The World of Rules

Schuppert, Gunnar Folke

Published by Max Planck Institute for Legal History and Legal Theory

Schuppert, Gunnar Folke.
Chapter Four
From the Plurality of Normative Orders to the Plurality of Norm Enforcement Regimes: Jurisdictional Communities and their Specific Jurisdictional Cultures

A. Normative Orders: “Ought-Orders” Intended for Realization: The Enforcement Dimension of Every Normative Order

I. Law Enforcement: A Necessary Element of Effective Legal Orders

Karin Nehlsen-von Stryk stresses that every legal order aspiring to effectiveness depends on orderly enforcement: “The effectiveness and societal relevance of a legal order are also essentially determined by the extent to which it can guarantee its realization. At the same time, fundamental decisions of a society on values are revealed by the extent of and limits to the coercion considered acceptable” (Nehlsen-von Stryk 1993, p. 550 f. Transl. R.B.). Christian Waldhoff has taken this quote as a leitmotif for his treatment of the state as a law enforcement authority, adding:

The law as an “ought” system aims not at abstract validity but at realization. In the democratic constitutional state, the two types of legal coercion, namely enforcement and sanctions, are the final stages in a uniform and comprehensive process of realizing the law. It begins with lawmaking, continues with application of the law as the concretization of general/abstract rules in relation to individual cases, and ends – if need be – with the more or less coercive enforcement of the law. This model can be graduated, extended, or adapted in many ways. In all variations, however, it remains essentially the same. Under this uniform model for realizing the law, coercive enforcement as the category subsuming enforcement and sanctioning is given substance and impetus, goals and programmes by the law to be enforced. ...

Not only the goal but also much of the legitimation for [the coercive realization of the law] derives from the law to be enforced – which for its part requires democratic legitimation – while procedural decoupling from the rights and rulings to be enforced keeps this realization at a rule-of-law distance from them. The law to be
enforced can be described as substantive law, the norms of the enforcement and sanctioning regime as law-enforcement law (Waldhoff 2008, p. 13f. Transl. R.B.).

We turn to another author who gives a vivid account of the enforcement dimension of every normative order intent on realization. In his habilitation thesis on *The State Guarantee for Public Safety and Order*, Markus Möstl writes – with regard to state-made law – of the *rule-of-law mandate to enforce the legal order*.

The mandate to enforce the law is in many regards immanent in the principle of the rule of law. On the one hand, it follows from the fundamental rule-of-law mandate to preserve and safeguard the public peace and legal certainty: both historically and dogmatically, keeping the peace through a legal order is among the original and constitutive properties of the rule of law. However, the public peace and certainty as to the law (legal certainty in the broader sense of the term) presuppose that the legal order of the state, which is to provide this peace and certainty, not only exists but is effective, which in turn requires this legal order to be sufficiently efficient and actually enforced. The efficiency and enforcement of the law are therefore permanent requirements of a state governed by the rule of law. But even if – second – the focus is less on peace than on freedom as a conceptual cornerstone of the rule of law, the result is no different: if the essential property of the rule of law is to ensure lawful freedom and self-determination through the law, this presupposes that lawfulness and the law are actually realized and enforced, not only in relation to the state to ensure freedom from unlawful coercion but also in relation to third parties to ward off unlawful encroachment; for only the all-round enforcement of the law produces the state of lawful freedom that the rule of law seeks to guarantee. ...

Third, this idea is reinforced in the democratic constitutional state, because in such a state the enforcement of the law serves not only to produce lawful freedom but also to give effect to the law as the outcome of democratic will formation (Möstl 2002, p. 65f. Transl. R.B.).

There seems to be full agreement that the law (as a prime example of a normative order) must if necessary be enforced by coercion. This insight brings the realization that the law, which seeks to prevent the use of coercion and violence to impose interests and purported claims cannot itself manage without coercion if it is to perform its central function with credibility. We can therefore speak of a law-enforcement paradox, a situation that Christian Waldhoff describes as follows:

The law works by enabling disputes to be resolved without the exercise of physical force, and thus keeps the peace. To this extent, the law is a tool for non-violent dispute settlement. In borderline cases, however, the law itself has to use coercion and physical force to perform its function: to domesticate power and violence, the law has to threaten the use of force, violence, and coercion (Waldhoff 2008, p. 17. Transl. R.B.).
II. The Organizational-Institutional Dimensions of Norm Enforcement: Norm Enforcement Law and Norm Enforcement Regimes

Norm enforcement law has already been mentioned; it determines the circumstances under which and the means by which coercive measures may be taken to enforce the law. Waldhoff describes the administrative enforcement of the law as follows:

In relation to substantive law, the law pertaining to enforcement is instrumental. The distinction, effective impact and interaction between between these two levels are key problems in the administrative law dogmatics of the law pertaining to enforcement. In other words, this dogmatics is concerned, first, with enforcement norms and procedures themselves, and, second, with examining the relationship between the substantive and enforcement norms. What is at issue is ultimately the choice between different models of law enforcement, the relationship between enforcement and sanctioning, but also alternatives to the coercive realization of the law. This choice between “models” of coercive administrative realization of the law can be made at the law-making and application levels (Waldhoff 2013, p. 271, marginal note 2. Transl. R.B.).

Waldhoff thus points out that law enforcement is not only about normative statements – about what enforcement measures are permissible and required and when – but also about the enforcement procedures and the organization of enforcement: he writes of various law enforcement models, a useful concept that we shall, however, modify. The concept of law enforcement regimes brings together the substance, procedures, and organization of law enforcement with deliberate allusion to the concept of governance regime as a task-related institutional arrangement that has to consist not only of legal rules but also legally non-binding modes of control such as social pressure or governance by reputation (Schuppert 2010, p. 93 ff. On the concept of governance regime see Trute et al. 2008).

If we thus leave the somewhat too narrow world of state-made law and recall the plurality of normative orders treated in chapter two, we can expect to come across a variety of law enforcement regimes. And this proves to be the case. Werner Gephart and Raja Sakrani identify at least four norm enforcement regimes – from excommunication to social exclusion mechanisms (Gephart and Sakrani 2012, p. 108):
On the basis of this overview, we shall be looking at various manifestations of norm enforcement regimes; but first we turn to the fundamental question of what authorities or actors provide for the validity and enforcement of a normative order.

<table>
<thead>
<tr>
<th>Validity Dimensions</th>
<th>Religion</th>
<th>Law</th>
<th>Custom</th>
<th>Fashion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Symbolic validity</strong></td>
<td>Symbolic representations of final reference</td>
<td>Difference between symbolic and factual validity</td>
<td>Distinctions between manners, conduct, and affectation</td>
<td>Paradox of the ‘éternel dans le fugitif'; uniqueness and group membership</td>
</tr>
<tr>
<td><strong>Normative validity</strong></td>
<td>Degrees of binding effect, virtuoso and lay obligations</td>
<td>Arbitrary changeability, force du droit, ‘consensual binding effect’ as validity fiction</td>
<td>Facticity</td>
<td>The plural validity of dress codes</td>
</tr>
<tr>
<td><strong>Organizational validity sanctioning</strong></td>
<td>Excommunication, confession, and conscience control, threat of eternal damnation</td>
<td>Enforceability and enforcement staff, selection of validity claims</td>
<td>Social sanctioning</td>
<td>Market versus institutional control and social exclusion mechanisms</td>
</tr>
<tr>
<td><strong>Ritual consolidation</strong></td>
<td>Ritual hostility versus ritualism</td>
<td>Ritual legitimation versus procedural legitimation</td>
<td>Routine</td>
<td>Rituals of self-presentation and group membership</td>
</tr>
<tr>
<td><strong>Period of validity</strong></td>
<td>From the beginning in all eternity</td>
<td>Illusion of eternal validity; by nature; contingent validity</td>
<td>Factual duration</td>
<td>Illusion of eternal validity</td>
</tr>
<tr>
<td><strong>Grounds for validity</strong></td>
<td>“Because it stems from a higher being and exists from the outset”; sacred origin legitimation</td>
<td>“Because it was always so” or “because it can be changed again”; from sacred grounds to arbitrary regulation as a ground for validity</td>
<td>“Because it is so”</td>
<td>“Because it is so beautiful,” “because others do it”; validity paradoxes</td>
</tr>
</tbody>
</table>

On the basis of this overview, we shall be looking at various manifestations of norm enforcement regimes; but first we turn to the fundamental question of what authorities or actors provide for the validity and enforcement of a normative order.
III. The Diversity of Norm Enforcement Regimes as a Reflection of the Diversity of Normative Orders

As discussed in the introductory chapter, our concern in “The World of Rules” is to capture the diversity of normative orderings, of which the state legal order is only one, albeit particularly important element. If, as we have just seen, it is immanent in every normative order to develop a specific regime to ensure that it is respected and complied with, we posit that the diversity of normative orderings must be mirrored in a diversity of norm enforcement regimes.

If this is indeed the case, a key methodological consequence is that we need a wide-angle lens in this chapter, too. Not only the state sanctioning system needs to be considered, which, as Christian Waldhoff has shown, is legally so wonderfully elaborated – as doubtless appropriate for a community that sees itself as a state governed by the rule of law. We need also to ascertain the mechanisms that come into play in enforcing legally non-binding norms that nevertheless control behaviour – for instance, monitoring and evaluation systems up to and including intangible forms of “mere” social control, which – as the example of political correctness will show – can be particularly unforgiving in the intensity of their sanctions.

But this does not mean that we intend to go through the various types of norm ordering again from the point of view of what sort of norm enforcement regimes they have developed in order to propose more or less convincing couplings – for instance, on the pattern:

- state law – state judiciary
- customary law – customary courts
- canon law – ecclesiastical court and penance system

or the like; this in itself quite plausible procedure (on the comparison of various types of state and various types of regulation see Schuppert 2001) runs the risk of neatly dividing up the world of rules into such diverse couplings without placing them in their given specific societal and political contexts – for instance, the link between norm enforcement and functional differentiation or norm enforcement as a manifestation of institutionalized social disciplining. But these functional links are particularly interesting, and they explain the structure of this chapter, which addresses “norm enforcement in context” on the basis of examples.
B. Safeguarding and Enforcing the Law as Functions of Government

Law affects the development of a community in many and varied ways. As Carl Schmitt noted (1923/2008), the law sides with revolutionaries who make throne and altar tremble in the name of inviolable human rights and with the defenders of an existing social order. For the latter, in particular, it performs what we shall call a *transformation function*. Law – as we have shown in detail elsewhere (Schuppert 2003b) *transforms power into government*. By grounding pure power in law as well as channelling it, the exercise of power becomes government and proving and safeguarding the law become key functions of government.

Benno Zabel describes this link between the legitimation of rule through law and the safeguarding of the law:

The paradigm of safeguarding the law points to ... the key link between providing certainty and legitimating rule. It played an outstanding role in the difficult birth of modern criminal law. The corresponding leges or sanction patterns along with the “staged” principle of public trial and proceedings establish institutions and rituals, that is to say stabilization factors, which alone can ensure durable, albeit proto-state guarantees and public peace. We can hence also speak of the basic structures of sovereign power or of an independent “mode of the legal” (Zabel 2012, p. 24. Transl. R.B.).

Historically, the task of safeguarding the law – especially by ensuring the public peace and legal certainty – has fallen primarily to the governance collectives state and church, each with a monopoly of power in its specific field:

The genesis of and changes in the form of safeguarding the law were ... closely associated with the development and transformation of governance monopolists, namely, empire and church. The governance monopolist par excellence was, at the latest since the Peace of Westphalia in 1648, the (secular) state as an ordering and sense-making functional entity. The evolutionary history of the state always has to do with a changing and to this day controversial history of sovereignty. It should be remembered that Bodin’s *Six Books of the Commonwealth* begins with the key thought “A commonwealth may be defined as the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power” (http://www.constitution.org/bodin/bodin_1.htm). Worth noting in the postulate is that, at the rational level, sovereignty and government are primarily directed towards greater rationality, which, over and above particular, moral, and religious interests, can *guarantee peace and protection*. As things have developed, the scope of the Leviathan has changed and grown. Alternately or simultaneously,
the ordering power became a welfare state, a state governed by the rule of law, an ensuring or social state. ... [W]hat has remained constant, however, is the pretension, namely to concentrate rule, with or without a separation of powers, in an institutionally organized functional unit (Zabel 2012, p. 151. Transl. R.B.).

These considerations invite the conclusion that any observable change in statehood would have to be reflected in changes in how the law is safeguarded. Zabel therefore rightly speaks of a structural change in the safeguarding of the law, a change that cannot be overlooked, despite the fact that the state continues to be the dominant governing authority. His arguments are worth looking at, because they not only bring the governance perspective into play – safeguarding the law as a governance problem – but also point to the key importance of self-disciplining on the part of governance collectives:

... Governance models and strategies, thus cooperative forms of coordinating action, safeguards, and conflict resolution [play] an important role in both political and legal contexts. With regard to structural change in safeguarding the law, this aspect still needs to be looked at more closely. Governance strategies are primarily concerned to meet the need for less control and for informalization in modern regulatory and crime policy. In contrast to a hierarchical/vertical ordering regime, they stress the horizontal, that is to say, negotiatory nature of societal interaction and interest communication. Developed originally in the transnational and international field as global or good governance, governance has meanwhile become firmly established [on the relationship between transnational or international governance concepts with domestic governance concepts see Behrens 2004, p. 93 ff.; on informalization tendencies see Schuppert 2011b, p. 27 ff.]. The focus today is on maintaining, re-establishing, and coordinating the political and economic, institutional and legal balance by activating non-state or “semi-state” actors. For society as a whole, this then affects social subsistence, economic development, cultural, educational, and science management. The goal is the self-regulation of entire areas of society, either through cooperation among themselves or with state authorities. The latter not only eases the burden on the state – a direct goal – but also leads to various forms of endogenous and exogenous disciplining of the parties involved (Zabel 2012, p. 155 f. Transl. R.B.).

We now turn to variants of the link between the exercise of authority and the safeguarding and/or enforcement of the law.
I. The Safeguarding of the Law and Judicial Office as Tasks of the Divine and/or Religious Exercise of Power

1. God as Judge

Wolfgang Schild, writing about “God as judge” notes from an art history perspective that the Christian faith has always conceived of God as a judge.

One of the key elements of the Christian creed is the notion of God as judge: “From thence He shall come to judge the living and the dead.” He is Christ, the incarnate Son of God, who “sitteth on the right hand of God the Father Almighty,” to whom, according to John (5.22) the Father “hath committed all judgement” ... “That all men should honour the Son, even as they honour the Father”; “And hath given him authority to execute judgement also, because he is the Son of man” (John 5.27). According to St. John the Evangelist, Jesus says “I can of mine own self do nothing: as I hear, I judge; and my judgement is just; because I seek not mine own will, but the will of the Father which hath sent me” John, 5.30). Judgement therefore lies also in the will of the Father. What is more, Christians have also regarded God the Father Himself as judge (Schild 1988, p. 44. Transl. R.B. Bible quotes from the King James translation).

Delving deeper into this fascinating material, we come across innumerable representations of God the Father and Christ as judge and depictions of the Last Judgement. At the Last Judgement, the focus on Christ the Judge in all these pictures also – as Schild posits – has to do with the development of law:

Theologians had always compared the Last Judgement with legal proceedings before an earthly court – one need only recall Tertullian (†160) and John Chrysostom (†407). But this forensic aspect had been relegated to the background by the idea of Christ the Ruler. But the parallels between the Last Judgement and the earthly court now became apparent and were expressed. In the commentary on the Saxon Municipal Law (Weichbildrecht) written between 1330 and 1386, the author notes: “Where the judge sits and judges, in the same place and at the same hour God sits in divine judgement over judge and lay judges, and every judge should therefore have the stern court of our Lord depicted in the courthouse”...

As the tasks of presiding and passing judgement were gradually united, with the judge playing an ever more active role, the notion of Christ as Last Judge changed. He had to become what he had really always been: the active lord of the court, behind whom the apostles appointed as (co)judges according to Matthew 19.28 had to take second place.

The Last Judgement itself followed an elaborate judicial procedure like every earthly court:
Witnesses did not need to be heard, since the Book of Life was read and so forth. The act of judgement itself was differentiated: Mary, John the Baptist, the apostles and martyrs (Rev. 20.4), the saints (and holy rulers) were not judged. Similarly, no judgement needed to be passed on the Jews, the heathen (including the old gods of the Greeks and Romans), Saracens, Egyptians, or, for example, on Nero, for they were damned from the outset, like Lucifer and the fallen angels. Only sinful Christians had to face judgement, which is described as the weighing of their deeds. The subsequent sorting of the saved and the damned to the right and left of the throne are dramatically played out; above all the torments of hell are graphically displayed as deterrence and warning (Schild 1988, p. 70 ff. Transl. R.B.).

From Divine Judgement we now move “downstairs” to canon law.

2. *Utrumque ius in utroque foro*: Normative Pluralism as Reflected in the Specific Jurisdictional Culture

a) The Duality of Secular and Ecclesiastical Jurisdictional Cultures

The duality of temporal/secular and spiritual/ecclesiastical legal order that prevailed throughout the Middle Ages is interesting in this context as a *duality of jurisdictional communities each with its own jurisdictional culture*. This duality manifests itself in two ways: in the dualism of punishment and penance and in a dualism of administration of justice and administration of penance.

- Paolo Prodi has this to say about the *dualism of punishment and penance*:

  Many Roman-Germanic peoples introduced the norms of the Ten Commandments into their own secular criminal law. On the one hand, secular adjudication sought to guarantee the capacity of the individual to act in order to obtain satisfaction for violations suffered, and did so through legal means, from the feud and judicial vengeance to many forms of compensation and financial penalties such as the wergild. The aim was thus to re-establish a balance in the human relations at issue. There is no superordinate justice “out of the blue,” and the state limits itself in a certain manner to regulating the procedure for expiation and to “quantifying” compensation. On the other hand, the institution church sought in the same fashion to regulate relations on earth between people and God. In so doing, it did not exercise divine judgement but intervened in the visible part of sin to allow the human being to achieve true and sole judgement through a different, inner accounting in which sin is set off by acts of penance, prayer, fasting, alms, or other acts that the church regards as equal in value and imposes. This was the perspective adopted by one of the prominent church fathers of the Early Middle Ages in Europe, the Venerable Bede: penance does not expunge the offence, but while confession before the judge leads...
to punishment, confession before God leads to forgiveness (Prodi 2003, p. 38. Transl. R.B.).

- This sanctional dualism finds institutional correspondence in a dualism in the administration of justice and the administration of penance. Prodi:

The fact that canon law holds its own as a legal order means that Roman thinking developed belatedly and from a defensive position, in close symbiosis with the imperial ideology of the separation from and autonomy of the secular power of the empire from the spiritual/ecclesiastical power of the papacy. This is the sense in which the famous commentaries of Accursius “Sacerdotes” and “Cuique” prefacing the digests are to be interpreted, in which the jurist is compared with the priest: Just as the priest administers things sacred (“sacra”) the jurist administers the laws, which are “sacratissimae.” Scholars have rightly paid attention to this solemn assertion. But what is particularly interesting is that, in the same passage, Accursius makes a much more valid comparison, between the administration of justice and the administration of penance as two different and parallel applications of the law, which Ulpian defines as “suum cuique tribuere.” There appears to be no competition between the two orders but rather a difference of level, a justice spanned between God and humanity. In the following considerations of the commentators, however, the problem seems to be a quite different one. Competition – with common reference to natural and divine law – exists between two concrete institutions, the papacy and the empire; both are equipped with the same power with regard to the forum and differ only in competence. Canon law is law, in both ecclesiastical and secular regard: it applies in the territories of the church; on the territory of the empire, secular law applies, but canon law increasingly has the upper hand when it comes to sin, and it is the church alone that passes judgement in this field (Prodi 2003, p. 90. Transl. R.B.).

\quad b) Norm Enforcement through a “Scaled” System of Penance: The Priest as Judge

Finally, Paolo Prodi also provides us with the relevant information about the judicial function of penance and the role of the priest as judge:

In the treatise De vera et falsa poenitentia, written in the mid-11th century and attributed to Saint Augustine (which had great influence throughout the following century), confession heard by a priest itself, causing the penitent to blush at his own sins before the representative of God, is already the penance required. The priest is therefore the judge and must have the knowledge and ability to proceed against the person before his court; he must be capable of inquiring into and assessing the aggravating or mitigating circumstances of the sin committed, as well as uncovering sins the sinner has not admitted to himself. Absolution – the remission of sins –
Abandoning the religious, ecclesiastical domain, we now turn to that of secular law.

II. Law Enforcement as a Task of the State: The Duty of the State to Maintain the Well-Functioning Administration of Criminal Justice

Markus Möstl (2002, p. 65 f.) had pointed out that law enforcement can be understood as a constant requirement of a state governed by the rule of law. Criminal law is doubtless the most powerful enforcement weapon, suggesting that the rule of law also requires criminal law to be used as a tool for enforcement. Writing about “the duty of the state to ensure the effective administration of criminal justice” Herbert Landau, judge at the Federal Constitutional Court underlines this conclusion (Landau 2007). Interestingly, he embeds this requirement in the overall system of social control, a context we shall be looking at later from the social disciplining perspective. Landau:

The efficient administration of criminal justice ... is a condition sine qua non for every ordered state, just as the well-ordered administration of civil law is indispensable for the economic system. This is obvious and therefore needs no more explaining than does the need for every state to engage not only in will formation but also to exercise authority if it does not wish to see a state of nature reasserting itself. ... If this is the case, the telos [of the efficient administration of criminal justice] lies in simple social contexts: the necessity of exercising social control through state institutions to ensure comprehensive internal public peace. The administration of criminal justice is only one aspect of societal and social control. What is decisive is the overall system of social control that enables the public peace to be kept. But without criminal law no state can survive; protecting the coexistence of people in communities is a fundamental task, indeed one of the most essential objectives of the state. It is the precondition for all life befitting a human being in freedom and security. Criminal law is so important because its function is reflected more cogently and obviously in people’s awareness than that of all other fields of law, which often do not invite such insight. With respect to the aim of ensuring social acceptability and
the public peace, the criminal law is, in the eyes of the public, the very epitome of law (Landau 2007, p. 124f. Transl. R.B.).

The second main argument that Landau advances for the fundamental task of the state to ensure the effective administration of criminal law is the need to secure a minimum standard of social ethics within the state, particularly in the interest of those subject to the law, who trust in the enforcement of such a standard:

Since every state must ensure a minimum standard of social ethics, and under the prevailing circumstances this can be done only through criminal law, the administration of criminal justice must seek to ensure the acceptance of this standard. Criminal law safeguards the inviolability of this order, i.e., it aims to maintain an objective state of public peace and to safeguard the legal goods of the individual and the state. But its objective is also and in equal measure to provide for the subjective certainty of those subject to the law that members of the community will comply with this objective order. The ultimate goal of the administration of criminal law in every polity is thus to establish a socio-psychological state of certainty as to the inviolability of recognized ethical minimum standards. Experience has shown that this can be achieved only through the threat and exercise of state coercion, which therefore is also the focus of criminal law methods. It is generally recognized that only the state can proceed against violations of this order with the most effective means available to a polity, namely the public punishment of offenders. This centuries-old cultural conception is undisputed. Awareness that the guarantees of freedom associated under the rule of law with the attainment of this goal are specific, hierarchically derived ends and methodological instructions cast in procedural rules can develop only if these simple conditional relations are taken into account. Here, too, it can be said that we owe our freedom to the limits to freedom that result from the necessity of penalization by the state. If we accept these conditions, the topos of the effective administration of criminal law must be a prime duty of the state, regardless of its concrete structure; it can therefore not represent a countervailing interest in taking account of individual interests and basic rights or a partial aspect of the obligation to provide justice (Landau 2007, p. 126. Transl. R.B.).

We do not share this “fundamental-theological position” as such, but shall not comment on it at this stage; we let it stand as – probably – prevailing opinion. In the course of the chapter, we shall be going into greater detail on the mechanisms of social control as part of a differentiated, “broad” concept of law compatible with the rule of law.
III. Judicial Authority as a Component of the Manorial System: Two Examples

Until the state monopoly of lawmaking and law enforcement became established, the exercise of judicial authority was viewed as a subfunction of the manorial system, as we shall show with two examples.

1. The Example of the English Justice of the Peace

Particularly from the point of view of regulated self-regulation, the English justice of the peace is an interesting construction; “JPs” were culled from among the propertied classes and entrusted with judicial authority on an annual basis by the crown. Ronald G. Asch:

In England, the crown managed to win the nobility for the task of keeping the peace at the local level, even though the inclination to resolve conflicts by force, as in the so-called “poaching wars” was still rife in the sixteenth century. In the shires, the corresponding functions were in the hands of the gentry, in particular, who provided the membership of the so-called commission of peace. Ever since the fourteenth century, the king had commissioned a small number of local landowners in the shires with the task of punishing offences of all sorts by vesting judicial powers in them through an annually renewed commission. The members of this commission were entitled “justice of the peace.” In the sixteenth and seventeenth centuries, the number as well as the powers of these royal commissioners grew (in the late Middle Ages there had often been no more than 12 or 15 per shire, their numbers later increased to 40 or 50 and after 1600 to 100 or more). They were de facto responsible for enforcing all laws, issuing licenses to publicans, administering poor relief, ensuring that roads and bridges were in good repair, setting wages and sometimes food prices, settling disputes, and punishing all minor criminal offences. Since the Reformation they had also been responsible or partly responsible for prosecuting Roman Catholics. However, the crown could only appoint people to the office of justice of the peace if their wealth, pedigree – this factor still played a role in the sixteenth century – and general standing gave them enough authority in the county. Vice versa, misconduct as justice of the peace could lead to them being excluded from the commission. This was naturally a blot on the family escutcheon and a threat to their reputation, namely when their position within the gentry was in some doubt, owing, for instance, to humble origins (Asch 2008, p. 243f. Transl. R.B.).
2. The Example of the Manorial System

a) The Manorial System as Type of Government

The so-called manorial system or manorialism was an autonomous type of government in Europe from the 15th century on (Peters 1995); one could even speak of manorial societies (see Peters 1997). The study by Monika Wienfort on the nobility in the modern age provides first information in the following infobox (Wienfort 2006, p. 63):

---

Since jurisdiction relating to land rights can be understood only in the social context of the Gutsherrschaft system, we shall cast a brief look at the manorial system as an ensemble characterized by communicative interaction (see Wunder 1997, p. 227), where judicial authority constitutes only one element of this ensemble.

Heide Wunder gives us a graphic description of the governmental system of a manor, taking the example of the Dohnas (1997). She reports on the how this noble Prussian family understood government and its Christian foundations:

... [T]he conception of government held by Peter’s Calvinist grandsons, the brothers Friedrich, Abraham, Fabian, Achatius und Christoph is contained in the “Eternal Will and Testament” of 1621. They drew up a “constitution” that was to be followed by their children and descendants “in the future and for all time.” With regard to relations with their subjects, it stated:

“It is our firm will that our future descendants treat their subjects and servants not tyrannically but in a Christianly and moderate manner, for they must bear in mind
that Christ our Lord and Saviour shed His holy blood for the least pauper and for
the noble mighty of this world. Therefore they should follow our example and be
satisfied with only moderate interest and benefit from their labour and the labour of
their beasts in such fashion that the poor shall have bread and nourishment. For
where his subjects perish so does the lord also. If they are not burdened with
tolksome service or bled dry by severe chastisement they will flourish, so that the
poor will pray for their masters and God will send his blessing from heaven on both
for their wellbeing; for the tears of the poor provoke God’s just punishment. So may
our beloved descendants be mindful of this for the sake of their earthly and eternal

This conception of government was very much that of sovereign rulers in
that, for example, the Dohnas were intent on decreeing and enforcing the
uniform regulation of village conditions throughout the area over which
they held authority:

While their conception of government showed the mindset of a sovereign ruler, the
Dohna’s specific governmental arrangements, also introduced in 1624, reinforced
this impression. With the “Willkür” [statute or constitution] for all the villages under
his dominion, Count Dohna succeeded in a project that the ducal administration
had sought to achieve in vain in the sixteenth century, namely the uniform regu-
lation of village conditions by means of a “general,” i.e., identically worded statute,
which also covered fire prevention and the use of forests and wood, not to mention
the celebration of betrothals, weddings, and baptisms. These “Dorfwillkür” thus
aimed to guarantee “good public order.” Such normative standardization of local
conditions was certainly in the interests of rational estate administration; neverthe-
less most of the substantive provisions of communal statutes went back to the
period of the Teutonic Order, so that the Willkür cannot be read only as a document
of a lord. In key sections it established peasant participation in local government
and is therefore constitutes a form of government in which peasants organized in
the community took part. How this proceeded in detail can only be ascertained “ex
negativo” from judicial con-
fl
it resolution. The series of Willkür accounts from the
seventeenth and eighteenth centuries – which recorded the dates for reading out the
Willkür, the activities of the bailiff and suitors, the income and expenditure of the
community – provide evidence of specific communal practices and of the independ-
ent life of the community.

Further insight into the importance of community participation in “public order” in
the manorial system is provided by the rules for the common court of the Dohnas in
Deutschendorf. Although the version available to me dates only from 1710, the
precise provisions pertaining to participation of village court officials are all the
more important. In addition, the rules of the court give insight into questions
important to subjects: bailiffs were not to interfere in judicial matters but limit
themselves to maintaining “law and order,” i.e., adjudication and administration
were kept apart. In holdings outside the immediate demesne, however, there were
subsidiary courts (Beigerichte) with jurisdiction over fellow tenants. Fines paid to the
manor are recorded, for example in the annual accounts for Reichertswalde and Lauck for 1710/11 under the heading “Fines imposed out of court” (*An Strafen. Außer Gericht erkant*) (Wunder 1997, p. 231f. Transl. R.B.).

- In general, the Gutsherrschaft manorial system must be conceived of as an ensemble with various actors playing specific, more or less defined roles. Writing about big landowners in Hungary, András Vari uses the concept “game of government” (*Herrschaftsspiel*):

There were at least five players in the game of government: the lords of the manor, the officials, the tenants, the rich peasant members of the municipality or the mayor and peasants. Of these five participants, the mayor (*Gemeindevorsteher*) and the tenants (*Pächter*) need more explaining. The important role of the mayor arose from the far-reaching autonomy of the farming community during the reconstruction period in the first half of the eighteenth century. Municipalities regulated the ploughing of waste arable land and land use to a large extent jointly, and on this basis interpreted the competence of the freely elected village judge very broadly. Although the reaction of the manorial authorities meant that they had to accept curbs to the judicial competence of the village court, for instance that the village judge was to be appointed from among three candidates nominated by the lord of the manor, other more essential rights were not touched (e.g., the free election of village jurors, the right of appeal to the district (*Komitatstuhl*) and to the royal governor’s office (*königliche Statthalterei*). In many places, the municipality was strengthened by the acquisition of municipal property (Vari 1999, p. 265. Transl. R.B.).

b) Jurisdictional Authority as a Right in Rem

As defined by the General Law for the Prussian States (*Preußisches Allgemeines Landrecht – ALR*), so-called *patrimonial jurisdiction* (see Wienfort 2001) was, as juridical construction, a right in rem, tied to possession of certain property, with the consequence that judicial rights went with the property when transferred. Since possession of the given property was the decisive factor (possession was treated as synonymous with ownership), anyone could in principle assume judicial authority, “what counted was not the noble status of the candidate but only the circumstance of possession” (Wienfort 2001, p. 34); but this did not change the fact that in social reality judicial authority was reserved to the nobility:

It was therefore not contradictory that in around 1800 judicial authority was almost everywhere vested in nobles. In sum, it can be said that the legal perspective of rights in rem concealed the politico-social classification of patrimonial jurisdiction as a
socially exclusive privilege. A treatise published in 1790 on “the law of the propertied nobility in Germany” described patrimonial jurisdiction as a “right in rem of the nobility,” which, however, was grounded in a universal “property law.” In the pursuit of various and sometimes opposing interests, judicial rights therefore developed into a question of possession (Wienfort 2001, p. 34. Transl. R.B.).

c) Patrimonial Jurisdiction between State Sovereignty and Private Property

The extent to which traditional patrimonial jurisdiction could be reformed or even abolished was not only a question of the political relation of forces but also a subject of vehement legal controversy (see Wienfort 2001, p. 134). Whereas the one camp stresses the administration of justice as a function of state law that is conferred but can also be withdrawn, the nobility and sections of the noble reform bureaucracy evoked the duly acquired right of property in land, which since the Middle Ages had included judicial rights; we shall take a brief look at two views on the subject.

The renowned criminal lawyer Paul Johann Anselm von Feuerbach was a strong opponent of patrimonial jurisdiction as a privilege of the nobility. Since the French Revolution, in his opinion, manorial jurisdiction should be burnt at the stake of history:

The same blow that in France destroyed the feudal aristocracy also struck down patrimonial jurisdiction. Confronted by the personal freedom and independence of the citizens in their mutual relations, by the idea of the universal equality of subjects before the law, patrimonial jurisdiction, like slavery, serfdom, and hereditary servitude had to vanish (quoted from Wienfort 2001, p. 135. Transl. R.B.).

The opposing view was put by Carl Ludwig von Haller in his programmatic-conservative and very influential “Restoration of Political Science” (Restauration der Staatswissenschaft); Monika Wienfort:

In Haller’s 1817 work, the jurisdiction of the lords of the manor was described as “natural” and “not a delegated right.” Hereditary and patrimonial jurisdiction, he lectured, could “well be restricted as to its scope but never fully abolished.” Haller thus cautiously sanctioned the state assuming criminal jurisdiction. The majority of those exercising patrimonial jurisdiction welcomed such a plan without reservation because of the high costs of criminal proceedings. The view of statists and some liberals that judicial rights had been delegated to the sovereign by “social contract” was explicitly rejected. Haller’s praise of patrimonial jurisdiction as “local, fast, cheap,” just and impartial stylized and emotionalized the relationship between the lord of the manor as judge and those under his jurisdiction as “family,” as paternalism par excellence. All authors intent on defending judicial rights in the period
C. Safeguarding the Law as Civil Right and Civic Duty

In the preceding section, we were concerned exclusively with safeguarding the law and enforcing norms as functions of government. If, however, governance collectives are understood as regulatory collectivities and hence as legal communities – as they are throughout this book – an eye needs to be kept on the actors who exercise power and their “legal staff” (Max Weber) as well as citizens, not only as the addressees of norms but also as members of the given legal community, which both endows them with basic rights and imposes basic duties on them.

If – as we have just seen – every normative order has a norm enforcement dimension, for the state legal order, which springs primarily to mind, this would mean that the enforcement of the law is also a task of the state; logically, the modern state claims a monopoly not only on lawmaking but also on law enforcement. However, inspired by Anglo-American models and the European Union, there are an increasing number of interesting exceptions that invite more thorough consideration of the relationship between law enforcement by the state and enforcement under private law.

Comprehensive treatment of this interesting perspective is beyond our present scope. We limit ourselves to examining three brief examples of the role of the citizen as autonomous actor in safeguarding the law.

I. Mobilization of the Citizen for Environmental Protection in European Law

It has always been the right of all citizens to defend themselves when their rights are restricted or even unlawfully encroached upon. On the grounds that their subjective rights have been violated, citizens can take action before the courts – the “right of action” or “standing to sue” in juridical jargon – which is additionally protected by Article 19 (4) of the Basic Law. There are corresponding provisions in European law, which by waiving the criterion of individual involvement essentially go much further towards mobilizing the citizen to enforce the law (see Masing 1996); the citizen is quasi institu-
tionalized as advocate of the common good and the safeguarding of the law (see Schuppert 2004c).

Significant for the mobilization of the citizen under European law in support of environmental protection as a public good is the highly regarded Council Directive on Freedom of Access to Information on the Environment of 7 June 1990 (OJ No. L 158/56) – unusual for German law – which has meanwhile been transposed into national law by the Environmental Information Act. The duties to provide information under the directive ensure that the interested citizen receives comprehensive access to all relevant environmental data without this material having been pre-sorted or processed, for example in the course of public relations work by the authorities. The aim of such transparency is to provoke an “open discussion on the environment” and “strong public participation in the environmental policy decision-making process,” notably “improved cooperation with environmental organizations, non-governmental organizations, and other interested parties” (Economic and Social Committee 1989) Freedom of access to information on the environment is intended to “strengthen public participation in procedures for supervising environmental pollution and preventing environmental damage and ... thus contribute effectively to attaining the objectives of Community action in the field of environmental protection” (European Commission 1988). Johannes Masing has summarized the concept as follows:

The concept pursued is clear. The implementation and design of Community environmental law is not to be assigned to the arcana of national administrative authorities but made public through the participation of vigilant citizens. Responsibility is not to be vested only in the national executive machinery; the citizens themselves are to be mobilized as stewards of the environment. They, too, should take care of the environment. Public information on the environment thus brings citizens and administration closer together: both authorities and citizens keep watch. Not only the public sector but also private organisations consider and initiate measures (Masing 1996, p. 33. Transl. R.B.).

II. Enforcement of Antitrust Law by Public Authorities or through Private Law?

Market economy activity is activity under competitive conditions. The Act on Restraints on Competition (GWB) and the existence of the Federal Cartel Office indicate that the state is responsible for guaranteeing well-functioning
competition. This is also quite particularly close to the heart of the European Institutions. The smooth running of the European single market requires undistorted competition among the participants in such an internal market. Considering, however, what tools are suitable for ensuring well-functioning competition, individual market participants should obviously be brought into play as guardians of competition and given the appropriate legal means to fulfil this task. This is the declared policy of the European Commission and points to a trend that Wernhard Möschel criticizes:

_The strengthening of private legal protection under antitrust law is in keeping with the international trend._ In 2005, the German legislator amended the Act on Restraints on Competition to comply with the 2004 reform requirements of EU competition law. A key aim of the legislation was to expand the possibilities for private legal protection. In December 2005, the EU Commission issued a Green Paper on damages actions for breach of the EC antitrust rules. The purpose was to make it easier for consumers and businesses to claim compensation from offenders for damages suffered. It was also sought to strengthen the application of competition law (Möschel 2007, p. 483. Transl. R.B.).

Individual competitors that consider they have been specifically disadvantaged or have suffered damages were thus to be enabled and encouraged to enforce the application of competition law; the necessary tools are the effectuation of damages claims, but above all the admission of so-called competition complaints, which allow market competitors to take legal action against state aid detrimental to competition (for example, unlawful state aid to finance regional airports, see Martin-Ehlers and Strohmayr 2008).

Not aspiring to the status of experts on competition law, we shall be content with these few remarks to point the way to a more general issue, namely whether law enforcement is necessarily a primarily state task or whether private law, “normally” serving private interests, is “called upon” to enable or facilitate enforcement of the law with an eye to the public interest. It is a both fundamental and interesting question.

III. Norm Enforcement through Private Law?

How enforcement by the state and through private law relate to one another has been thoroughly and convincingly examined by Dörte Poelzig (2012), taking the example of antitrust law and capital market law. She sees norm enforcement through private law as in conformity with the system because business law in the form of the antitrust and capital market law on which
she focuses has the job of advancing private interests; ultimately it pursues public interest goals (in the importance of the public interest topos in economic law, see Eberhard Kempf et al. 2013), since it is concerned to order and maintain the institution of the market:

With the involvement of private parties in the effective enforcement of business law, private law assumes a function in the enforcement of objective law that serves the general economic interest. Private law is accordingly assigned a control function of its own in the interest of protecting the market. ... [T]he focus is not on the private utility of private-law powers but on the public good. The general interest that private-law sanctions pursue in enforcing the behavioural norms of economic law thus goes beyond the public interest, which generally consists in upholding the objective legal order by exercising subjective private rights. Concern about the instrumentalization of private law as a control tool in economic law is therefore due largely to the classical understanding of private law as a system of action by private-law subjects in their own interest. There are fears that the “collectivization of interest evaluation” in economic law could eliminate the advantages of the decentralized evaluation of interests in concrete relations between parties proper to private law. If a party can invoke the public interest and thereby strengthen its position, the balance between parties would be seriously perturbed. The common good could be advanced at best as a useful side effect of individual legal protection (Poelzig 2012, p. 29f. Transl. R.B.).

Dörte Poelzig sees the division of labour between the two legal orders quite differently; she considers enforcement under public law and under private law to be equivalent alternatives for inducing market participants to comply with the rules of market conduct:

The enforcement of rules of market conduct is the common goal of public-law supervision and private-law demands. Public-law and private-law sanctions are therefore functional alternatives directed towards a common goal – enforcement of market conduct norms in the public interest to protect the market as institution. Public law and private law thus differ not in their regulatory purpose but in the tools they use to attain this purpose. The decision about public-law and/or private-law norm enforcement is more often a question of practicality than of principle. Whether a legal order opts for private-law or public-law forms of enforcement is therefore often also determined by history (Poelzig 2012, p. 566. R.B.).

The thought behind this argument is the conceptualization of the two legal sub-orders of civil law and public law as “mutually supporting systems” that we owe to Eberhard Schmidt-Aßmann and Wolfgang Hoffmann-Riem (Schmidt-Aßmann and Hoffmann-Riem 1997). This theoretical approach allows the relationship between norm enforcement by the state and through private-law to be perceived as a division of labour. Poelzig:
As the law stands, private law is already a key regulatory instrument in markets – traditional with respect to fair trading, antitrust matters, and the capital market. It seeks to enforce rules of market conduct. Such rules serve primarily to protect the market as institution and the interest of all participants in its well-functioning. To this extent, private law as a regulatory tool is committed not primarily to protecting the individual but to protecting the market as institution. In order to control the market, private persons are vested with a claim to its regulation. The private-law enforcement of rules of market conduct thus places the law in the hands of market participants with an interest in the well-functioning of the market and thus in compliance with such rules. General and individual interests hence run in parallel or indeed converge. Societal countercontrols through organizations and market participants acting to protect the market are hence an expression of secondary societal responsibility – in other words supportive responsibility – for the common good. Together with public law, private law forms a regulatory system “in joint ownership,” which can achieve effective enforcement of the rules of market conduct only in conjunction, and thus efficiently defend the interests of the community as a whole (Poelzig 2012, p. 593. Transl. R.B.).

IV. Defence of the Law (Rechtsbewährung) in Criminal Law – Self-Defence

One of the few cases in which the citizen is lawfully permitted to use force to uphold the law is self-defence, which in Germany is dealt with under Section 32 of the Criminal Code. It is a matter of controversy whether what is being defending in the exercise of self-defence is only the specific individual object of legal protection – such as property and the physical integrity of the victim in a robbery – or whether the person attacked is also defending the legal order as a whole and thus exercising an essential function of state authority. Johannes Kaspar sums up opinion on the subject:

Three opposing views have long been advanced in this field. A minority view, which has gained increasing support in recent times, is that the rationale of Section 32 of the Criminal Code is solely the protection of the individual good. The counterposition, represented particularly by Schmidhäuser, is that self-defence is grounded solely in the supra-individual aspect of “defending the law.” The act of self-defence directed against an unlawful assailant is to be seen solely from the perspective of “defending the legal order,” whereas the protection of the individual good that it also effectuates is to be regarded as a side effect of the act of defence and mere “reflex.”

Common to these two approaches is that they are monistic, that is to say, they set out from a single fundamental principle. The predominant dualistic view, by contrast, combines these two aspects: the justification of Section 32 of the Criminal Code is considered to be correctly understood only if it is based on both protection of the individual and defence of the law. ...
The main argument advanced by proponents of the dualistic approach against a purely individual understanding of self-defence is that the special “forcefulness” of the right of self-defence cannot be explained in these terms. The right of self-defence under Section 32 of the Criminal Code is very far-reaching; according to prevailing opinion it also covers the right to kill an assailant to defend material assets without weighing “proportionality” in the balance between the attacked and defended good. Furthermore, neither evasive action nor the securing of outside help is expected of the party attacked. All this, it is argued, cannot be explained only in terms of protection of the threatened good but is to be understood only against the backdrop of “defending the law” (Kaspar 2013, p. 41f. Transl. R.B.).

The probably predominant dualistic approach with its stress on the supra-individual aspect of defending the law necessarily finds itself in difficulty when it comes to so-called petty offences, when things of minor value are involved. The critical question is then whether the party exercising self-defence can with good conscience invoke the often quoted statement of A.F. Berner: “it would be wrong if justice had to give way to injustice” (Berner 1848, p. 557. Transl. R.B.). Johannes Kaspar:

Here, too, [the proponents of the dualist approach] abide by the strict principle of permissible defence. Since in the case of petty offences ... we are dealing only with a “diminished” and not with fully eliminated interest in upholding the law, the right of self-defence is given; sparing the attacker is appropriate only with respect to due consideration for his life. Schmidhäuser goes even further as apologist for the purely supra-individual approach, according to which the adult fruit thief who ignores a warning to climb out of the apple tree may be shot. He argues that this is part of the indispensable “struggle for the law,” which depends on the “defensive willingness of all members of the legal community.” The fact that many members of the legal community fortunately see things differently will later be shown on the basis of empirical data (Kaspar 2013, p. 43. Transl. R.B.).

The empirical data Kaspar mentions are findings of the so-called Dresden Self-Defence Study by Knut Amelung and Ines Kilian, who looked at the public acceptance of such a far-reaching right of self-defence (Amelung und Kilian 2003; Amelung 2003). The outcome of the study is clear, showing “that the majority of population quite self-evidently assumes that the right of self-defence is limited by considerations of proportionality” (Kaspar 2013, p. 54. Transl. R.B.). Kaspar’s comments on this result is interesting, because it clearly shows that the discussion of the problem of justifying self-defence also has to be conducted as a debate on political culture; to be more precise, on the conflict culture of a society:

The findings of the Dresden self-defence study also offer a strong argument against a positive, general prevention justification for the forceful right of self-defence. The argu-
ment of “re-establishing the public peace” – substantively somewhat ambiguous and indeterminate – seeks to guarantee that the population perceives any punishment imposed as a just and reasonable reaction to the offence without this effect being seriously amenable to empirical measurement in any one case. The lawgiver is under obligation to give normative expression to what it regards as a just and reasonable reaction – but always with the goal in mind of taking due account of prevailing views in society. If there is any indication that the population would be content with a lower level of sanctioning or would regard a complete abandonment of sanctions as acceptable, this would have to be looked into in the interest of optimizing the protection of basic rights; otherwise there would be a risk of imposing punishment without any meaningful preventive effect.

Applying this to self-defence, it would mean that warding off an attack with particular force cannot be legitimated on the grounds of “defending the law” if the population does not expect such a reaction in certain constellations but, on the contrary, regards it as excessive and unlawful. The 1962 government bill also interestingly assumed that the right of self-defence was limited “in cases where its exercise would go against the legal convictions of the general public” – and precisely this appears to be the case for homicide to defend material assets. By contrast, the assertion in the same bill that self-defence is “a forceful defensive right rooted since time immemorial in the legal convictions of the people” is clearly obsolete in the eyes of this general public, as is the assertion based on an antiquated bourgeois concept of honour that the party attacked cannot on principle be expected to give way because this would constitute “shameful flight.” According to the study mentioned, this, too, finds no echo among the population. Overall, what we have here is one of the far from rare intersections between criminology and substantive criminal law – that have hitherto largely escaped overarching and systematic examination – where empirical findings are urgently needed in interpreting and applying substantive criminal law (Kaspar 2013, p. 55 f. Transl. R.B.).

The above quotes show that, by granted a broad right of self-defence, the state enforces the legal order against the attacker indirectly through the exercise of self-defence by the party attacked. Self-defence, for the person against whom it is exercised, thus has de facto the character of a sanction whose possible intensity is regulated by prevailing law. The citizen is therefore empowered not only to supervise but also to rigorously enforce the legal order, albeit in a strictly limited corridor that— as we have seen – is always the subject of political debate.
D. The Plurality of Norm Enforcement Regimes as a Consequence of Functional Differentiation: The Example of the Professions

I. The Concept of Functional Differentiation

The theory of functional differentiation is a key element of systems theory and associated above all with the name of Niklas Luhmann (1984; 1997; 2000). Whereas in pre-modern societies the main criteria of differentiation were status and rank, in the modern world-society functional differentiation is the primary differentiation principle; what is meant by this term is outlined by André Brodocz:

Functional differentiation means that the perspective of unity under which a difference between system and environment is established is the function that the out-differentiated system ... fulfils for the system as a whole ... That is to say that every functional system of society has to have “monopolized” performance of the given function because its “functional primacy,” i.e., the priority of its own function over all other functions, is the basis of its own subsystem formation ... One such functional system is the political system ... The exclusive function of a political system is to “provide the capacity for collectively binding decision-making” ... Other functional systems identified by Luhmann and others are the economy, science, law, and religion, as well as the mass media, education, medicine, art, social welfare, and sport. The functions that the various functional systems perform are thus widespread. The function of the economic system, for example, is to regulate the distribution of scarce goods, which combines sustainable provision with current distribution; the science system finds its function in gaining new knowledge, and the legal system seeks to ensure the precautionary stabilization of expectations, which can be maintained even in the event of disappointment or conflict (Brodocz 2006, p. 509f. Transl. R.B.).

These social subsystems operate self-referentially; this is the meaning behind the talk of autopoietic systems which operate with a function-specific binary code (true/false, credit/debit, right/wrong, and so forth). These concepts are familiar from every introduction to systems theory and do not require detailed discussion here.

The really interesting question, however, is whether these autopoietic subsystems can be conceived of as operating in actuality. In her essay on “Functional Subsystems in the Theory of Social Differentiation” (1988), Renate Mayntz provides a useful explanation. In the process of social differentiation, she identifies three stages of differentiation (Ausdifferenzierung):

The concept of differentiation refers to a process of system formation in which a number of stages can be identified analytically without ascertaining whether exist-
ing functional subsystems have developed through such a process. The lowest stage is the single action, action situation, or interaction. The special meaning of action must naturally not be idiosyncratic but recognized socially for what it is – religious, economic, or military action, a relationship of intimacy or domination, a situation of healing or necromancy. In the next stage of differentiation there are special functional roles characterized by the continuous performance of an activity that is initially marked off only situationally: physician, researcher, actor, priest, etc. Finally, in the third stage, correspondingly specialized larger social structures develop, which are often but not necessarily formal organizations, and which are interlinked throughout society to form a special universe of action (Mayntz 1988, p. 20. Transl. R.B.).

Really interesting, however, is the question whether the “formation” developing in the process of social structural consolidation can be characterized in terms of a specific mode of conduct. On this question, which administration science addresses under the heading of organizational behaviour (see Schuppert 1994), Renate Mayntz gives two important answers: in the first place the institutions shaping the given subsystem tend to claim a monopoly on their function:

Even after the stage of subsystem formation as defined has been attained, differentiation can vary in extent. Although the fact that a subsystem has primary responsibility for a certain type of action in society is part of the minimum definition of the concept, there are marked differences in the degree of monopolization of the action concerned (e.g., education, medical treatment, news dissemination) by a definable institutional complex. Important for perception of the distinct existence of a subsystem by members of society themselves and for this subsystem’s operation and political controllability is the extent to which those performing a certain category of functional role and/or the relevant formal organizations succeed in imposing the exclusivity of responsibility for a certain service or type of activity... (Mayntz 1988, p. 22. Transl. R.B.).

On the other hand, their behaviour reveals a leitmotif, which we shall be examining in greater detail, namely the claim to represent interests externally and to effective internal self-regulation:

What is important for the degree of a subsystem’s differentiation is whether and to what extent there are actors who can claim authority for internal self-regulation of the subsystem and to represent its interests externally. Although the existence of corporate actors is not fundamental to this capacity, it is so in practical terms. Corporate actors can also better secure access restrictions, claims to competence, and the “threshold of legitimate indifference”... than an amorphous crowd of functional role-players. ...

Societal subsystems that have attained the three stages of differentiation described are generally perceived by the members of society themselves as autonomous and
easily distinguishable systems... The delimitation of single functional subsystems in
the perception of members of society is for its part an important precondition for
enforcing claims to exclusive responsibility, in particular access conditions or the
special attention of the political system. To this extent, interaction between sym-

bolic-cognitive processes of definition and social structural differentiation is mutu-

Having gained a general idea of the theory of functional differentiation, we
turn to the example of the professions to examine how the differentiation of
subsystems also leads to the differentiation of norm enforcement regimes.

II. The Role of Professions

1. The Sociology of Professions Perspective

Chapter 2 examined in detail the type of norm ordering specific to profes-
sions, so that a few remarks from the “sociology of professions” viewpoint
(see Muzio and Kirkpatrick 2011), notably on links with the theory of func-
tional differentiation, will suffice for our present purposes. This having been
said, the following findings are impressively clear:

Professions (on the broader German concept “Beruf” see Gispen 1988) do

exactly what Renate Mayntz would expect of them: they monopolize knowl-

edge specific to a profession, they act externally as representatives of interests,
and internally exercise sometimes very intensive social disciplining. A num-

ber of authors have addressed the subject.

• As an introduction, so to speak, Manfred Mai lists the most important
ideal-typical characteristics of professions as social and political insti-
tutions:

  – A demanding, generally academic training;
  – Close relations with clients, generally marked by great personal trust;
  – Far-reaching autonomy in organizing professional matters such as quality con-
trol of the services offered, admission to the profession, training content, and
remuneration;
  – A high social reputation;
  – Codified professional ethics addressing the common good;
  – Largely monopolistic control of a societal sector of key importance (2008, p. 15.
    Trans. R.B.).
As this list shows, professions fit almost exactly into the picture of social-structurally consolidated formations produced by processes of functional differentiation.

- The connection between profession formation and functional differentiation is discussed by profession sociologist Michaela Pfadenhauer. With reference to the outstanding position the professions play in the social theory of Talcott Parsons (see already the 1939 essay “The Professions and Social Structure”), she stresses the conditional relationship between autonomy and self-regulation:

The structural functionalist model for explaining the occupational division of labour is based on the premise that societies conceived of as systems are subject to the progressive outdifferentiation of the functions and services necessary for the existence of modern societies. They provide the appropriate professional positions and assign individual actors to them who perform specialized services in these positions under the guidance of role expectations. Performance is ensured through socialization and the concomitant internalization of the normative basis of a position and by (primarily positive) sanctions. ...

Optimal performance requires special institutional framework conditions, which, although they give professionals a higher degree of “freedom” in the exercise of their occupational activity, nevertheless demand a great deal of self-regulation and strong orientation on the public interest. Privileges and prestige are, so to speak, the rewards that professionals receive in return for self-restraint (Pfadenhauer 2003, p. 38 f. Transl. R.B.).

Michaela Pfadenhauer goes on to define professions “as self-regulating corporate formations relatively autonomous and subject to internal collegial regulation in training for and exercising their activities” (2003, p. 40). As such corporate actors, they are “political collective actors” (2003, p. 55) and pursue a professional policy shaped by their action logic. With respect to professional standards, this policy asserts an optimum of exclusive definitional and interpretative authority (see Mayntz et al. 1988, p. 27 f.), but this privilege of organized autonomy is granted only in return for “the credible promise of self-regulation” (van den Daele and Müller-Salomon 1990, p. 22. Transl. R.B.); Pfadenhauer has this to say about the link between the claim to autonomy and the claim to regulate:

The claim of professions to self-regulation generally concern admission to the profession in question, stocks of expertise, and to collegial self-regulation; and the manifest themselves in professional strategies, in professional policy. The claim to regulation is consequently internal, committing members of the profession to pro-
fessional standards (scientific and ethical, and in the professional practice), compliance being enforced by formal and informal sanctions. In seeking to ward off “juridification,” the claim to regulated is, however directed outside the subsystem: the principal concern is to reject any form of external control by the state (Pfadenhauer 2003, p. 61. Transl. R.B.).

Thus although the wish is to keep the state outside as much as possible, the state as an authority for guaranteeing the finely balanced governance regime of autonomy and self-regulation is indispensable; in this sense, Pfadenhauer, with reference to Eliot Freidson (1983; 2001) comments on the subject of “regulated self-regulation”:

Freidson even regards “the state” as a condition for professionalism, since it alone can guarantee certain occupations their special status and do so over the long term. In this view, the state creates and secures the basis for professionalism – from the occupational division of labour to the education and training system, the distribution of responsibilities and licensing, up to and including the restriction of competition – without invalidating professional autonomy and self-regulation (Pfadenhauer 2003, p. 54. Transl. R.B.).

2. Forms of Internal Collegial Regulation

a) From Codes of Professional Conduct to Quality-Assuring Governance Regimes

Chapter one discussed normative orderings at length, not least the development from canons of professional ethics to so-called codes of conduct. Without returning to this at length, one new aspect should be added, namely the growing conception of internal professional regulation as professional quality assurance management (on modern quality assurance law see Reimer 2010; also Schuppert 2011e). What is at issue – and this is, as it were, the price for the grant of autonomy and the durable trust of the clientele – is to guarantee a certain level of quality for professional services.

Franz Reimer illustrates this in the case of accounting law. “There is a quality-assuring governance regime characterized by an interesting mix of statutory and private regulatory components; Section 55b of the Ordinance for the Public Accounting Profession (WiPro) is, so to speak, the basic norm: “The accountant shall set the rules that are required for the performance of his or her professional duties and shall supervise and enforce their application (quality assurance system). The quality assurance system shall be documented.”
It is interesting to see in which regulatory regimes the standards for this quality assurance system are to be found, namely not primarily in enacted law but, as Reimer shows, in private regulatory regimes of the profession or of private standard setting committees:

Reference is taken first to general professional duties such as independence, integrity, confidentiality, and responsibility (Section 43 (1) sent. 1 of the WiPrO), conduct befitting the profession (Section 43 (2)), continuing training (Section 43 (2) sent. 4), and special professional duties (Section 57 (4) 2 f., 5 in conjunction with the professional charter of the Chamber of Public Accountants). In Section 4 (1), the Professional Charter imposes “technical rules”; they supplement statutory rules and address above all the principles of orderly accounting within the meaning of Section 238 (1) sent. 1 of the Commercial Code (HGB), the statements of the Accounting Standards Committee of Germany (ASCG), and the accounting standards, instructions, and comments on accounting and the accounting advice of the Institute of Public Auditors in Germany (IDW) (Reimer 2010, p. 367. Transl. R.B.).

Remarkable about this example is that the point of reference for enforcing professional standards is no longer a professional concept of honour and a professional ethic but the quality of professional services and its assurance.

b) Professional Disciplinary Jurisdiction between Professional Supervision and State Jurisdiction

Since governance collectives tend to develop a jurisdiction of their own, many liberal professions – such as the law – have long had professional tribunals exercising disciplinary jurisdiction, significantly entitled Ehrengerichte in German (literally “courts of honour”): not only military honour, as we have seen in chapter two, but also professional honour plays an important role in guiding conduct and contribute to quality assurance.

It was therefore obvious to attach such tribunals to the relevant professional organization, since they ultimately ensure effective professional supervision. In his book on the autonomy of the professions, Thomas Emde remarks:

It has already been indicated that the importance and effectiveness of professional supervision depend essentially on the existence of disciplinary jurisdiction proper to the particular profession. ... organizationally, the systematics of the law pertaining to professional associations attach the tribunals to the relevant organizations; they exercise professional supervision like these bodies, apply the same norms, and are composed of members nominated by the associations. In view of the range and density of connections and interrelationships between professional associations and
tribunals, it is justified to speak of a complementary functional community. While it is the tribunals that render the supervisory activity of professional bodies really effective, the same tribunals would be at a loss without the standard-setting and standard supervision work undertaken by the professional associations (Emde 1991, p. 113 f. Transl. R.B.).

But since the professional tribunals undoubtedly exercise jurisdiction that the Basic Law (Article 92) reserves to the state, the only possibility to avoid unconstitutionality is to let them “sail under the flag” of state jurisdiction. With a markedly critical undertone, Emde notes:

In spite of everything, however, the Federal Constitutional Court treats professional tribunals as elements of the state judicial system. From both the personnel and material point of view, the necessary ties between professional tribunals and the state are given: the state has the right to choose tribunal members from among nominees; the German Judiciary Act applies with binding effect to honorary judges; and in the case of tribunals for the legal profession, qualification requirements for this profession apply. Although the judiciary has deliberately played down the very close functional, organizational, and personnel interdependence between legal, medical, and architectural tribunals and the relevant professional associations to such a degree that justificatory intent can be suspected, we shall leave it at that. Even if professional tribunals had not qualified as state courts within the meaning of Article 92 of the Basic Law, the consequence would not have been to integrate them into the administration of professional bodies but their unconstitutionality, because their material quality as adjudicative institutions is in no doubt. However one judges their status and constitutionality, professional tribunals are thus never an integral part of the administration of a professional association ... (Emde 1991, p. 114. Transl. R.B.).

We, too, do not need to go into the legal status of professional tribunals in any greater detail at this point. We are interested rather in their function, which Thomas Emde has convincingly described as a “complementary functional community between professional associations and professional tribunals.”
E. Norm Enforcement as Institutionalized Social Disciplining

Consideration of the social disciplining concept can begin with a decision by the Federal Constitutional Court on whether social workers as an occupational group have a right of refusal to give evidence (Decision of the Second Senate of 19 July 1972, BVerfGE 33, 367 – Sozialarbeiter). The court began by stating that recognition of the privilege to refuse to answer questions in a criminal case requires special justification; in the case of public accountants and tax consultants this justification was given, since both professions are subject to professional disciplinary supervision.

In the light of the rule-of-law postulate of upholding the well-functioning administration of criminal justice, granting a privilege of refusal to give evidence on professional grounds requires special legitimation before the constitution. From this point of view, it is not self-evident that the legislator has granted the accounting and tax advisory professions the right of refusal to give evidence. However, it can be justified because their professional training, the professional rules to which they are subject (Ordinance for the Public Accounting Profession, 24 July 1961 [BGBl. I p. 1049] and Tax Advisory Act, 16 August 1961 [BGBl. I p. 1301]), supervision by professional associations, and disciplinary supervision by professional tribunals give a certain guarantee that they will make no inappropriate use of the privilege to refuse to give evidence granted them, that they will invoke it only when essential to meet the obligation of professional secrecy and no overriding public interests oppose this. Granting the right of refusal to give evidence in criminal cases to representatives of the accounting and tax advisory professions is therefore compatible with the principle of the rule of law.

Social workers, by contrast, lack professional social disciplining, so that there is no guarantee that they will exercise the right of refusal to testify with responsibility:

Furthermore, the legislator has for good reason granted the privilege to refuse testimony only to representatives of professions in which – owing to the nature of the matter or on grounds of rules of professional conduct considered binding and therefore obeyed – fixed standards approved by the community have been developed where professional secrecy applies and silence is hence called for. This is appropriate because exercise of the right to refuse to give evidence, which depends solely on the decision of the witness, would otherwise be subject to chance and arbitrariness. However, whereas the conditions for all the professions mentioned under Section 53 (1) 3 of the Code of Criminal Procedure are met, for social workers no such standards have been set. Although the concept of “social secrecy” has been current in the literature for some time, it has yet to be satisfactorily defined. What is to be understood by the term is spelled out neither in general professional regulations nor laid down with binding effect in a professional code of conduct recognized within the social work profession ... Unlike in the occupational groups listed in Section 53
(1) 3 of the Code of Criminal Procedure, with the sole exception – albeit for special reasons – of midwives, social workers also lack both public-law representative bodies and professional tribunals, able to raise confidentiality to the status of a professional requirement, to supervise compliance, and to sanction infringements through professional disciplinary law.

It is somewhat astonishing that professional disciplining is not only cited but also considered a precondition for recognizing the privilege of refusal to give evidence; at any rate, the passages quoted rouse our curiosity about what historians and social scientists actually understand by social disciplining.

I. The Concept of Social Disciplining

Social disciplining, a concept which has doubtlessly passed its prime, is inseparably associated with the name of Gerhard Oestreich, who identified it as one of the essential structural characteristics of absolutism (Oestreich 1969). Anyone wishing to learn more about the concept cannot avoid the now classical 1987 essay by Winfried Schulze in which he explains the origin and application of the term and places it in the context of the development of the early modern state (Schulze 1987). We, too, refer to this almost canonical text; three aspects are particularly interesting for our purposes:

1. Disciplining as Disciplining within a Governance Collective

In the first part of this book we had spoken about governance collectives and their normative orders and established that governance collectives generally also operate as regulatory collectives. But governance collectives can be analysed not only as regulatory collectives but also as what we shall call disciplinary collectives, in which the internal ordering of a group or a collective is ensured by discipline specific to the given collective. Winfried Schulze:

Disciplining in this context does not mean primacy of the state, political, dynastic considerations over culture, the economy, religion, or science. It means forming, shaping, fitting into the smallest social circle or association; it means enabling interaction, simplification of particularities, enhancing the effect through discipline. Even guild orderings not only regulated the occupational organization but also the not yet distinct public and private lives of their members, the vita civilis. All members of a guild were subject to an overall professional order. But when their membership sphere broadened to encompass greater areas like the city and later the country (= the “state”), new ordering problems arose. To resolve these, urban public order regulations, dress codes, then corresponding national public order regulations
were introduced, initially in consultation with the groups involved but soon mutating into enacted law as mainly or exclusively bureaucratic orders. The rules on dress and morality of the guild statutes found their way into council and princely edicts (Schulze 1987, p. 275 Transl. R.B.).

2. Disciplining as Quality Assurance

Under the heading “From Codes of Professional Conduct to Quality-Assuring Governance Regimes” we have addressed a certain development in the role of professions. Schulze takes up this thought, commenting on quality control through discipline:

In the fifteenth and sixteenth centuries, the demand for quality work increased markedly. For this reason, supervisory institutions such as public authorities, guilds, and chambers of handicrafts had to monitor work more and more carefully. A tangible sign was the appearance of examinations as precondition for the guild to award the title of master craftsman. Disciplining thus also meant enhancing performance, expertise, quality. Control of the product and regulation of the working process gradually gave rise to a disciplining of work as such, together with the prisons, workhouses, poorhouses, and orphanages, which constituted barracks and disciplinary institutions in the economic field (Schulze 1987, p. 275 f. Transl. R.B.).

3. The Churches as Disciplinary Agencies

Among governance collectives whose cohesion was enhanced by discipline, the churches occupy a particularly prominent position. Winfried Schulze has this to say on the subject:

In the major churches and in sects, the idea of reform was associated from the outset with notions of energetic discipline. Luther demanded obedience from the lords and princes no less than from the peasants. He rejected self-help and regarded authority and obedience as prerequisites for the Christian life. As religious reformers, Zwingli and Calvin were also reformers of public order and discipline. In the city states of Zurich and Geneva, they established severe and drastic Christian discipline applicable to all, which they energetically intensified. The equality of Christians before God was practised as equality in Christian discipline. Corresponding to this was the Catholic Church with its disciplined school and monastic systems. The revival movements, August Hermann Francke’s school curricula, Zinzendorf’s statutes: all had to do with discipline. But the methodical disciplining of life demanded by Calvinism in particular is not to be equated with social disciplining Social disciplining is a secular process, supported but not determined by religious disciplining. The church as the agent of the hitherto most far-reaching discipline was the most important factor alongside the secular agents. In the sixteenth century, the jurisdiction of bishops was transferred to consistories as an element of ecclesiastical power alongside church discipline. The means
available for sanctioning serious public nuisance in the congregation were exclusion from Holy Communion and public penance; these were disciplinary measures, spiritual measures not criminal penalties with legal consequences for the citizen. Church discipline intruding into public life was checked by the modern state (Schulze 1987, p. 279 f. Transl. R.B.).

II. Social Disciplining at Work: The Example of Church Discipline

This is not the place for a systematic and comprehensive discussion of the phenomenon of church discipline; we limit ourselves to four aspects that are particularly interesting in connection with the plurality of norm enforcement regimes.

1. The Purity of the Congregation as the Goal of Reformational Church Discipline

According to Hans-Jürgen Goertz and John H. Leith (1990, p. 176): “The Reformation in a broader sense was itself a major effort to restore and maintain order and discipline in Christendom.” Order and discipline were particularly close to the hearts of the reformers Calvin and Zwingli. They sought to impose it in reformational Zurich and Geneva with uncompromising zeal:

A dense network of morality control descended over the territory of Zurich. Just how far it penetrated all areas of life is shown by the Great Morals Mandate (Großes Sittenmandat) of 1530/1532. ... The intention underlying the mandate is signalled by the fact that the severest sanction was reserved not for general vices but for offences committed against the church: they could be punished by excommunication. The offender was banished from Zurich. Whoever had committed only a moral offence was fined but not excluded. In a vast “popular educational experiment,” the purity of the congregation was to be secured to ward off the wrath of God from the new reformed polity. The price was high: Zwingli tended to promote rather than prevent the political tendency to discipline the citizenry. ...

Church discipline, although a central concern of the church, was in the hands of a consistory composed of elders, who were also members of the city council, and pastors. In Geneva, the city council had a decisive word to say in appointing the presbytery and preachers and thus fulfilled its duty to preserve the purity of the Christian polity. This is demonstrated by the Ordonnances ecclésiastiques de Genève of 1541 ... But the initial impetus for church discipline came from the church, which placed the municipal authorities in the service of spiritual government. Ultimately it amounted to the same: the polity was subjected to religious, moral,
Under the heading “The Christianization of Social Behaviour as Permanent Reformation,” Heinrich Richard Schmidt also examines the central role of the congregation, which is not only the object of church discipline (intent on preserving its purity and cohesion) but also operates as norm enforcement authority, and, moreover, is constituted in the first place as a corporation by the bonds of church discipline. Far more important for the cohesion and purity of the congregation proved to be the so-called “choir courts” ("Chorgerichte") whose job as morality courts was not only to ensure “order and discipline” but also peace in the congregation and neighbourly cohesion. Schmidt concludes:

Town and village demanded of their inhabitants the same peaceful and neighbourly behaviour. At this level of action, the choir court articulated and satisfied the existential needs of both the urban and rural congregation. Common to churches of the Geneva or Zurich type with regard to their social function was that church discipline served the practice of socially disciplined behaviour to maintain the integrity of the congregation as a community of the Lord’s Supper.

The moral courts therefore performed social “services” for the congregation by enforcing the social norms of conduct without which it could not survive. Attaining salvation and both individual and collective well-being was made dependent on socially disciplined behaviour. In a certain sense, the choir court as a “shaping apparatus” (Prägeapparat) as Norbert Elias would put it, performed the function of the conscience that reflects on, directs, and guides action. The choir court interpreted instrumentally rational action in value-rational terms by referring it to the unconditional will of God. Social action becomes worship. The church thus entered everyday life, the love of God practised in everyday action as social behaviour (Schmidt 1989, p. 161f. Transl. R.B.).

2. The Jesuits as Disciplinary Teachers

Christian social disciplining takes many forms and uses just as many disciplinary agents. The Jesuits played a prominent role in this. In this context we leave aside their great success in missionary history (see Schuppert 2014 with further references) to examine their achievements as highly effective moral-educational authorities. Writing about church discipline in early modern Europe, Heinz Schilling notes:

In comparing Christian denominations it should be remembered that in the framework of Catholic confessionalization, public church discipline was not the only nor even most important or typical form of church control and discipline. The Triden-
tine Reformation, of which the Jesuits were the most determined and successful agents, created a whole spectrum of disciplinary, regulatory, and norm-setting measures that – differently but no less decisively than Calvinist public congregational discipline – influenced the development of modern rational modes of conduct and attitudes. The spectrum of these measures ranged from spiritual exercises, general educational activities in schools and universities, and morality plays, to the sermon, popular catechesis, and confession. The Jesuits have been described as “disciplinary teachers” whose “total regimentation (also in other Catholic schools) led to corresponding supervisory measures” Tridentine confraternities, notably the Jesuit sodalities also had a disciplinary impact, as did the modernized pilgrimage. The renewed pilgrimages of the sixteenth to eighteenth centuries under clerical supervision became an “organized and disciplined venture,” a controlled and standardized sacred exercise; an innovation which is also essentially to be attributed to the Jesuits (Schilling 1994, p. 36 f. Transl. R.B.).

3. Differences between Protestant Calvinist and Roman Catholic Church Discipline

In his comparative study of church discipline in early modern Europe, Heinz Schilling notes a number of important differences between Protestant Calvinist and Roman Catholic church discipline that concern the entire direction of disciplining as well as the agents involved:

... [T]he differences cannot be overlooked. There is much to suggest that they had a major impact on the history of both mentalities and of society in general. The first cardinal difference was in the standard deemed attainable through penance and self-discipline, revealing differences in the concept of man. Catholic confessors assumed that spiritual exercises, general confession, and the internalization of repentance could lastingly place a person on the path towards the good and even to veritable sanctity; Ignatius of Loyola and the modern practice of penance attributed essentially him offered a prime example. For Calvinist discipline and for Protestantism in general, by contrast, the irremediable sinfulness of man was constitutive and control and punishment unavoidable for every Christian. There was a Protestant theology of sin and penance. There was no theology of sanctity, which in the Catholic variant of early modern church discipline played an important role. The second cardinal difference between Calvinist and Catholic discipline was in the referential context for the cleansing from sin. Among Calvinists this was the congregation, specifically the congregation in Holy Communion. Penance accordingly had to be public, especially where the sin was public knowledge, but in the case of particularly grave offences even when the “sinner” and the presbyter alone knew about it. The sinful member of the congregation was to seek reconciliation “with the congregation” so that God’s wrath provoked by his offence did not fall upon the congregation sullied by the transgression of the individual. This emphasis on publicness was alien to Jesuit concepts of confession; just as the post-Tridentine confession radically cut the
link between parish and congregation in favour of a quasi private, non-public and subjective interaction between confessor and believer. The post-Tridentine confession was concerned primarily with the *disciplina interna* of the sinner ... (Schilling 1994, p. 38f Transl R.B.).

4. Protestant Church Discipline between Church and State

Under the heading of law enforcement as a function of government, we had pointed out at the beginning of this chapter that state and church have a common regulatory interest in safeguarding the law and enforcing the law (constituting an “ordnungspolitischer Interessenverbund” see Zabel 2012, p. 38; Brecht and Schwarz 1980). Quite rightly, Martin Brecht therefore asks “Who actually disciplined whom?” He also supplies the answer: “State, church, and society interrelate” (Brecht 1994, p. 44). At this point we cannot resist recalling one of our favourite concepts, the “co-production of statehood” (Schuppert 2009); applying the concept to the present subject, we could speak of the “co-production of order and discipline.” Martin Brecht:

*The actual means available for church discipline were limited: sermon, personal discussion with admonition, interrogation, public penance, and exclusion. The extent to which this led to acknowledgement and repentance is only sporadically apparent from the records of interrogations. The state participated in church discipline with mandates, interrogations, money, and corporal punishment, as well as the pillory, prison, or banishment. These means of the state could generally serve to maintain the Christian moral order, but given their external coercive nature, they were largely unsuited for the spiritual welfare purposes of church discipline, and, as the often repeated mandates show, were frequently also ineffective. A state-dominated moral discipline should therefore perhaps be distinguished more sharply from real church discipline. It would doubtless be far from simple to discover whether action was being taken against a person as a sinner causing a public nuisance or an offender against the public order. At the same time, certain distinctions are possible with respect to the alleged offences and their treatment, even though there was a great deal of overlap between church and state interests* (Brecht 1994, p. 45 f Transl. R.B.).

We return to the role of the Swiss *choir courts*. Heinrich Richard Schmidt also looked at who the judges were, noting a remarkable continuity that suggested the relationship between state and church went beyond the co-production of order and discipline towards an overlap of identity between the state and the church congregation:

*The century-long list of names suggests a move-up procedure that itself produced internal village elites from among whom the choir court president (*Ammann*) was successively appointed. The period of service was relatively long. Literally the “eld-
ers” headed the church congregation. The choir court became the “nursery” for the local political elite, but they remained committed to its prime and original function because they never left the court. As far as the dominant institutional position of state and church is concerned, it is almost justified to speak of church predominance: elders became Ammänner, not vice versa. In staffing, the church permeated the state. But these arguments should not be taken too far. A personal union in the sense described can at any rate not be captured solely in terms of an “established” or “state” church; it could also be expressed in terms of the identity of spiritual and political community. Significantly, the new matrimonial court statute of 1533 speaks of “our Christian community in town and country.” The concept “Gemeinde” [both “community” and “congregation”], to be understood in primarily Christian terms in this context, is applied to the totality of the nation. The state is conceived of as an overdimensioned church congregation (Schmidt 1989, p. 137. Transl. R.B.).

F. Parallel Orders and Their “Parallel Justice”

The point of departure for our consideration of the plurality of norm enforcement regimes remains the empirical thesis that it is in the functional logic of a normative order designed to be realized to develop institutional arrangements and procedures to enable compliance with and enforcement of this normative order. We call such arrangements norm enforcement regimes: we posit that such regimes will also be found where so-called parallel societies have developed within a majority society. In this connection, the Hanover criminologist Christian Pfeiffer (quoted here from Wagner 2011, p. 11. Transl. R.B.) asserts that: “it is typical of a parallel society to develop its own justice.” The reference is to Islam, and the statement is backed by the Berlin juvenile court judge Kirsten Heisig (ibid.): “I feel uneasy when control over the law is relinquished and shifts onto the streets or into a parallel system where an imam or other representative of the Koran decides what is to happen.” Before going into detail on whether “parallel orders lead to parallel institutions for norm enforcement,” it is advisable to consider the appropriateness of the concept “parallel society,” because this semantics involves us inevitably in a largely emotional debate on integration.

I. The Minefield of Parallel Society Semantics

To use the term parallel society necessarily provokes contention (on the usage of the term see Schiffauer 2008; see also Köster 2009). It is easy to accuse the user of avoiding the discriminatory ghettoization concept only to
embrace the no less discriminatory concept of parallel society formation with the intention – as the subtitle of Köster’s book puts it – of engaging in a *discourse “to dramatize migration”* (see, for example, Lanz 2007). This is not our aim, nor do we wish to take a stand without greater expert knowledge in the debate on integration rekindled by the former mayor of the Berlin’s Neukölln district Heinz Buschkowski in his book *“Neukölln is Everywhere”* (2012).

We therefore prefer to speak of *parallel orders* rather than parallel societies in addressing the broader topic of the plurality of normative orderings and to underline that our interest is more in the sociology of law field than in integration policy. The concept of parallel orders brings us to a study by Karsten Fischer (2011), who describes the Augustan *principat* as a parallel order, since, although Augustus formally maintained the republican system of government, he de facto established a personalized autocratic system of rule. He thus adopted the very strategy his later critic Machiavelli recommends in his *Discorsi*:

> He who desires or wants to reform the State (Government) of a City, and wishes that it may be accepted and capable of maintaining itself to everyone’s satisfaction, it is necessary for him at least to retain the shadow of ancient forms, so that it does not appear to the people that the institutions have been changed, even though in fact the new institutions should be entirely different from the past ones (Machiavelli, Discorsi, Book One, Chapter XXV).

Fischer himself comments on this policy of deception with reference to Christian Meier (1980, p. 273) and Maria Dettenhofer (2000, p. 215):

> In this manner the “appearance of republic” was lastingly preserved. Machiavelli preferred a frank statement to the effect that, on account of the decadence of its bearers, the people, the republic ought to be temporarily replaced by an autocracy – an ideological argument that Machiavelli adopted from Roman republicanism and could also be found in Sallust. Augustus had instead established “a new system for the exercise of political power that permanently undermined public institutions because it competed with them for competencies and to a certain extend operated in parallel to these institutions. Although the basis for this parallel order was the same as for the traditional republican order, given his supremacy ..., Augustus could use the socio-political basis of the Roman order for pretensions to power incompatible with the republican order in a manner that permanently overrode the factual importance of the institutions” (Fischer 2011, p. 49. Transl. R.B.).

We shall go beyond this suggestion of a semantic shift, taking a narrow concept of parallel orders as our basis, as defined by someone who really
considers talk about parallel societies to be nonsense: the migration scholar Klaus J. Bade. In a SPIEGEL ONLINE interview he had this to say:

SPIEGEL ONLINE: The concepts under debate are well-known: multicultural society, parallel society, lead culture.

Bade: Those are living corpses that are cropping up again. What’s more, development is confused with concept: the outcome of development is that in Germany we now have a multicultural society whether we like it or not. Period. The question is how we deal with it. Critical minds have long since abandoned the romantic notion that multiculti is a kaleidoscopic slide into a cheery paradise. You should never heat up cold coffee. We should talk about the “parallel societies” nonsense – but only to show that “Little Istanbul" is no different from the “Little Germany" in the nineteenth century USA. And at the time the Americans got just as upset about it.

SPIEGEL ONLINE: Politicians, including the federal minister of the interior Otto Schily, have warned against street and place-name signs in foreign languages. Tolerance, says Schily, does not mean tolerating intolerance.

Bade: But social hotspots don’t automatically develop where immigrants gather but where migration problems or ethnic problems come up against social problems. In Germany there are no parallel societies in the classical sense of the term. A number of points have to come together: a monocultural identity; voluntary and conscious social withdrawal – in settlement and everyday life, too; far-reaching economic separation, a doubling of state institutions. In Germany immigrant districts are mostly ethnically mixed, withdrawal is for social reasons, there is no doubling of institutions. Parallel societies exist in the minds of people who are afraid of them: I’m scared and believe the other guy is the cause. If this simplistic and dangerous talk about parallel societies continues, the situation will deteriorate. So this talk isn’t part of the solution but part of the problem (Sternberg 2004. Transl. R.B.).

Following on from these comments, we will be quite specifically examining whether such institutional parallel structures of norm enforcement can be pinpointed – not in our minds but in the reality of society.

II. Parallel Conflict Resolution Institutions and Norm Enforcement

1. The Example of Sharia Courts in the United Kingdom

Karsten Fischer drew our attention to the case of sharia courts in the United Kingdom. In 2008 there was much controversy about their establishment. One prominent contributor was the then Archbishop of Canterbury, Rowan Williams, who caused a stir with his assertion that such courts were possibly unavoidable.
Under the Arbitration Act 1996, several sharia courts had been set up, which at the time made legally binding decisions in civil matters and had heard more than 100 cases, for example divorce cases. Lawyers issued “grave warnings about the dangers of a dual legal system,” and politicians expressed concern about the undermining of the British legal system (Edwards 2008).

Three things make this British case particularly interesting.

- First, it offers a clear instance of regulated self-regulation. The state framework was provided by the Arbitration Act 1996, which regulated not only Islamic but also Jewish arbitration tribunals, the “beth din” (on their function and scope see The Centre for Social Cohesion 2009). The Arbitration Act begins as follows:

  General principles

  1. The provisions of this Part are founded on the following principles, and shall be construed accordingly:

     (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

     (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

     (c) in matters governed by this Part the court\(^1\) should not intervene except as provided by this Part.

The result was interplay between state jurisdiction and the Muslim arbitration tribunal, which had its own rules of procedure. Abul Taher describes this institution:

Islamic law has been officially adopted in Britain, with sharia courts given powers to rule on Muslim civil cases. The government has quietly sanctioned the powers for sharia judges to rule on cases ranging from divorce and financial disputes to those involving domestic violence. Rulings issued by a network of five sharia courts are enforceable with the full power of the judicial system, through the county courts or High Court.

Previously, the rulings of sharia courts in Britain could not be enforced, and depended on voluntary compliance among Muslims. [...] Sheikh Faiz-ul-Aqtab Siddiqi, whose Muslim Arbitration Tribunal runs the courts, said he had taken advantage of a clause in the Arbitration Act 1996. Under the act, the sharia courts are classified as arbitration tribunals. The rulings of arbitration tribunals are binding in law, provided that both parties in the dispute agree to give it the power to rule on

\(^1\) Part IV, Section 105 (1) states: “In this Act the ‘court’ means the High Court or a country court.”
their case. Siddiqi said: “We realised that under the Arbitration Act we can make rulings which can be enforced by county and high courts. The act allows disputes to be resolved using alternatives like tribunals. This method is called _alternative dispute resolution_, which for Muslims is what the sharia courts are (Taher 2008, p. 2).

- Second, the ground gained by parallel institutions for conflict resolution thanks to the 1996 Arbitration Act is embedded in a legal and religious policy discussion in which not only the Lord Chief Justice but above all the Archbishop of Canterbury, Rowan Williams, participated. The archbishop’s lecture is a remarkable document. With reference to legal theory and legal philosophy, he made a stand against what he sees as the anachronistic _jurisdictional monopoly of the state_ since it is incompatible with the _realities of a pluralistic society_. What is needed in a “plural society of overlapping identities” is, he asserts, _recognition of “supplementary jurisdictions.”_ He argues that only such recognition can lead existing “communities within communities” out of otherwise inevitable ghettoization:

But if the _reality of society is plural_ – as many political theorists have pointed out – this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalised or privatised to the extent that what is produced is a _ghettoised pattern_ of social life, in which particular sorts of interest and of reasoning are tolerated as private matters _but never granted legitimacy in public_ as part of a continuing debate about shared goods and priorities (Williams 2008).

He bases his demand for recognition of the separate jurisdictional competence of religious communities explicitly on the analogy of the self-regulatory autonomy of professions discussed above: Rowan Williams:

... I have been arguing that a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, as I mentioned at the beginning of this lecture, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the _liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups_: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to “activate” this whenever called upon. Earlier on, I proposed that the criterion for recognising and collaborating with communal religious discipline should be connected with whether a communal jurisdiction actively
interfered with liberties guaranteed by the wider society in such a way as definitively to block access to the exercise of those liberties; clearly the refusal of a religious believer to act upon the legal recognition of a right is not, given the plural character of society, a denial to anyone inside or outside the community of access to that right. The point has been granted in respect of medical professionals who may be asked to perform or co-operate in performing abortions – a perfectly reasonable example of the law doing what I earlier defined as its job, securing space for those aspects of human motivation and behaviour that cannot be finally determined by any corporate or social system. It is difficult to see quite why the principle cannot be extended in other areas. But it is undeniable that there is pressure from some quarters to insist that conscientious disagreement should always be overruled by a monopolistic understanding of jurisdiction (Williams 2008).

- Thirdly and finally, just why the United Kingdom but neither France nor Germany introduced such far-reaching recognition of parallel jurisdictions needs explaining. John R. Bowen (2010) finds such an explanation in Britain’s colonial past. Most of the Muslims living in the United Kingdom, he argues, came from South Asia and had been accustomed since the times of the East India Company to the colonial masters practising a policy of legal pluralism, which notably respected indigenous and religious law pertaining to the family and personal status:

This set of ideas and institutions has carried over into the practices and approaches of South Asian Muslims who moved to England. These Muslims brought with them ideas and habits about personal status that had been developed under British rule of the Indies. They assumed that Muslims worked out matters of marriage and divorce among themselves, without the need for state intervention. Islamic scholars creating shariah councils in England drew from their own experiences in South Asia. In effect they brought colonial ideas of personal status back home to their legal source. ...

The ideas brought to England by South Asians, however, represented a sharp challenge to English ideas of a uniform English law. If Muslims handled marriage and divorce themselves, then the civil courts would, in effect, cede territory to them. Yet for some Muslims, doing so flowed from colonial practices. “Why don’t they just let us take care of these matters,” said one Pakistani scholar to me in London; “after all, that’s what they did in colonial days.” Understandably, English judges are reticent to take this step. ...

This double set of post-colonial continuities – in treatment of religions and of personal status laws – made England a particularly likely place for debates about the possibility of recognizing elements of Islamic family law in a Western legal system. These debates arose because of institutional initiatives taken by Muslim public actors starting in the 1980s (Bowen 2010, p. 417 f.).
2. The Second Example: Islamic Conciliation Procedures in Germany

The German example is concerned not with the operation of sharia tribunals accepted by the state but with the resolution of conflicts between Muslims by a circle of persons – whether lawyers, imams, or heads of households – who could be described as arbitrators (Streitschlichter) or justices of the peace (Friedensrichter). In Judges without Law (Richter ohne Gesetz, 2011), Joachim Wagner addresses their activity. The subtitle: “Islamic parallel justice endangers the rule of law” indicates what worries the author. We turn our attention not to whether this thesis – backed by many of the facts presented by Wagner – can really be sustained but to how the trend observed by Wagner and others towards internal Islamic conflict resolution bypassing state justice is to be explained. The reasons Wagner advances are worth thinking about.

- A first important aspect is the high value placed on compensation – above all in financial form – in Islamic law and culture. Such compensation is not negotiated between offender and victim – between individuals – but (the second important aspect) between the families involved. Wagner:

  Compensation is a central concept in Islamic criminal law. For Mathias Rohe, expert in Islamic law, it is an expression of “a social order that is based on economic activity in extended family groups ... without social security ...”

  It is astonishing that honour killing and the blood feud have survived in the Muslim parallel society here, even though the preconditions have long ceased to apply. In countries with no state order, the extended family had to assume the protective function of police and justice. And the blood feud played a disciplinary role (Wagner 2011, pp. 18, 23 f. Transl. R.B.).

- The key actors in conflict resolution bypassing the state are the families. We therefore have to do with what we could call the deindividualization of conflicts. Wagner therefore also writes of offender families and victim families:

  *When a criminal offence has been committed, the families concerned decide from case to case whether they can negotiate directly with one another or have to call on an arbitrator. The initiative is usually taken by the offender family, because it is in their interest to ensure that the son, brother, or cousin escapes punishment. In the event of direct contact, the father or oldest brother turns to his counterpart in the victim family. Generally this does not work if a suspect is in remand custody or the victim is in hospital with severe injuries. Feelings between the families then run so high that the offender family engages a neutral arbitrator. The aim of talks is almost always the*
same: the victim should under no circumstances inform the police, bring no charge, and if this has already been done, withdraw it. If the police has already been involved, for instance by a charge being brought, the aim is to persuade the victim not to testify (Wagner 2011, p. 30 f. Transl. R.B.).

- This having been said, it is not surprising that the concept of honour that repeatedly comes up in the discussion on the existence and assessment of so-called parallel societies has family connotations: honour is a family matter. Writing about the blood feud, Wagner comments:

In the oriental cultural area there are two aspects to honour: first, public respect for a person who complies with traditional rules and ensures that the members of his family do likewise, and, second, general esteem earned by achievement and merit.

In Muslim countries, “honour tops the list of virtues, ahead of life, bodily integrity, freedom, and wealth.” The concept of honour has survived to this day as a living guide to conduct in the diaspora. It is a key to understanding the Muslim parallel society in Germany (Wagner 2011, p. 23. Transl. R.B.).

- These passages invite two conclusions. First, extended families must really be counted among the governance collectives dealt with in detail in the first part. If this is indeed the case and the concept of honour plays a central role in the governance collective of the extended family,² it is clear that – because of the role family members play in compliance with norms – the family also has to be considered as a norm-enforcement institution. The wide-angle lens of our broad investigation requires it.

G. Norm Enforcement through Institutionalized Compliance

I. Compliance as a Form of Reflexive Regulation

Environmental protection policy has long offered a laboratory for new regulatory tools and has attracted the particular interest of an administrative jurisprudence concerned with regulation theory (see, for example, Schmidt-Aßmann and Hoffmann-Riem 2004). Administrative science and practice has shown great interest especially in the toolbox of environmental law – in section D.I above we had looked at the role of environmental regulation

² On the role of the so-called officers’ corps honour see chapter 2 p. 115 ff.
in European law in mobilizing citizens to enforce this law). Gertrude Lübbecke-Wolff (2001) offers a useful overview, which we have often presented in modified form (see Schuppert 2003b, p. 32):

Choice of Tools in Environmental Protection

Choice

Classical Environmental Regulatory Law

Tools for Informal Behavioural Control
- Information, recommendations, warnings
- Agreements of all sorts, especially voluntary agreements

Tools to Regulate Economic Behaviour
- Taxes and charges
  - Waste oil tax
  - Tax on Leaded petrol
  - Effluent charge
  - Waste transfer charge
- Tradable emission rights
- Environmental liability law
- Organizational tools

Organizational Tools
- Installation of self-regulatory systems
  - Primary obligation under regulatory law with preventive authorization: prototype Packaging Ordinance
  - Factual-economic organizational pressure: prototype Eco-Audit
  - Primacy of self-regulatory goal attainment: prototype Waste Avoidance, Recycling and Disposal Act
- Installation of reflexive institutions
  - Appointment of plant environmental officers
  - Preparation of waste management plans and balance sheets
  - Preparation of plans for the prevention of hazardous incidents
  - Obligations to inform on plant organization
Within this set of tools, we have always found the reflexive institution interesting, which effects what Matthias Schmidt-Preuß calls reflexive regulation: the state, he explains, “exposes private economic subjects to internal informational, learning, and self-regulatory processes to induce them to contribute to the public good on, as it were, their own judgement.” This is brought about by self-knowledge, not external regulation (Schmidt-Preuß 1997, p. 192. Transl. R.B.). Promoting the public good through reflexive regulation is therefore concerned not externally to impose behaviour conducive to the public good on the private economy or sanction misconduct but to implant behavioural incentives in the organization itself and thus, so to speak, drive a tunnel under the boundary between external and internal regulation.

On the entrepreneurial side, the corresponding concept is compliance. Taking the tunnel under the boundary, we can now examine the concept and functions of compliance from the perspective of private enterprise.

II. Concept and Functions of Compliance

1. The Concept of Compliance

It is relatively clear what compliance means:

... [C]ompliance is a self-evidence – the obligation to obey the rules. This universal obligation naturally also applies for all organizations in which labour is divided, especially legal entities. Compliance merely expresses the responsibility of an organization to ensure that it (the enterprise or legal person) does not violate the law. This may be considered a somewhat euphemistic way to define the legality obligation, as an element of the risk management obligation under Section 91 of the Companies Act or even the external relations requirements under this organizational obligation (Section 130 of Act on Regulatory Offences). The substance remains the same: namely to structure an organization based on the division of labour in such a way that no violation of the law occurs. There is accordingly agreement that the board of the company has to organize and manage the enterprise in accordance with the law (Spindler 2013, p. 293 f. Transl. R.B.).

Whoever finds this too long-winded might prefer the following definition, which addresses criminal compliance (CC), compliance with the rules of criminal justice:

If at first sight, one understands compliance to mean “complying with” (not only legal) norms, CC can be understood as the quintessence of the rules, procedures, and techniques by means of which business enterprises, in particular, seek to ensure
that their employees respect the norms of criminal law and that any violations are brought to light and punished (Saliger 2013, p. 263 f. Transl. R.B.).

2. Functions of Compliance

In his study on “Fundamental Questions of Criminal Compliance,” Frank Saliger provided an excellent overview of the function of compliance. He identifies a main function and a number of subfunctions.

- The main function is the avoidance of all legal liability risks:

There appears to be agreement about the fundamental or main function of CC, namely the avoidance of “criminal liability.” This basic function is in keeping with the core definition of CC. However, there is little mention of criminal liability tends in criminal law. This is to be explained genetically by the fact that the compliance idea in Germany originated in economic law, where it has to do with the more far-reaching function of avoiding all legal liability risks, and systematically by the nature of CC as a sub-instance of the general compliance concept. Leaving aside “criminal liability,” the fundamental function of CC can be described as the avoidance of punishable violations of norms (Saliger 2013, p. 266. Transl. R.B.).

- The following three subfunctions can be identified:
  - Prevention
  - Investigation
  - Supervision

Saliger has this to say about prevention:

Prevention is ... the most far-reaching function of CC. It implements the basic function of CC by setting preventive rules designed to anticipate criminal liability. Unlike criminal law, CC is basically prospective rather than retrospective. This anticipatory aspect means that the primary purpose of CC is to indicate the safe harbour in which the addressee of norms can be sure to avoid liability to prosecution. This in turn is possible only if the preventive function of CC takes effect far ahead of any commission of criminal offences. To this extent, CC cannot afford “to enable the enterprise to engage in risky criminal balancing acts.” Its aim is rather, in not unproblematic fashion, to forestall criminal offences by the anticipatory prohibition and structuring of conduct (Saliger 2013, p. 267. Transl. R.B.).

- An effective compliance system must investigate and sanction norm violations; Saliger:

  ... [S]etting and implementing preventive CC rules in an enterprise will not produce effective compliance if indications that rules are being violated are neither investigated nor sanctioned internally. CC rules, too, need to be enforced within the
enterprise. The investigation and sanctioning of criminal rule violation serves to avoid mere “fair-weather,” merely preventive compliance. Investigation is ensured primarily by formal CC rules covering internal inquiries. Internal sanctioning can be effected by rules under labour and disciplinary law (e.g., warnings, transfers, dismissals (Saliger 2013, p. 267 f. Transl. R.B.).

- Finally, Saliger explains the *supervisory function* of compliance:

  There is also consensus on a further function of compliance and CC. It is agreed that effective performance of the investigative and sanctioning function of CC is possible only if management also has to supervise employees. This supervisory function of CC also arises indirectly from Section 130 (1) of the Act on Regulatory Offences. The Act punishes violations of the supervisory duties of business proprietors; among the required supervisory measures are the appointment, careful selection, and supervision of supervisory staff. Although Section 130 of the Act on Regulatory Offences has nothing concrete to say about the type and extent of supervision and there is thus uncertainty with regard to application of the law, appropriate compliance audit programmes or whistle blowing systems are likely to be considered suitable measures for implementing the supervisory function (Saliger 2013, p. 268. Transl. R.B.).

Having gained an idea of what compliance involves (see Roland Broemel 2013 for more on the internal order of knowledge in enterprises as a norm compliance factor), we now consider compliance as a state law enforcement tool – particularly important from the perspective of this chapter.

3. Compliance as a Tool in Self-regulation and the Privatization of Law Enforcement

This is the most important and interesting function of compliance: a specific regulatory technique of the state, which we have referred to above as *reflexive regulation*, which makes the enterprise itself an agent for avoiding the criminal violation of norms. Frank Saliger:

For law enforcement by the state, compliance is particularly important as a tool of self-regulation and the privatization of law enforcement. Certain forms of crime in and from companies, businesses, and other subsystems of society have always been difficult for state criminal justice systems to access. This structural problem of state law enforcement has been further exacerbated in the present day by the inadequate material and human resources available to the criminal justice system. To the extent that this calls into question classical external regulation through criminal law control by which individuals are identified and sanctioned by the state, the self-regulation of crime prevention through internal CC programmes, internal inquiries, and disciplinary sanctions will grow in importance. This explains the inflation of sectoral legal norms with a compliance function.
For the state, this promotion of the (partial) privatization of criminal prosecution has two advantages. First, the state reduces the cost of law enforcement by committing enterprises to enforce the law through, for example, supervisory systems or internal inquiries, and thus assume the cost. Second, it is often the (interim) findings of such internal investigations that enable state law enforcement in the first place or at least facilitate it (Saliger 2013, p. 277 f. Transl. R.B.).

H. Sanction Modes and Criteria not Disciplined by Law: Forms and Actors

I. Imposing Norm-Conforming Behaviour through Thematic and Linguistic Taboos: Political Correctness

1. An Introductory Tale

Our story recounts in a nutshell what we need to know about how political correctness works. It is taken from the novel The Human Stain by Philip Roth (2000), whose protagonist, the professor of classics Coleman Silk, uses an allegedly racist expression when calling the roll in his class:

The class consisted of fourteen students. Coleman had taken attendance at the beginning of the first several lectures so as to learn their names. As there were still two names that failed to elicit a response by the fifth week into the semester, Coleman, in the sixth week, opened the session by asking “Does anyone know these people? Do they exist or are they spooks?”

Later that day he was astonished to be called in by his successor, the new dean of faculty, to address the charge of racism brought against him by the two missing students, who turned out to be black, and who, though absent, had quickly learned of the locution in which he’d publicly raised the question of their absence. Coleman told the dean, “I was referring to their possible ectoplasmic character. Isn’t that obvious? These two students had not attended a single class. That’s all I knew about them. I was using the word in its customary and primary meaning: ‘spook’ as a specter or a ghost. I had no idea what color these two students might be. I had known perhaps fifty years ago but had wholly forgotten that “spooks” is an invidious term sometimes applied to blacks. Otherwise, since I am totally meticulous regarding student sensibilities, I would never have used that word. Consider the context: Do they exist or are they spooks? The charge of racism is spurious. It is preposterous. My colleagues know it is preposterous and my students know it is preposterous. The issue, the only issue, is the nonattendance of these two students and their flagrant and inexcusable neglect of work. What’s galling is that the charge is not just false – it is spectacularly false.” Having said altogether enough in his defense, considering the matter closed, he left for home (Roth 2000, p. 6 f.).
But the matter was by no means closed. After being hauled before the college authorities, Silk resigns from his position. In the following passage he thinks over what has happened to him and identifies the driving force behind events as the typically American, tyrannical and unrelenting propriety:

Appropriate. The current code word for reining in most any deviation from the wholesome guidelines and thereby making everybody “comfortable.” Doing not what he was being judged to be doing but doing instead, he thought, what was deemed suitable by God only knows which of our moral philosophers. ... If he were around this place as a professor, he could teach “Appropriate Behaviour in Classical Greek Drama,” a course that would be over before it began.

...The college’s architectural marker, the six-sided clock tower of North Hall ... was tolling noon as he sat on a bench shadowed by the quadrangle’s most famously age-gnarled oak, sat and calmly tried to consider the coercions of propriety. The tyranny of propriety. It was hard, halfway through 1998, for even him to believe in American propriety’s enduring power, and he was the one who considered himself tyrannized: the bridle it still is on public rhetoric, the inspiration it provides for personal posturing, the persistence just about everywhere of this de-virilizing pulpit virtue-mongering that H.L. Mencken identified with boobism, that Philip Wylie thought of as Momism, that the Europeans unhistorically call American puritanism, that the likes of a Ronald Reagan call America’s core virtues, and that maintains widespread jurisdiction by masquerading itself as something else – as everything else. As a force, propriety is protean, a dominatrix in a thousand disguises, infiltrating, if need be, as civic responsibility, WASP dignity, women’s rights, black pride, ethnic allegiance, or emotion-laden Jewish ethical sensitivity (Roth 2000, p. 152 f.).

What particularly disturbs him is the gross disproportion between the real problems of the century and the luxury of being upset about supposed violations of political correctness:

A century of destruction unlike any other in its extremity befalls and blights the human race – scores of millions of ordinary people condemned to suffer deprivation upon deprivation, atrocity upon atrocity, evil upon evil, half the world or more subjected to pathological sadism as social policy, whole societies organized and fettered by the fear of violent persecution, the degradation of individual life engineered on a scale unknown throughout history, nations broken and enslaved by ideological criminals who rob them of everything, entire populations so demoralized as to be unable to get out of bed in the morning with the minutest desire to face the day ... all the terrible touchstones presented by this century, and here they are up in arms about Faunia Farley [Silk’s lover]. Here in America either it’s Faunia Farley or it’s Monica Lewinsky! The luxury of these lives disquieted so by the inappropriate comportment of Clinton and Silk! ... I’m depraved not simply for having once said the word “spooks” to a class of white students – and said it, mind you, not while standing there reviewing the legacy of slavery, the fulminations of the Black Panthers, the metamorphoses of Malcom X, the rhetoric of James Baldwin, or
the radio popularity of Amos ‘n’ Andy, but while routinely calling the roll (Roth 2000, p. 153f.).

The *concern* of political correctness to improve the situation of minorities and excluded groups by drawing attention to hurtful or otherwise harmful categorizations and labels in order to *change ideas and attitudes* deserves our full support. However, activism can easily develop that itself lapses into categorization and premature dichotomization, which is counterproductive since it intensifies opposition to its basically worthy goal. This is the point where political correctness transmutes from a concept of reconciling social inequalities into a rallying cry with the opposite effect. Roth’s story reveals three key things about the sword of Damocles that unbridled political correctness suspends over our heads:

- First, disputes on political and social topics are fought out as *semantic battles*: certain things cannot be said at all or at any rate not “like that.” “PC campaigns give expression to an unusually strong urge among activists to regulate the linguistic and social behaviour of others. Participants are often conspicuous for their aggressiveness, obtrusive lack of humour, and unwillingness to compromise” (Wimmer 1998, p. 44. Transl. R.B.). Political correctness, it can be said, operates as a “creator of discursive taboos” (Johnson and Suhr 2003, p. 56); with its tendency to *stigmatize* certain expressions and concepts, political correctness belongs in the larger thematic context of political culture as *communication culture* (see Schuppert 2008b on communication culture as part of political culture).

- The authority that decides what is political correct or not *exercises moral judgement*. In an article in Die Zeit on 22 October 1993, Dieter E. Zimmer wrote of a “moral furore” that fires PC and rightly identifies this stance as classical friend-foe thinking:

PC is mercilessly dichotomous: what is not politically correct is incorrect. It admits of no grey zone, zigzag profiles are beyond its horizon: whoever abandons the PC camp on one point is immediately consigned to the enemy camp. It is accordingly thoroughly moral: what is incorrect is not only wrong, it is bad. PC has retained a wonderful innocence: it has never realized that the greatest rectitude can sometimes only do harm and that sometimes harm must be done to prevent greater harm (Zimmer 1993, p. 60. Transl. R.B.).
• Thirdly and finally, the story of Coleman Silk shows that political correctness is clearly difficult to handle, if at all, in terms of the otherwise very helpful *yardstick of proportionality*. Just as mercilessly, Zimmer censures this “mercilessness” and proneness of PC thinking to immoderation:

Just how reliably and precisely – and mercilessly – PC operates in Germany became apparent to everyone when it finished off four writers who had infringed its unwritten rules; four writers who, each in his manner, had themselves for many years contributed to the prestige of PC and who could have expected a certain amount of respect, even if only in form of unprejudiced attention, if they ... once erred from the straight and narrow.

But overnight they were “given up for lost,” to quote a revealing formulation from the PC camp. To put it plainly, they landed on the shitlist of all true political believers. Of course, I’m talking about Martin Walser, Wolf Biermann, Botho Strauß, and Hans Magnus Enzensberger.

Walser was *excommunicated* (nice word: inner-community communication with him was ended) when, the collapse of the socialist camp having already set in, if not yet visibly, he publicly admitted in *Die Zeit* that he had difficulty inwardly accepting the division of Germany in the long run. From then on he was pronounced a “nationalist.” The fact that his crazy and dangerously unrealistic wishful thinking suddenly came to fruition was naturally somewhat embarrassing for the *inquisition*. But this summer at the latest everything was in order again when he explained that one reason for the xenophobic wave of violence possibly lay in the circumstance that these children who had “grown up in a society in which everything national was excluded or unreservedly criticized.” Anyone in this country who pronounces the word “national” without a shudder is immediately branded a nationalist, that is to say an advocate of national arrogance and hegemonistic dreams, if such expressions still have any meaning at all (which is doubtful).

It was Biermann’s turn when in *Die Zeit* he declared that the Gulf War was unfortunately necessary for Israel’s sake. He has been the devil incarnate ever since, before whom every politically upright citizen crosses himself: a warmonger. His question about whether and how Israel’s survival could be ensured was mentioned only in attacking him personally. Suddenly all he was capable of was playing the guitar. The magazine *Titanic* found it good satire not only to treat him to all sorts of epithet from “slimy” to “pig snout” but to plummet the depths of calculated nastiness: “It’s obviously not enough for you that your father was murdered by the Nazis” (Zimmer 1993, p. 60. Transl. R.B.).

So much on the story of Coleman Silk. We now cast a brief glance at the origins of PC thinking and the shifts in the meaning of the concept *political correctness*. 
2. Origin and Shifts in Meaning of the Concept Political Correctness

Its origins are easily traced, namely to left-wing liberal university circles in America, being popularized by Bernstein in a New York Times article that appeared on 28th October 1990 under the heading “The Rising Hegemony of the Politically Correct” (Bernstein 1990). Students were concerned about how disadvantaged minorities and marginal groups of all sorts were handled and – among other things – about the avoidance of hitherto little regarded language usage that could be felt to be discriminatory by such minorities and groups. Bernstein:

INSTEAD of writing about literary classics and other topics, as they have in the past, freshmen at the University of Texas next fall will base their compositions on a packet of essays on discrimination, affirmative-action and civil-rights cases. The new program, called ‘Writing on Difference’ was voted in by the faculty last month and has been praised by many professors for giving the curriculum more relevance to real-life concerns. But some see it as a stifling example of academic orthodoxy.

“You cannot tell me that students will not be inevitably graded on politically correct thinking in these classes,” Alan Gribben, a professor of English, said at the time the change was being discussed.

The term ‘politically correct’, with its suggestion of Stalinist orthodoxy, is spoken more with irony and disapproval than with reverence. But across the country the term p. c., as it is commonly abbreviated, is being heard more and more in debates over what should be taught at the universities. There are even initials – p. c. p. – to designate a politically correct person. And though the terms are not used in utter seriousness, even by the p. c. p.’s themselves, there is a large body of belief in academia and elsewhere that a cluster of opinions about race, ecology, feminism, culture and foreign policy defines a kind of ‘correct’ attitude toward the problems of the world, a sort of unofficial ideology of the university. Pressure to Conform” (Bernstein 1990, p. 1).

The PC movement was primarily concerned with making a stand against what Bernstein called the “trio of thought crimes: sexism, racism and homophobia” (Bernstein 1990). But in pursuing these goals a surplus of intolerance was clearly produced that found expression not only in the increasing regulation of language usage but also in the redesign of curricula to conform to PC (Kurthen and Losey 1995; Papcke 1995). This necessarily led to a swing of the pendulum in the other direction: the concept of political correctness increasingly became a rallying cry for the American right (Auer 2002) to pillory what they regarded as the unjustified dominance of American East-Coast liberalism. This shift in the meaning of the term makes it advisable to
distinguish between two usages. We quote the informative German Wikipedia article on “Politische Korrektheit:”

– Firstly, the concept has been a succinct and well-known slogan in the context of the notably North American, Australian, and European societal tendency since the later twentieth century to defend the interests of minorities more strongly and to avoid discrimination, particularly in language usage, that had in the past been accepted or simple not recognized. To state that something is “not politically correct” or “politically incorrect” is to assert that a norm has been violated, that an utterance (or action) contravenes general moral norms or even that a taboo has been broken.

– The second context is the rejection of a societal norm or critique felt to be a restriction on liberty or censorship, whether against exaggeration in the avoidance of “negative” concepts on the grounds that showing excessive consideration stifles the expression of facts or truths. This criticism of alleged “political correctness” as a battle cry against exaggerated consideration or political opponents is also in use as a political slogan (Wikipedia 2015. Transl. R.B.).

After this brief overview, we turn to a type of actor who plays an important role in creating and enforcing social norms: the so-called moral entrepreneur.

II. Moral Entrepreneurs as Key Actors in the Creation and Enforcement of Social Norms

1. Concept and Forms

In his major essay “The Market for Social Norms,” Robert C. Ellickson distinguishes three types of actor in the field of control: the norm maker or norm entrepreneur, the enforcer, and the member of the audience, the dividing line between norm makers and norm enforcers being difficult to draw (Ellickson 2001). Norm formation processes – and their later enforcement – is initiated by norm entrepreneurs, whom Ellickson also calls change agents, and who thus constitute the most important group of actors. A major example of successful change agents, according to Ellickson, are the black religious leaders like Martin Luther King who played an important role in the American civil rights movement:

These factors help explain the prominence of black religious leaders in the civil rights movement. Because they were black, they had much to gain from dismantling racial segregation. Because they were religious leaders, they were ideally positioned to
receive early esteem from members of their immediate social groups (that is, members of their congregations), and relatively immune to social opprobrium, economic retaliation, and physical violence on the part of racist whites (Ellickson 2001, p. 12).

One variety of norm entrepreneur is the moral entrepreneur, a term coined by Howard Becker (1973). Ellickson mentions it briefly (Ellickson 2001, p. 9), but we had hitherto not found it elsewhere. Under this heading, the “Krimpedia” website offers an article that defines the moral entrepreneur as follows:

The ... moral entrepreneur is a person who is dissatisfied with existing rules and wishes to see them changed so that everyone else is also obliged to “do what he considers to be right.” If successful, the relevant rules of behaviour will be declared binding by legal enactment. Whoever behaves differently then becomes an “outsider” displaying “deviant behaviour” and is therefore also subject to sanctioning. Moral entrepreneurs thus “produce” not only rules but also – indirectly – deviation and crime (Krimpedia 2008).

Leaving aside the criminal sociology context, this concept is useful because it captures what is particularly problematic about the relationship between sanction modes and criteria not disciplined or difficult to discipline by law: the aura of moral superiority surrounding norm entrepreneurs and the unconditionality of their pretensions. These “moral change agents” therefore need closer examination.

2. Norm Formation Processes and Communication Processes and Change Agents as their Managers

Already in the introductory chapter of this book we had pointed to the key importance of the communicative dimension of law formation and enforcement processes, and thus to the definition of legal spaces. The change agents Ellickson describes bring us back to this issue, being prime examples of actors that know how to use the political and societal stages as effective and often highly professionalized communicators to create or change norms.

Ellickson identifies three categories of change agent: self-motivated leaders, norm entrepreneurs, and opinion leaders, who on closer consideration are endowed all three with high communicative competence:

- Ellickson describes the ideal candidate for self-motivated leadership:

To illustrate: A charismatic person faces lower costs of working for social change. A lessening of smoke especially benefits persons with emphysema or other lung dis-
ease. Therefore a charismatic person suffering from emphysema would be an ideal candidate to become a self-motivated leader of an antismoking campaign (Ellickson 2001, p. 14).

- Also interesting is how Ellickson defines the qualities of norm entrepreneurs and opinion leaders; personal charisma and communicative competence are useful for both:

  For the remaining two types of change agents – norm entrepreneurs and opinion leaders – external rewards provide an essential carrot. Although leaders of both types are likely to garner some tangible benefits from a norm change, they also need esteem to cover their full costs of supplying a new norm. Norm entrepreneurs are specialists who campaign to change particular norms, whereas opinion leaders are generalists. Ward Connerly, Martin Luther King, Jr., Catharine MacKinnon, Joseph McCarthy, and Carry Nation are norm entrepreneurs. Jimmy Carter, Walter Cronkite, Doris Kearns Goodwin, and Billy Graham are opinion leaders. Both types tend to be endowed with personal attributes, such as charisma and skill in communication, that reduce their costs of serving in these capacities (Ellickson 2001, p. 15).

- It is up to opinion leaders to give or deny their blessing to the efforts of norm entrepreneurs and self-motivated leaders. Ellickson:

  Unlike a self-motivated leader and a norm entrepreneur, an opinion leader is not at the forefront of norm change but instead is located one position back from the front ... An opinion leader evaluates the initiatives of these other change agents (the true catalysts) and then decides which of their causes to endorse. Opinion leaders therefore play a pivotal role in determining whether change agents succeed in triggering a cascade toward a new norm ...

  A successful opinion leader tends to have two exceptional characteristics. The first is an usually high level of social intelligence, which helps the opinion leader anticipate better than most which social innovations will end up attracting bandwagon support. An adept opinion leader, for example, may be aware that many have been disguising their true opinions about the merits of current norms ... Opinion leaders involved in the Velvet Revolutions in Eastern Europe, for instance, best sensed that support for communism was less genuine than it seemed. Second, an opinion leader is likely to be a person to whom other members of the group are unusually prone to defer in order to avoid being socially out of step. An opinion leader may have earned this trust through prior accomplishments in the arena of norm enforcement and change. A village elder is a generic example. The costs of supplying a new norm fall when someone expects to be followed (Ellickson 2001, p. 16).
I. The Multiplicity of Sanction Modes as a Selection Problem: From Regulatory Choice to Choice of Sanctions

In the preceding six sections we have had ample opportunity to examine the wide range of sanction systems and sanction modes – not only in the sense of different norm-enforcement techniques but also and above all as forms of social control; for governance collectives are not only regulatory collectives (see chapter one), they are always also what Benno Zabel has called “control and orientation systems” (Zabel 2012, p. 19).

The multiplicity of norm enforcement regimes really becomes apparent only when one considers the multiplicity of normative orderings – not only state-made law and its legally elaborated sanction system but also and above all social norms and the associated social sanctions (on forms and sanctioning logic see Ellickson 1991, 2001; Posner and Rasmusen 1999). Here, too, capturing and analysing the diversity of norm enforcement regimes requires a wide-angle lens. Two things need to be considered: first, the range of sanction types and how they relate functionally to the various normative orderings; second, the diversity of sanction types has to be examined as a selection problem. We shall be considering a number of examples of the advantages and disadvantages of certain sanction modes: in other words, specific “sanction costs.”

We begin with the multiplicity of sanction types (I.) and the need to choose between them (II.).

I. The Multiplicity of Sanction Types

In Richard A. Posner and Eric B. Rasmusen’s article on “Creating and Enforcing Norms, with Special Reference to Sanctions” (1999), we find a useful overview of sanction types:

A norm is a social rule that does not depend on government for either promulgation or enforcement. Examples range from table manners and the rules of grammar to country club regulations and standard business practice. Norms may be independent of laws, as in the examples just given, or may overlap them; there are norms against stealing and lying, but also laws against these behaviors. The two kinds of rule reinforce each other through differences in the mode of creation, the definition of the offense, the procedure for administering punishment, and the punishments themselves. Laws are promulgated by public institutions, such as legislatures, regulatory agencies, and courts, after well-defined deliberative procedures, and are enforced by the police power of the state, which ultimately means by threat of
violence. Norms are not necessarily promulgated at all. If they are, it is not by the state. Often a norm will result from (and crystallize) the gradual emergence of a consensus. Norms are enforced by internalized values, by refusals to interact with the offender, by disapproval of his actions, and sometimes by private violence (Posner and Rasmusen 1999, p. 369f.).

Posner and Rasmusen identify six types of sanction, which we assign to the norm enforcement regimes discussed in this and preceding chapters:

<table>
<thead>
<tr>
<th>Sanction type*</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Automatic sanctions:</strong></td>
<td></td>
</tr>
<tr>
<td>The violator’s action carries its own penalty because of its not being coordinated with the actions of others.</td>
<td>Failure to comply with DIN standards leads to the incompatibility of products and falling profits for the producer.</td>
</tr>
<tr>
<td><strong>Guilt:</strong></td>
<td></td>
</tr>
<tr>
<td>The violator feels bad about his violation as a result of his education and upbringing, quite apart from external consequences.</td>
<td>Feelings of guilt about failing to meet the demands of military courage or religious tenets.</td>
</tr>
<tr>
<td><strong>Shame:</strong></td>
<td></td>
</tr>
<tr>
<td>The violator feels that his action has lowered himself either in his own eyes or in the eyes of other people.</td>
<td>The contempt that an officer or the member of another profession suffers if he violates his profession’s code of honour.</td>
</tr>
<tr>
<td><strong>Informational sanctions:</strong></td>
<td></td>
</tr>
<tr>
<td>The violator’s action conveys information about himself that he would rather others not know.</td>
<td>A breach of the etiquette of a social class shows someone up as not belonging to it.</td>
</tr>
<tr>
<td><strong>Bilateral costly sanctions:</strong></td>
<td></td>
</tr>
<tr>
<td>The violator is punished by the actions of and at the expense of just one other person, whose identity is specified by the norm.</td>
<td>Exercise of the right of self-defence to protect individual assets or the legal order as a whole.</td>
</tr>
<tr>
<td><strong>Multilateral costly sanctions:</strong></td>
<td></td>
</tr>
<tr>
<td>The violator is punished by the actions and at the expense of many other people.</td>
<td>Loss of a firm’s reputation among its stakeholders if it violates legal or non-legal standards.</td>
</tr>
</tbody>
</table>

* This column quotes from Posner and Rasmusen 1999, p. 371f.
What is interesting about this overview is that it lists either self-imposed sanctions – as in the case of shame and feelings of guilt – or social sanctions such as disapproval or social exclusion either by those directly affected or by the so-called social environment; there is no mention of sanctioning by the state. Interestingly, the types of sanction listed are by no means exclusive but rather – which is likely to be the rule – cumulative: “A norm can be enforced by more than one sanction – indeed, by all six. A drunk driver weaves along the road and crashes into a bus, killing a child. He has wrecked his car, he feels guilty, he knows that all his neighbors look down on him, his employer discovers that he is an alcoholic, the child’s parents condemn him, and he is ostracized by the entire community” (Posner and Rasmusen 1999, p. 372).

Another author who uses a wide-angle lens is Robert C. Ellickson. In his article “The Market for Social Norms” (2001) he discusses representatives of the law and economics school like Eric Posner (see above) and Richard McAdams (1997), whom he describes as “new norms scholars,” defining their common approach as follows:

Although the new norms scholars differ on many points, they generally share a common conception of norms and a common methodological approach. They regard a social norm as a rule governing an individual’s behavior that third parties other than state agents diffusely enforce by means of social sanctions. A person who violates a norm risks becoming the target of punishments such as negative gossip and ostracism. Conversely, someone who honors a norm may reap informal rewards such as enhanced esteem and greater future opportunities for beneficial exchanges. A person who has internalized a norm as a result of socialization enforces the norm against himself, perhaps by feeling guilt after violating it or a warm glow after complying with it (especially if the norm is burdensome to honor). A norm can exist even if no one has internalized it, however, so long as third parties provide an adequate level of informal enforcement (Ellickson 2001, p. 3).

Interesting about this passage is the strong emphasis on the informality of social sanctions: we are thus dealing with the full spectrum of sanction systems comprising a formal and a much bigger informal sector. This informal sector largely escapes legal regulation (on the relationship between formal and informal statehood see Schuppert 2011b); it is difficult to channel legally, and its effects are often difficult to predict. We discuss this under the heading of political correctness.
II. From Regulatory Choice to Choice of Sanctions

1. Choice of Sanctions

Politics is about choices. On this basis, we have repeatedly proposed (Schuppert 1994; 2003a; 2011c) distinguishing between three choice situations in the field of political action: instrumental choice, institutional choice, and regulatory choice.

Whereas instrumental choice is about different control tools – classical regulatory law, prohibitions and requirements, recommendations and warnings, economic incentives – and institutional choice is about various institutional arrangements – from public-law institution to private limited company – regulatory choice is about different types of regulation – enacted law or codes of conduct – and different domains of regulation – state regulation or private self-regulation.

Transferring the choice of regulation type to the closely related level of sanction modes, we can with Richard A. Posner and Eric B. Rasmusen (1999) speak of a choice of sanctions, a concept they introduce as follows:

Two central puzzles about social norms are how they are enforced and how they are created or modified. The sanctions for the violation of a norm can be categorized as automatic, guilt, shame, informational, bilateral costly, and multilateral costly. The choice of sanction is related to problems in creating and modifying norms. We use our analysis of the creation, modification, and enforcement of norms to analyse the scope of feasible government action either to promote desirable norms or to repress undesirable ones. We conclude that the difficulty of predicting the effect of such action limits its feasible scope (Posner and Rasmusen 1999, p. 369).

Taking up the concept of choice of sanctions, we consider two choice situations.

2. Choice of Sanctions “At Work”: Two Examples

a) Financial Penalties or Social Sanctions: The Power of Disapproval

An article in the Süddeutsche Zeitung of 16 January 2013 drew attention to this example: under the heading “The Power of Disapproval. Social Sanctions are Stronger than Fines” the author writes:

How can a smoker be induced to light up outside the pub rather than inside? And how can someone be persuaded not to discard rubbish in the street or park in a no
parking zone? The answer is simple: through prohibitions backed by fines. But however effective this pattern is, it has its limits: as soon as no checks are to be feared and therefore no fines, the impact of the prohibition weakens. Psychologists Rob Nelissen and Laetitia Mulder from the Dutch University of Tilburg report that social disapproval has a more long-lasting effect than financial penalties. If conduct is frowned on socially, people keep to a ban even when they are not under observation ...

The scientists had their test persons take part in a game that rewarded selfish conduct in some participants. However, for the group result – test subjects were rewarded with money – it was important that the majority of participants cooperate. One third of test persons could be punished by fining for acting parasitically: the degree of cooperation in this group was particularly high. In another group it was possible to condemn egoists socially in the circle. This, too, encouraged cooperative behaviour, if not as strongly. In a control group, participants played with no threat of sanctioning and ultimately came to be dominated by egoism. When on a pretext the psychologists withdrew the possibilities for sanctioning from the game, cooperation in the financial penalty group collapsed within a short space of time. If good behaviour had previously been achieved through the threat of social disapproval, by contrast, the test persons remained cooperative.

Psychologists Nelissen and Mulder argue that financial penalties tend to encourage cost-benefit analysis. And when no fine threatened, this calculation clearly favoured selfish behaviour. Or the penalty was even treated as buying the right to violate a norm. A meanwhile notorious study on the behaviour of parents examined, for example, whether a fine would induce them to be punctual in fetching their offspring from the kindergarten. The contrary was the case. Parents regarded the fine as a fee for the right to ignore the closing time of the kindergarten. In the long run, public social disapproval would probably have been more effective in disciplining parents (Herrmann 2013. Transl. R.B.).

The article by Rob M. A. Nelissen and Laetitia B. Mulder (2013) referred to in the newspaper report is well worth consideration. The issue they address is how voluntary compliance with norms can best be ensured if – which in practical life is likely to be the rule – the regular sanction system of “prohibition backed by financial penalty” does not work all the time; our authors are worried that the fine as a sanction leads people to behave in society purely in terms of costs and benefits, an effect that could be countered by tangible social disapproval:

Voluntary norm compliance is an important issue because sanctioning systems are rarely perfect. Frequently, norm violations will go unnoticed. If people only comply with norms when otherwise facing punishment, a sanctioning system is only as effective as its execution. In spite of their norm-enforcing ability, several studies suggest that sanctions actually undermine voluntary norm compliance. Imposing a sanction may cause people to frame a previously ethical decision (Is it acceptable to
do this?) in business terms (Is it cost-efficient to do this?), which may even result in less compliance ... Moreover, sanctions may negatively affect trust. Under a sanctioning system people ascribe others’ norm compliance to the prospect of punishment upon violation, rather than to a desire to cooperate. Consequently, when the sanctioning system is removed, levels of cooperation tend to drop ....

These ‘dark sides’ of sanctions (i.e., the adoption of an economic decision frame driven by external incentives rather than mutual trust) will impair norm compliance under conditions of imperfect execution; that is, when norm violations are not consistently punished. In the present study, however, we explore the possibility that these drawbacks are an artifact of sanctions usually being modeled as financial punishment. We investigated whether the drop in voluntary norm compliance that is commonly observed after the removal of a (financial) sanctioning system is attenuated in case a social instead of a financial sanctioning system is implemented and subsequently removed. In a social sanctioning system the only form of punishment consists of the mere expression of disapproval with a particular kind of conduct. In the present study the removal of a social sanctioning system is achieved by terminating the possibility for participants to express their disapproval of each other’s behavior after each round of contributions in a social dilemma game (Nelissen and Mulder 2013, p. 71f.).

The experiments conducted by our authors invite the conclusion that social disapproval is a more effective type of sanction than financial penalties if those required to comply with rules cannot be permanently kept under surveillance:

We conclude that, compared to financial sanctions, social sanctions are more likely to elicit voluntary norm compliance even if people’s behavior cannot be consistently monitored and their norm violations therefore may go unpunished from time to time as is often the case in real life. In other words, social sanctioning systems are more lenient than financial sanctioning systems to inevitable flaws in their execution. As already stated, we do not claim that people will voluntarily comply with norms indefinitely if violations remain unpunished. When people do not disapprove each other’s non-cooperation any more, the norm will ultimately vanish. Although exact statistics on the proportion of an individual’s norm violations that go unnoticed are lacking, extended non-punishment seems unlikely. The observed resilience of a social sanctioning system should thus be sufficient to buffer incidental slips of vigilance. Clearly this has important implications for public policy. Our results suggest that successful norm induction requires public communication of social (dis)approval, not only because it increases the salience and thus the effectiveness of norms in guiding behavior ..., but also because it makes them stick even if people are not consistently punished for their violations (Nelissen and Mulder 2013, p. 78).

If this is indeed the case, we ought to take a closer look at this so effective type of sanction and clarify its functional logic. Nelissen and Mulder:
In everyday interactions social rather than financial punishment is the default. Expressing disapproval or contempt, gossip, peer pressure, and teasing are informal, non-institutionalized means to punish norm violations. Indeed, social disapproval of non-cooperation ..., but also social approval of cooperation ... boosts cooperation in social dilemmas just like financial punishment does. Ultimately social sanctions hint at the possibility of social exclusion, which probably accounts for their impact ... Studies demonstrate that experiencing ostracism has severe consequences ... and shares the same neural substrate as physical pain ... Some even argue that the threat of ostracism is the key mechanism underlying the development of social norms ... (Nelissen and Mulder 2013, p. 72).

This teaches us that social disapproval is no joke: it is informal and therefore not disciplined by law, it can hit people hard and in extreme cases lead to social exclusion without appeal. We shall be coming back to this.

b) Order without Law: The Effectiveness of Governance by Reputation

Robert C. Ellickson’s ground-breaking study on dispute settlement mechanisms among farmers in Shasta County under the significant heading of “Law without Order” (Ellickson 1991) shows how effectively governance by reputation (see Schuppert 2010, p. 90 ff.) can substitute for legally binding regulation, which generally takes the form of enacted law. However, we turn to two other examples that we have already considered elsewhere.

• The first is that of Jewish diamond merchants in the New York Diamond Dealers Club (DDC), who trade in accordance with rules they set themselves under the supervision of the Club, which provides regular information about the business practices of its members, thus influencing their reputation and – in the event of repeated and significant loss of reputation – threatening them with exclusion. Barak D. Richman writes of “reputation-based enforcement” (2006) of the self-given rules, what can be in more general terms be called governance by reputation. To put it simply, such a mode of governance presupposes two things: a functioning exchange of information about the business practices of certain people (mostly merchants) and the existence of a social group or a social network for which the reputation of its members is important; we shall call such social groups reputation communities.

• The second example is a case study by Lothar Rieth and Melanie Zimmer (2004) on the conduct of transnational corporation in crisis areas – Shell in Nigeria and BP in Colombia – and their contribution
to conflict prevention. The authors come to the conclusion that changes in behaviour are apparent where the pressure of publicity produced by NGOs is so great that a change in corporate behaviour in the sense of assuming “corporate security responsibility” (Wolf et al. 2007) seems advisable owing to company reputation sensibilities. Rieth and Zimmer explain how this reputation mechanism works:

One factor that can contribute to the level of pressure exerted by NGOs on the behaviour of corporations is the reputation of these corporations. The reputation of the company is often reduced to or equated with the brand name. However, reputation is a more comprehensive, relational concept that points to the relationship between a corporation and various groups, so-called stakeholders. The stakeholders of a company are its customers, employees, investors, business partners, governments, international organizations, local communities, and not least NGOs. Through its reputation, a corporation seeks to demonstrate to its stakeholders reliability and dependability as interactional partner. It is thus constantly under pressure to present an image to stakeholders that corresponds to the expectations they have of the company and their conception of it in order to gain or improve a positive reputation. A positive reputation facilitates interaction between a corporation and its stakeholders (Rieth and Zimmer 2004, p. 94f. Transl. R.B.).

J. Concluding Remarks

Having intensively measured the World of Rules over the past three chapters, discovering one plurality after another, it is time to pause and take stock.

Without exaggerating, we can claim to have gained a far-reaching idea of how the universe of rules is constituted. We have made the acquaintance of a wide range of regulatory regimes from divine law to local tribal law and the code of honour of the Prussian officer corps; we have observed all sorts of norm producers at their work of setting rules, taking a particular interest in what semi-autonomous socio-legal fields they inhabit. Finally, we have sorted through a broad array of norm enforcement regimes, from patrimonial jurisdiction in manorial societies to forms of political correctness.

All this plurality naturally raises the question of how it is to be dealt with. Various disciplines offer answers, such as the theory of legal pluralism, but above all classical sociology of law and legal theory. Common to all these approaches is that they raise the question of what is really to be understood by “law.” There is no eluding this question of the “right” concept of law, or at
least not for someone who, like the present author, has been socialized in the
discipline of jurisprudence. The next chapter will accordingly be devoted to
finding the right concept of law. The reader is cordially invited to join in the
search.
This page intentionally left blank.