provide them – establish such structures themselves. As far as the institutional competence of international law firms is concerned, it clearly consists in the ability to satisfy the need of a globalized economy for legal advice and regulation better than any.

Before concluding this third chapter with reflections on the normative benchmarks of pluralized law production, an important issue needs to be considered: the public function of private norm-setting.
D. Normative Yardsticks in the Pluralized Production of Law: The Rule of Law

I. Private Norm-Setters as Public Institutions

Andreas Engert has recently examined the manifestations and consequences of private norm-setting power (2014). Taking three examples, the rules of the International Swaps and Derivates Association (ISDA), the German Corporate Governance Code (DCGK), and the International Financial Reporting Standards (IFRS), he describes the most important functions of private norm-setters:

Recurrent transactions almost inevitably generate network effects and thus natural standardization. Widespread rules like the pari passu clause [debtor declaration vis-à-vis the creditor that his claim will be treated “on an equal footing”] therefore shape contracts at least as much as the norms of state dispositive law. However, whereas legal norms can mostly be attributed to the legislator, private standards have so far appeared to be “heteronomy without heteronomous agents.” The ISDA rules, the DCGK, and the IFRS show that private standards also frequently build on a central institution. When a particular actor claims responsibility for the private norm, its heteronomous effect is more apparent. The most important role in this is to give substantive shape and an authoritative formulation to the rule (Engert 2014, p. 331 f. Transl. R.B.).

These functions, and particularly the network effects of private rule-makers noted by Engert mean that they obtain a “certain power over ‘their’ norm” (Engert 2014, p. 334) and accordingly perform de facto a public function. Engert identifies two groups of actors that have outgrown the purely private sphere: big law firms, and industrial federations or other non-profit institutions.

He outlines the action logic of big law firms, which at first glance are not obviously norm-sets:

Legal advisers can go to great lengths to develop appropriate solutions; others copy their arrangements, so that network effects arise and the solution becomes an established standard. Since lawyers and other service providers frequently accompany the same sort of transaction with changing parties, they are in an especially favourable position to diffuse a solution and coordinate market participants. However, the aim of their activity as “norm entrepreneurs” is to keep their consultancy fees flowing. They have no interest in making their services superfluous. No norm-setting is to be expected from them in the sense of formulating generally applicable rules and making them available to others. Legal consultants will more likely seek to at least avoid any impression of standardization for fear their services could appear inter-
changeable. The publication of a uniform normative text and concomitant guidance for application is therefore not to be expected from legal consultants (Engert 2014, p. 334f. Transl. R.B.).

As far as the second group of actors is concerned, their norm production quite clearly “provides a public good and therefore constitutes a public task”:

Where rules are set not only as a collateral effect of providing legal advice, private norm-setters are generally industrial federations or other non-profit institutions. The network effects of arrangements mean that an efficient normative configuration – including the substantive quality of predominant standards – is a public good of the given market. ... With regard to the status quo, it should be noted that, with the services they render but also with their (limited) disposition over the norms they provide, private norm-setters perform a public task. In influencing the normative configuration, they influence the developing network effects without fully internalizing them. How they employ this norm-setting power depends on their internal constitution. This raises questions for private standard setters similar to those facing other public institutions, especially about the representation of the interests concerned (Engert 2014, p. 335f. Transl. R.B.).

If not only state-made law but also private law production provides public goods, a yardstick is needed not only for good lawmaking but – in keeping with our science of regulation approach – for good rule-making, notably rule-making beyond state law.

One such yardstick could be the sheaf of principles that constitute the rule of law. By the rule of law we understand not a state-centric principle but – on the contrary – an ensemble of second order rules that can be drawn on as a benchmark wherever rules are being made, also and particularly by non-state rule-makers.

II. Rule-of-Law Principles as Second Order Rules in the Sense of “Rules for Rule-making”

In our view, rule-of-law principles in the sense of second order rules are a particularly suitable normative yardstick for every form of rule-making. Robert S. Summers (1999) explains the distinction between primary and secondary rules commonly drawn in legal theory:

The principles of the rule of law differ from principles of ordinary “first order law.” Principles of ordinary first order law apply directly to determine legal relations between immediate addressees of such law. ... Unlike such “first order principles,” the principles of the rule of law are what might be called “second order” principles. ... Principles of the rule of law are about first order law in the sense that they are
general norms that direct and constrain how first order law is to be created and implemented (Summers 1999, p. 1692).

Michael Zürn and Bernhard Zangl also take up this distinction, finding it useful in examining juridification:

Characteristic of juridification processes is ... that so-called secondary rules are defined institutionally. Where the making, application, and enforcement of rules do not function in accordance with pre-defined procedures ... one can hardly speak of law. To this extent, a meticulous legal system presupposes primary and secondary rules ... (Zürn and Zangl 2004, p. 21 f. Transl. R.B.).

With this in mind, we can conceive the role of rule-of-law principles as second order rules:

- **On law production** or – to put it more generally – rule-making, and notably on what authority is legitimated to make rules and what procedural law demands are to be made of the production process

- **On the nature of the product itself, i.e., the quality of the norms produced**, not only in the sense of what type of norms are to regulate what areas, but in the sense of the demands made on every type of norm designed to control behaviour and which must therefore have a modicum of clarity, certainty, and freedom from contradictions

- **On law enforcement**, since such enforcement rules are indispensable for modern societies:

  The effectiveness and societal relevance of a legal order is determined essentially by the extent to which it can guarantee its realization. At the same time, fundamental decisions of a society on values are revealed by the extent of and limits to the coercion considered acceptable (Nehlsen-von Stryk 1993, p. 350 f. Transl. R.B.).

If by the rule of law we understand an ensemble of second order rules for the generation and enforcement of behavioural control rules, it is also clear that such second order rules cannot be limited to state-made law. The yardstick of rule-of-law principles therefore needs to be applied above all in areas in which no state-made law exists or where it is ineffectual but where other, non-state forms of ordering and conflict resolution are to be found that are equivalent in function to “classical law.” The scope of application for rule-of-law principles can therefore not be meaningfully limited to the state and the law it produces. To the extent that the rule of law means the exercise of power and the management of societal conflicts through the law, this scope
must be seen as including forms of regulation other than law made by the state.

What is also needed is the area-specific operationalization of the second order rules – described here only in very general terms. This is a task that the International Organization for Standardization (ISO) has already set itself. It has drawn up a “Code of Good Practice for Standardization,” providing standards for standardization. Note particularly rule 3.1, which explicitly explains that these second order rules have to do with every sort of standardization:

3.1 This code is intended for use by any standardizing body, whether governmental or non-governmental, at international, regional, national or sub-national level. ...

4.1 Written procedures based on the consensus principle should govern the methods used for standards development. Copies of the procedures of the standardizing body shall be available to interested parties in a reasonable and timely manner upon request.

4.2 Such written procedures should contain an identifiable, realistic and readily available appeals mechanism for the impartial handling of any substantive and procedural complaints.

4.3 Notification of standardization activity shall be made in suitable media as appropriate to afford interested persons or organizations an opportunity for meaningful contributions. ...

4.6 All standards should be reviewed on a periodic basis and revised in a timely manner. Proposals for the development of new or revised standards, when submitted according to appropriate procedures by any materially and directly interested person or organization, wherever located, should be given prompt consideration. ...

6.1 Participation in standardization processes at all levels shall be accessible to materially and directly interested persons and organizations within a coherent process as described in this clause (ISO/IEC 1994).

In brief, it can be said that, in the field of non-state standard setting, rules for rule-making have already developed, which in this domain fulfill precisely the functions that we assign to the rule of law as an ensemble of second order rules. Standards for standardization are nothing other than second order rules designed to control the process of standard setting, and which therefore, as we have seen, formulate certain procedural “law” and organizational requirements for this process. From the point of view of a science of regulation not focused exclusively on the state legal order but which embraces the full span of normative regulatory systems, it is easy to comprehend that it is essentially about the application of rule-of-law principles. This should be
no surprise when one considers that from an Anglo-American standpoint, the rule of law has never been an exclusively state-centric concept.

This third chapter comes to an end with a glance at the rule-of-law concept recently presented by Jeremy Waldron, who argues in very similar vein, adding a noteworthy normative point.

III. Jeremy Waldron’s Rule-of-Law Concept

The conception of the rule of law to be presented in conclusion argues – as we have just done – in a number of steps:

- The first is what we have called the requirements of law production. We agree with Waldron that law must be produced essentially in a “constraining framework of public norms”:

  The rule of law is a multi-faced ideal, but most conceptions give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology or their own individual sense of right and wrong.

  Beyond this, many conceptions of the rule of law place great emphasis on legal certainty, predictability, and settlement ... (Waldron 2008, p. 5).

- The second step is concerned not with rule-bound law production but with what we call the requirements of normative quality, i.e., clarity, reliability, and consistency, which arise from the control function of law:

  A conception of the Rule of Law like the one [outlined above] ... emphasizes the virtues that Lon Fuller talked about in his book The Morality of Law: the prominence of general norms as a basis of governance, the clarity, publicity, stability, consistency, and prospectivity of those norms, and congruence between law on the books and the way in which public order is actually administered. On Fuller’s account the Rule of Law does not directly require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so. Requirements of this sort are described sometimes as procedural, but I think that is a misdescription. They are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based (Waldron 2008, p. 6).
The third step is about the *application of norms*; Waldron’s position on this has been summed up by Richard B. Stewart under the heading “regularity of norm application” in his essay on global administrative law:

Norms must be applied in specific instances through procedures that ensure accurate and impartial administration, ensuring that official respects [sic!] the limits on their authority that those norms establish, and protect the correlative rights and the security of persons subject to their exercise of authority. Regularity of application requires procedural and institutional arrangements to ensure impartial decisions in specific instances in accordance with relevant regulatory norms that are accurately and consistently applied. In the core situation, where officials enforce sanctions, impose liabilities, or make other decisions that impact the rights and obligations of specific persons in ways that have serious consequences, domestic administrative law typically requires adjudicatory hearings in which the affected person has a right to participate and present evidence and argument to an impartial decisionmakers to why norm does or does not apply in his case, a reasoned decision based on evidence of record, followed by opportunity for review of the decision by an independent authority (Stewart 2012, p. 10).

But the aspect we find most interesting is what Stewart calls “public regarding” – “the norms regulating official conduct towards citizens must be public regarding, in substance and the procedures for their adoption and application must promote their public-regarding character” (Stewart 2012, p. 10). Jeremy Waldron writes:

> [T]he norms must be not only general but public. They must be promulgated to the public – to those whose conduct will be assessed by them and to those whose interests their application is supposed to affect ... The publicity of these norms is also not just a matter of pragmatic administrative convenience along the lines of its being easier to govern people if they know what is expected of them. It embodies a fundamental point about the way in which the systems we all call legal systems operate. They operate by using, rather than short-circuiting, the responsible agency of ordinary human individuals. ...

We recognize as law not just any commands that happen to be issued by the powerful, but norms that purport to stand in the name of the whole society and to address matters of concern to the society as such (Waldron 2008, p. 25 ff.).

There is nothing to add.
E. Concluding Remarks

A chapter on the plurality of norm producers might have offered a closer look at “law as a product.” As we have seen in discussing the law of the economy, there can be said to be a global market for law in which states compete. The Federal Republic of Germany is no exception: writing on the website of the Federal Ministry of Justice, former minister of justice Leutheusser-Schnarrenberger had the following to say about the “Law – Made in Germany” project:

“Made in Germany” is not just a quality seal reserved for German cars or machinery, it is equally applicable to German law. Our laws protect private property and civil liberties, they guarantee social harmony and economic success. For entrepreneurs, German law constitutes a genuine competitive advantage. It is predictable, affordable, and enforceable. Our law codes ensure legal certainty. Whoever loses his case in court will have to bear the costs of the litigation. Once a court has made its rulings, its judgments are enforced swiftly and effectively. It is primarily for the sake of legal certainty and swift enforcement that German law does not recognise some legal concepts, such as class actions or punitive damages, which are common in other legal systems. German law is steeped in the tradition of the system of codified law that has evolved throughout continental Europe and that has proven its worth even in difficult times. After the Second World War, it was German law that helped facilitate the “economic miracle” in West Germany. After the fall of the Berlin wall, German law assisted in the transformation of East Germany. Today, prosperity and democracy prevail throughout Germany. In large measure, we owe this success to our law. Anyone choosing continental European – German – law today, is making a wise choice, as “Law – made in Germany” helps guarantee success (Bundesministerium der Justiz 2011).

Leaving aside the advertising jargon, the kernel of truth in this statement is that there is something like a world market for law, because other states or corporations have a choice, albeit limited, between American and German insolvency law or American and British accounting standards (see Botzem und Hofman 2009 on competition between accounting standards). To this extent, we can speak of competition between legal orders, with the very real consequence that “law – made in Germany” and law made in the USA come up against one another in certain markets, with, so we hear, the Americans not hesitating to deploy even members of the Supreme Court as “legal advisers” (see Gemkow 2012 for a highly graphic description of American legal imperialism).

The focus of this chapter, however, has been different. Our concern has been to link examination of a plurality of norm producers with investigation
of the normative spaces in which such norm-producing institutions are to be found. The aim has been to contextualize what we call norm production: to place it in the context of a given normative arena or normative field.
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