Chapter Five
In Search of the “Right” Concept of Law

The plurality discovered in the course of the last four chapters suggests that it will be far from easy to define “law” precisely and draw a reliable distinction between what is law and what is not. A sharp dividing line can perhaps not be drawn anyway, so that other ways will be needed to adequately address plural normative orderings with differing “degrees of hardness,” plural sources of law and norm producers, and plural norm enforcement regimes. The second part of the chapter will consider how to tackle this problem.

The first problem to reflect upon, however, is whether scholarly disciplines that have long inquired into what counts as law can help in distinguishing between law and non-law. Two come into question: the sociology of law and the theory of legal pluralism. We start with legal sociology.

What we can already do in our search for the right concept of law is to exclude two options that lead nowhere and examine how legal sociologists can help.

A. Putting Legal Sociology to the Test

We call on three well-known representatives of the sociology of law to testify on what counts as law.

I. Eugen Ehrlich or How Bukovina Developed from a Remote Region in the Austro-Hungarian Empire into a Virtual Mecca for Legal Sociologists

Our foray begins with Eugen Ehrlich, generally regarded as the founder of German legal sociology (see Raiser 2009, p. 71 ff.). A brief look at his origins will throw light on his lasting importance and function as the progenitor of legal pluralism.

Eugen Ehrlich was born in Chernivtsi in the Duchy of Bukovina, then a border region of the Austro-Hungarian Empire, which in 1919 was assigned to Romania and is now part of Ukraine. In 1910 Ehrlich – meanwhile
professor of Roman law – established a “Seminar for Living Law” because he saw it as the task of jurisprudence to consider the whole of living law instead of limiting itself to what can be enforced by coercive legal powers of the state. With regard to Bukovina he noted:

A traditional legal scholar would doubtless claim that all these nations had only a single system of law, one and the same system: Austrian law applicable throughout Austria. But even a casual glance shows that each of these tribes obeys quite different legal norms in all the legal relations of daily life (Ehrlich 1967, p. 43. Transl. R.B.).

Ehrlich’s observations turned the politically insignificant Duchy of Bukovina into a virtual Mecca for legal sociology. His image of a legally plural Bukovina was taken up and intensified by Gunter Teubner in an essay entitled: “Global Bukovina: The Emergence of a Transnational Legal Pluralism” (“Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus”) – the geographical term Bukovina came to stand for legal pluralism. And in “Law without State?” (“Recht ohne Staat?”), Stefan Kadelbach und Klaus Günther, mentioned Bukovina no fewer than three times in listing the best-known phenomena of legal pluralism:

- Private law without the state within a state: Bukovina
- Societal law without law in the state: exotic Bukovina
- Law without the state outside the state: global Bukovina

As Raiser rightly remarks (2009, p. 74), the traditional concept of law, which refers to enacted or statutory law, is inadequate for Ehrlich’s research programme. He identifies three types of law: societal law, jurists’ law, and state law, the first being the really relevant type. The hard core of societal law is the law of societal associations, that is to say, the totality of norms that regulate the internal ordering of these associations. In 1913 Ehrlich wrote:

*The internal order of human associations is not only the original but even today the more fundamental form of law.* The legal rule (Rechtssatz) developed only much later, and to this day is largely derived from the internal ordering of associations. To explain the development and nature of law, the ordering of associations therefore has to be investigated. All attempts to gain clarity about the law have hitherto failed because they set out not from the ordering of associations but from legal rules.

*The internal ordering of associations is determined by legal norms.* The legal norm (Rechtsnorm) is not to be confused with the legal rule (Rechtssatz). The legal rule is the universally binding, chance version of a legal provision in a statute or book of law. A legal norm, by contrast, is a legal directive that is valid in specific, perhaps quite small associations, even if not put into words. As soon as there are legal rules in a society that have actually come into effect, they also produce legal norms; but in
every society there are far more legal norms than there are legal rules, because there is far more law for individual circumstances than for all similar circumstances, and also more law than contemporary jurists, who seek to put in in words, have realized. Every modern legal historian knows how little of the law applicable in their own time is contained in the Twelve Tables or in the Lex Salica; but things are no different with modern legal codes. In past centuries, all legal norms that determined the internal order of associations were based on the traditions, the contracts, and the statutes of corporations, and still today they are largely to be found there (Ehrlich 1989, p. 43f. Transl. R.B.).

Whether the norms of this associational law are obeyed by association members is not an arbitrary matter: there are such things as normative societal constraints. Ehrlich explains:

We all therefore live in the midst of innumerable, more or less established, but also at times quite loose communities, and our human fate depends mainly on the position we manage to attain within them. Clearly, reciprocity plays a role. Communities would be quite unable to offer every single member something if every individual gave nothing in return. And in fact, all these communities, however organized – whether they go by the name of mother country, home town, place of residence, religious community, trading corporation, or clientele – all demand something in return for what they do for us, and the societal norms that prevail in the given community are nothing other than the generally applicable outcome of the demands they make of the individual. Whoever has to rely on the support of those about him – and who does not? – is well advised to bow at least largely to their norms. Anyone who fails to do so must expect his conduct to damage his ties with his circle; whoever is stubborn in his resistance, who himself loosens existing ties with his fellows, will find himself gradually abandoned, avoided, excluded. It is in societal associations that we find the source of the constraining power of all societal norms, of law as of propriety, morality, religion, honour, decency, good taste, fashion – at least as far as outward compliance is concerned (Ehrlich 1989, p. 65. Transl. R.B.).

As far as the demand for compliance is concerned, this binding regulatory regime is a force to be reckoned with. According the Ehrlich, there are many associations in society that take action just as energetically as the coercive association “state”. He comments on “the power of societal normative constraints”:

People therefore act in accordance with the law primarily because societal circumstances oblige them to do so. In this connection legal norms are not to be distinguished from other norms. The state is not the only coercive association; there are innumerable such groupings in society that can act far more energetically than the state. One of the strongest among them is still the family. In ever growing measure, modern legislation refuses to enforce judgement in matters concerning the conjugal community. But were the entire family law of the state to be repealed, families would certainly not be much different than they are today; fortunately family law
seldom requires coercive action by the state. The worker, the employee, the civil
servant, the officer; they all perform their contractual and professional duties, if not
from a sense of duty then because they want to keep their position and perhaps even
gain a better one. The physician, the lawyer, the tradesman, the merchant are all
concerned to satisfy and expand their clientele, and also to consolidate their stand-
ing by scrupulously fulfilling their contracts. The last thing they think of is penalties

Although Ehrlich assumes that legal norms in society are often also enforced
through social constraints, this is not the most important aspect of his con-
cept of law. As we have seen, he defines every rule as a legal norm that, as a
prescription for desirable behaviour, determines the actual conduct of an
individual within an association – and thus within a regulatory collective. At
a very early date, Ehrlich accordingly severed the traditional conceptual
connection between law and the state, introducing a sociological concept
of law based on the observation of regulated behaviour. As we shall see, not
all his successors in legal sociology followed him in his radical, de-statized
understanding of law.

II. Theodor Geiger or From Embryonic and Incomplete Law
to the Hardening of Social Norms

The second great German legal sociologist to consider in this context is
Theodor Geiger. Thomas Raiser has this to say about him:

Theodor Geiger, born in Munich in 1891, started life as a lawyer, but immediately
after the First World War turned to journalism and adult education and engaged in
empirical sociological studies, obtaining a chair in sociology at the Technical Uni-
versity of Brunswick in 1928. Emigrating to Denmark in 1933, he taught at the
University of Aarhus from 1938 until his death in 1952. His copious oeuvre, to some
extent in Danish, covered broad areas of theoretical sociology and empirical social
research. His “Preliminary Studies on a Sociology of Law,” (“Vorstudien zu einer
Soziologie des Rechts”) which appeared in 1947, contains the essence of his legal
sociology, and constitutes the most important work in his later research (Raiser

This work strikes the basic chord of Geiger’s sociology of law from the
outset, namely that law can be defined as an ordering structure of a group,
but that not every group order deserves to be described as law:

Law is an ordering structure that exists within an integrant of society (“group”). This tells
us little and that in very general terms. Not every social ordering is law. It would be
at least unusual to describe certain ordering phenomena such as the statutes of a
society or the practices of a particular social class as law. What particular properties does a social ordering structure therefore require to justify calling it law? What particular sorts of group can a legal order be ascribed to? – There is clearly a specific relationship between “law,” “state,” and “enacted law” (Geiger 1987, p. 6. Transl. R.B.).

Law is “per se” group law, but rules can be called law only if they are made by the state or recognized as such by the state. The decisive passage is probably the following:

The legal system is never the sole ordering structure prevailing within a differentiated society. Morality and convention also play a major role. We call this phenomenon the pluralism of the social ordering structure. From the perspective of the dualistic conceptual model of “state and society,” “state” and “free society” are two social structures shared by the personal substratum “population.” The legal order is then classified as belonging to (if not identical with) the statist form of life, whereas morality is associated with “free society” as a whole – with single groupings and circles within free society naturally having their own particular ordering structures. The legal order is thus distinguished by definition in two directions from other ordering structures. Firstly, in terms of differentiation between integrants of society [Gesellschaftsintegrate], the law being treated as the ordering structure of a particular integrant, the citizenry of the state (Staatsvolk); secondly, in morphological terms, in so far as other non-law ordering structures exist alongside the law within the nation (within the society governed by law) (Geiger 1987, p. 117f. Transl. R.B.).

There is thus a pluralism of social ordering structures, within which, however, it is possible to advance from the “lower division of morality” to the “premier league of law,” a process that is to be seen as follows:

Once again this is a question of genetics: What causes this differentiation of the ordering structure? If we set out from the hypothesis that the overall organization of society has developed under a central power and hence that the legal system has formed endogenously within an existing but hitherto decentralized society of the same substratum, it must be assumed that, at a given point in time, a society existed that was ordered solely in terms of morality. Crystallization around a central power within a society also leads to the “judicialization” of parts, but only parts, of the previously prevailing ordering structure, whereas other social and economic matters continue to be regulated by spontaneous morality. The regulation of certain matters is thus elevated to the legal sphere, while that of others is not (Geiger 1987, p. 118. Transl. R.B.).

Geiger adopts a decidedly processual perspective, leading him elsewhere to speak of embryonic law – for instance among “primitive peoples” – or of unfinished law:

One thing needs to be stressed from the outset: there is no clear dividing line between legal and other orders in the sense that every concrete ordering phenomenon can be defined as either law or non-law. Not least, this is because law in our
understanding is the product of societal development. If law develops out of a preceding, pre-legal ordering structure, transitional states are to be expected in which the prevailing order is “not yet quite law” but “no longer merely” what had preceded law. And since law has a number of characteristic properties, it can be that this or that property will “still be lacking” here or there. We can expect to find a core surrounded by phenomena that are doubtless legal in the full sense of term and concept, ringed by other phenomena that are more or less but not fully and completely law. I call this unfinished law (Geiger 1987, p. 87. Transl. R.B.).

In effect, however, this processual perspective does not stop Geiger from insisting that the state and law are coupled, and that other governance collectives (which he calls “integrants of society,” Gesellschafts-Integrate) – although equipped with an ordering structure of their own – must, if not attributable to the state, be relegated to the status of non-law. He concludes:

The state ranks first among the notions associated with the idea of (positive) law. Law is conceived of as a social order “applicable to the citizenry of the state (Staatsvolk),” which, if not established by the state, is nevertheless guaranteed by it. However, certain autonomous administrative entities, such as municipalities, set rules that we treat as legal norms in the strict sense of the term; but they do so by virtue of empowerment by the state. There is ecclesiastical law – but it is either state law relating to religious societies or it is a system carried by the church itself and described as law precisely because the church is a state-like organization – a state within a state or above states. ...

On the basis of the conceptual connection between law and state, we can now attempt to identify the characteristics that distinguish the law from other social systems. It should be noted that this coupling with the “state” points in two directions. First, it assigns the law to a particular type of ordering integrant of society, if by state we understand an organized manifold of persons belonging together, the “national citizenry” (“Staatsvolk”). Second, it implies a special structural form of legal activity in so far as the state is conceived of in impersonal terms as an apparatus of power working through institutions (Geiger 1987, p. 87 f. Transl. R.B.).

In Geiger we have a classical proponent of the law = state formula. Although recognizing normative orders as law-like or protolegal, he cannot accept as law what does not derive directly or indirectly from the state. However, he offers no convincing argument why this should be the case. And, as the preceding chapters have shown, there is also much to suggest that non-state normative orderings should be treated as law if only because, except for their authorship, they often do not differ in any way from state law.

As we shall see, Manfred Rehbinder takes a somewhat more differentiated approach to the issue.
III. Manfred Rehbinder

The third author to be considered is the Zurich legal sociologist Manfred Rehbinder, to whom we owe what is probably the leading textbook on the sociology of law (2009). His work shows a peculiar tension between his concern with the regulatory collective and its given normative order – in this regard he thinks as a sociologist – and his concern with the state and its legal personnel – here he thinks as legal scientist. He is at heart a sociologist but the consequences of adopting a sociological stance bring him to submit to disciplining by the legal sociologist in him and finally to come out in favour of unison between the state and the law.

1. Regulatory Collectives and Their Own (Sociological) Legal Order

Rehbinder’s point of departure in determining “what law is” is a sociological conception of law that recalls that of Ehrlich. However, he differentiates more strongly in terms of how precisely one establishes what constitutes law in a regulatory collective. For instance, he cites three paths towards the empirical investigation of law:

In total, three ways have been proposed for investigating law empirically:
1. Identifying norms regarded as binding for the life of a group, and which for this reason guide the behaviour of addressees (legal consciousness = ideal patterns of behaviour),
2. Identifying patterns of behaviour in the actual lives of groups (legally relevant social life = actual patterns of behaviour),

He then asserts that many societal associations have legal orders of their own in a sociological sense, especially organizations that have their own disciplinary law:

Not only the state but also other societal associations have organizations that concern themselves specifically with applying and enforcing norms, e.g., the church, the military, the civil service, the universities; in brief, all groupings that have a special “disciplinary law,” as well as clubs, political parties, industrial associations and interest groups, etc. All these groups can have their own organizational apparatus for supervising compliance with their specific group order. In the sociological sense, they all have their own legal orders (Rehbinder 2009, p. 39. Transl. R.B.).
A Regulatory Collective can well have its own Normative Order – but this does not yet make it a Legal Order

Rehbinder avoids taking the decisive step; although he concedes that a given group ordering is a legal order in the sociological sense, he asserts that this does not allow us to speak of a legal order in the real sense of the term, because such an order can be maintained and enforced only by the state and its professionalized legal personnel. The crunch comes with the question whether legal pluralism can actually exist. Rehbinder denies it explicitly, even though he again emphasizes that group orders also have an autonomous coercive apparatus and that from a functional point of view they do not differ from the state legal order. He cites Karl N. Llewellyn and his study on the law of the Cheyenne Indians, the “Cheyenne Way” (Llewellyn and Hoebel 1941):

But it was Karl N. Llewellyn (1893–1962), who with his classic study on the Cheyenne Indians, which he published in 1941 in collaboration with anthropologist E. Adamson Hoebel, established the idea of law in sub-groups of society independent of the law of overall society, and thus the notion of a plurality of legal systems. Looking not at society as a whole but at the individual sub-groups within it, he argues that completely and fundamentally different legal systems can be found in these smaller entities, and that all generalization at the overall societal level about what constitutes the family or a particular type of association is risky. In every society, the overall picture of the law includes not only that pertaining to the whole but also subordinate or coordinate legal arrangements pertaining to smaller actors (Rehbinder 2009, p. 41. Transl. R.B.).

But this does not prevent Rehbinder from denying such group orderings the status of legal orders. He advances what we could call a “gang-of-thieves” argument:

However, this consideration of smaller actors does not necessarily lead to a pluralistic concept of law. Even if we ascribe the same character to the coercive apparatus of the sub-groups as to the legal personnel of overall society, there is nevertheless terminological consensus on reserving the term “law” for a means of overall society for exercising social control in order to avoid, for example, having to declare legal the coercion exercised by gangsters. The background is not necessarily, as Pospišil ... claims, a moral value judgement that seeks to exclude the investigation of criminal gangs from investigation of the law. For organized crime has a major impact on the effectiveness of law and is accordingly a subject for jurisprudential (criminological) inquiry. But if misunderstandings are to be avoided, the organizational and behavioural rules of societal sub-groups, if they are not (even if only by virtue of a reference provision) an integral part of the law of society as a whole, cannot be described as law despite their legal character in the sociological sense. A state judge
ruling on the Mafia could otherwise be accused of perverting the course of justice (Rehbinder 2009, p. 41. Transl. R.B.).

In the end, Rehbinder remains rooted in a statist concept of law, surprisingly evident in his comments on the mainstream German line of argument:

Within the legal system of the Federal Republic, this development is apparent in the stress placed on the state’s monopoly of law and in the harmonization of lawmaking and the administration of justice. The theory of this monopoly attributes the grounds for the validity of all law to the state and reserves to the state the enforcement of legal norms by direct coercion. Although the law produced by associations (associational law, ecclesiastical law, collective bargaining law, standard business terms) does not from a genetic point of view arise outside the state, its legal nature now derives from the circumstance that in certain areas the state grants associations lawmaking autonomy. The state is therefore entitled to monitor non-state lawmaking (the competence competence of the state legal personnel). It does so increasingly through legislation of its own, which limits the freedom of non-state authorities (e.g., competition and consumer law), and through the limited review of legal norms set outside the state and of the rulings of associational courts (professional and arbitration tribunals). This prevents the legal order from breaking down into completely autonomous particular systems (Rehbinder 2009, p. 74. Transl. R.B.).

IV. Taking Stock: A Dualistic Concept of Law – An Unsatisfying Heritage

The floor has been given at such great length to representatives of legal sociology because their arguments show it is one thing to describe and analyse the efficacy of non-state normative orders and quite another to upset the apple cart of a statist concept of law and define such behaviour-controlling normative orderings as “law.” In effect, this amounts to proposing a dualistic concept of law, namely a distinction between state-made or at least state-recognized law on the one hand and law in a “merely” sociological sense on the other. Although not yet solving the definitional problem, this at least files the issue away under two scholarly headings, dogmatic jurisprudence for state law and legal sociology for law in the sociological sense. This cannot be the last word on the matter for a legal science that in our view ought to be understood as a science of regulation.

There is therefore no option but to continue the search for the “right” concept of law, now calling legal pluralism theory to the stand, which some consider the “key concept in a postmodern view of law” (de Sousa Santos 1987, p. 297).
B. Legal Pluralism: What Does the Concept Really Achieve?

A brief review of the impressive career experienced by the *legal pluralism* concept is needed.

I. The Theory of Legal Pluralism Enters the Scene

The appearance on stage of this theory was particularly loudly applauded by two groups in the audience. Those who put the case for a decline in the importance of the state or even its withering away, are, so to speak, natural fans of *legal pluralism*; the obvious equation is loss of importance for the state = loss of importance for state law. And this is indeed conceivable, as Stefan Kadelbach and Klaus Günther remark:

> For those who see the state withering away, the legal pluralism perspective is intuitively plausible. They turn their attention to possible surrogates for state legislation, which they find in private self-regulation, norm production by supranational and international organizations, or in public-private hybrid norm-setting. The multitude of norm producers who have come into being in the course of time fit easily, it seems, into a new picture replacing the homogeneous will of the state by the fragmentation of society and its law. State law applying within or outside the state would fit into this picture, along with international law, the lex mercatoria of international trade, and the corporate governance standards of multinational companies, not to mention more weakly standardized agreements or procedures between governments or between governments and private enterprises, and also the norm-setting activities of many non-governmental organizations (NGOs). The functional differentiation of world society can be described and possibly even explained in legal theoretical terms (Kadelbach and Günther 2011, p. 14. Transl. R.B.).

Not only those sceptical about the state “come out” as proponents of a pluralist concept of law: we could also count “friends of globalization” ruminating on a non-state world order among the exponents of legal pluralism theory. In his much cited essay on “Global Bukovina,” Gunther Teubner declares:

> Global law can be interpreted only in terms of a theory of legal pluralism and a corresponding pluralistic theory of legal sources. Only recently, the theory of legal pluralism has undergone a successful change, shifting the focus from the law of colonial societies to the legal forms of various ethnic, cultural, and religious communities within the modern nation state. Today the focus needs to shift once more – from the law of groups to the law of discourses. Similarly, the juristic theory of legal sources needs to turn its attention to novel, “spontaneous” processes of lawmakers.
which – independently of law made nationally or transnationally – have developed in various areas of world society (Teubner 1996, p. 257. Transl. R.B.).

The popularity of the legal pluralism theory is ground enough to cast a brief glance at the three waves of attention that the phenomenon of normative plurality has attracted and which Marc Hertogh identifies in his essay on “What is Non-state Law?” (2007). The first wave, referred to in the literature as “classic legal pluralism,” is a product of colonialism, a form of rule in which the legal ideas of the colonial powers confront the lived legal structures of colonized societies. Hertogh:

The first wave of attention for non-state law is set against the background of colonialism. In Africa, Asia, the Pacific and elsewhere, the colonizer was confronted with a situation of local rules and customs without the presence of a Western-style central state. “Social scientists (primarily anthropologists) were interested in how these people maintained social order without European law”... This focus on non-state law is associated with ‘classic legal pluralism’ and typically looks at the intersections of indigenous and European law ... Although there was some information available on customary and religious laws in law reports and administrative minutes of the colonial powers, studies specifically conducted on the laws and cultures of pre-industrial societies did not generally much appear before the early years of the 20th century ... (Hertogh 2007, p. 4).

Sally Engle Merry (1988) has coined the term “legal pluralism at home” for the second wave of attention, pointing out that normative plurality is not per se an exotic phenomenon, something to be found only in remote corners of the world and among strange peoples, but also at home, for instance in dealing with “immigrant groups and cultural minorities”:

Beginning in the late 1970s, a new wave of attention for non-state [law, G. F. S.] is developing as well. Typical for this second wave is that more and more sociolegal scholars become interested in applying the concept of legal pluralism to noncolonized societies, particularly to the advanced industrial countries of Europe and the United States. This development is sometimes referred to as “new legal pluralism” or “legal pluralism at home”... This constitutes an important shift in the study of non-state law. It means that in contexts in which the dominance of a central legal system is unambiguous, “this [approach] worries about missing what else is going on; the extent to which other forms of regulation outside law constitute law” (Hertogh 2007, p. 7).

The third wave of attention, which has had a durable impact, can be called the globalization wave: legal pluralism developing into global legal pluralism (Berman 2009; Michaels 2009). Here, too, we quote Marc Hertogh, who not
only describes this third wave but also names the authors most important in fostering this attention:

The third, and most recent, wave of attention for non-state law is related to globalization. In general terms, this refers to the “movement diffusion and expansion [of trade, culture, and consumption], from a local level and with local implications, to levels and implications that are worldwide, or, more usually, that transcend national borders in some way” ... A growing number of authors claim that these developments also have profound legal implications: “Globalization reminds us that the state is constrained not only by other states and supranational organizations, but also by non-state organizations (e.g. NGOs), communities (e.g. religious groups), and powerful private players (e.g. multinational corporations). All these actors, in one way or another, play roles in the globalizing world that were traditionally reserved to the state. One of these roles might be the role of lawmaker.” It is argued that, after ‘classic’ and ‘new’ legal pluralism, these developments should be interpreted in terms of ‘global legal pluralism’ ... Similar to the Austro-Hungarian empire of the early twentieth century, in which Eugen Ehrlich identified many different social associations with their own legal order, the present social and legal context can be understood as a ‘Global Bukovina’ ... The study of this “global law without a state” or “post-Westphalian conception of law”... focuses primarily on two fields: (i) the development of international merchant law; and (ii) human rights law (Hertogh 2007, p. 14).

This third wave has a particularly strong impact on the part the state plays in law; it is only with the globalization wave, which led to global legal pluralism, that Eugen Ehrlich’s concern – the decoupling of state and law – really takes on serious dimensions and topples the state from the pedestal of legal centralism. This is at any rate the view taken by Marc Hertogh:

The socio-legal literature is characterized by three waves of attention for non-state law, which highlight important changes in law and in society. First and foremost, however, they illustrate the changing role of the state. One of the most significant characteristics of colonialism was the powerful presence of the (foreign) national state. This undisputed presence of the state continued during the second wave of attention, albeit – of course – with important legal, political, and social differences. The third wave of globalization is, however, significantly different from its two predecessors. Here, as illustrated by the examples of the new lex mercatoria, Internet law and human rights law, the national state only plays a minor role or has disappeared altogether. Moreover, these latest examples of non-state law are no longer connected with marginalized tribal societies, immigrant groups or cultural minorities, but with large multinational businesses and powerful non-governmental organizations.

This raises all sorts of important questions about law, about the role of the state legislature, but also about the future of legal studies. Writing in the early twentieth century, Ehrlich argued that the legal scholars of his day seriously impoverished the
science of law because they confined their attention to the national state. Today, in the rapidly changing ‘Global Bukovina’ of the twenty-first century, Ehrlich’s plea for a decoupling of law from the state has still lost little of its relevance and a “liberation from these shackles” seems more appropriate than ever (Hertogh 2007, p. 27).

In brief, the inevitable impression is that the previous predominance of the state-centric concept of law has long since begun to erode and that the future belongs to legal pluralism. This can and shall be questioned.

II. The Troubled Concept of Legal Pluralism

Under this heading, Brian Tamanaha (2008) reveals in almost sympathetic vein the theoretical weaknesses of the concept of legal pluralism, rightly complaining “that legal pluralists cannot agree on the fundamental issue: what is law?” Tamanaha gives expression to his scepticism in describing the wide-angle lens employed by legal pluralists:

John Griffiths, whose 1986 article “What is Legal Pluralism” is the seminal piece in the field, set forth the concept of law that is adopted by most legal pluralists ... After considering and dismissing several alternatives as inadequate, Griffiths argued that Sally Falk Moore’s concept of the “semi-autonomous social field”¹ – social fields that have the capacity to produce and enforce rules – is the best way to identify and delimit law for the purposes of legal pluralism. There are many rule-generating fields in society, hence there are many legal orders in society, including the family, corporations, factories, sports leagues, and indeed just about any social arena with social regulation. In another important and often cited early theoretical exploration of legal pluralism, published in 1983, Merc Galanter asserted: “By indigenous law I refer not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety on institutional settings – universities, sports leagues, housing developments, hospitals” (Tamanaha 2008, p. 30).

Tamanaha then cites one of the most prominent proponents of legal pluralism to show how much this theory is at a loss when it comes to answering the question “What is law?”:

The problem with this approach, as Sally Engle Merry noted almost 20 years ago, is that “calling all forms of ordering that are not state law by the term law confounds the analysis”. Merry asked: “Where do we stop speaking of law and find ourselves simply describing social life?” Galanter was aware of this difficulty at the very outset: “Social life is full of regulations. Indeed it is a vast web of overlapping and reinforcing regulation. How then can we distinguish ‘indigenous law’ from social life

¹ See chapter three (“legal spaces”).
generally?” Legal pluralists have struggled valiantly but unsuccessfully to overcome this problem. In an article canvassing almost twenty years of debate over the conceptual underpinnings of legal pluralism, Gordon Woodman, the longtime co-Editor of the Journal of Legal Pluralism, conceded that legal pluralists are unable to identify a clear line to separate legal from non-legal normative orders. “The conclusion,” Woodman observed, “must be that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.” Similarly, John Griffiths asserted that “all social control is more or less legal.” Consistent with this view, a recent theorist on legal pluralism suggested that law can be found in “day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors...” Nothing prohibits legal pluralists from viewing law in this extraordinarily expansive, idiosyncratic way, although common sense protests against it. When understood in these terms, just about every form of norm governed social interaction is law. Hence, we are swimming – or drowning – in legal pluralism (Tamanaha 2008, p. 30 f.).

Since it cannot be our intention to swim let alone drown in the waters of legal pluralism, we turn to a seemingly simple example that promises to get us further: the rules of the game.


At first glance, rules of the game appear to be a clear case of non-law; after all, Section 762 (1) 1 of the Civil Code unequivocally distances itself from gaming and betting: “No obligation is established by gaming and betting.” This is a clear statement that leaves no room for doubt. However, if norms are regarded as the broader concept for regulations with varying degrees of binding force, things look somewhat different. Von Arnauld draws our attention to the following quote from Max Weber:

First of all, the “norm” as such – that is to say: the rules of the game – can be made the object of purely theoretical considerations. ... They may lead to practical value judgements, as for instance when a “skat congress” ... discusses whether it is not appropriate, in the perspective of the (“pleasure”) “values” governing the game of skat, to immediately introduce the rule that, henceforth, a “grand” [contract] shall outrank a “null ouvert” [contract]. This is a question concerning skat policy. Or, alternatively, they may be dogmatic and ask whether, for instance, a particular kind of bidding “would” not “have as its natural consequence” a particular rank ordering of those games. This would be a question falling under the general theory of the laws of skat, viewed in the perspective of “natural law”. Other matters belong to the domain of the jurisprudence of skat, as for instance the question whether a game
is deemed “lost” when the player has “played the wrong card”, and any question as to whether a player has in a concrete game played “correctly” (i.e. in conformity with the norm) or “incorrectly”. On the other hand, the question why a player has played “incorrectly” in a concrete game (deliberately?, unintentionally? etc.) has a purely empirical – and more particularly: a “historical” – character (Weber 2012, p. 212).

In his article on the “Normativity of Rules of the Game” (“Normativität von Spielregeln”) Andreas von Arnauld has been moved by the undeniably normative nature of rules of the game to take a somewhat closer look at the normative status of rules of the game and how they resemble other behaviour-controlling rules. He discovers astonishingly many parallels, included the fact the rules of the game normativize the rule-governed behaviour of a group of players:

Now the concept of “norm” is not monopolized by the law: we find it in many different contexts, in connection with human action, in practical philosophy and in sociology. If one approaches all these norms in terms of their (intended) mode of operation, they take on the aspect of action-guiding propositions: by means of (at least linguistic) directives they seek to steer behaviour in a desired direction. The parallels are clear between legal norms imposing behaviour in keeping with a given proposition within the legal order and rules of the game, which call for regulated behaviour governed by this set of rules. If one looks at rules of the law and rules of the game “from without,” further commonalities are apparent: legal norms are mostly codified; they are subject to societal change only up to a point, since they are normally set by a special act of creation; the creation of legal norms is not the work of society as a whole but is assigned to certain functionaries; unlike general societal reactions to breaches of norms, the sanctions entailed by the violation of legal norms are institutionalized. Similar observations are to be made, mutatis mutandis, in games: the rules of a game, too, are often codified and go back to a special act of creation (viz. the rules drawn up by the inventor of the game); breaches can be sanctioned, and disqualification counts as exclusion from the playing community (Arnauld 2003, p. 17f. Transl. R.B.).

Like legal norms, rules of the game also apply in general to a general circle of addressees that forms wherever and whenever the game is played:

Rules of the game, too, are in the first place general in the sense that they are to be respected by all players and not only particular ones. They are also general in the sense that that they apply to recurrent game situations and thus cover a multiplicity of cases over time – provided that the rules of the game are not changed during play. This corresponds with the players’ belief that a breach of the rules, at least if discovered, will be to their disadvantage; even in games there is “general habit of obedience.” ... This brings out the autonomous nature of the game, whose “sovereign” is the playing community as such, which sets its own rules. Parallels to the popular sovereignty (see Article 20 (2) 1 of the Basic Law “All public authority emanates from the people”) are quite obvious (Arnauld 2003, p. 20f. Transl. R.B.).
A further parallel is that rules of the game, like legal norms, are strongly binding:

It will be obvious that rules of the game are binding *in the same fashion* as legal norms. But the parallels go beyond this: like the law, the rule-governed game is based on the fundamental assumption that all participants are willing to keep to the rules. To this extent we can even say that rules of the game are *just* as binding as legal norms. If the rules are *generally* disregarded, the game will collapse. The fact that this has no consequences for society worth mentioning may initially throw doubt on this observation; but *pacta sunt servanda* is an equally essential dictum for (rule-governed) games and for the law. Taken in isolation, however, a single rule in a game is mostly *not considered to be as binding* as a legal rule. This is due first to the lower degree of social necessity to which the system-specific *opinio necessitas* refers, and second to the role of the player as “lord of the game,” hence to the possibility of changing the rules at any time without any intervention by constitutional institutions. If we take into account that, compared with the legally determined social system, a game is considerably smaller and less complex, and that the existence of the individual rule of the game is in greater “danger” than that of the individual legal norm, we can speak of the “micro-normativity” of rules of the game; but their mode of operation is “genuinely” normative. Rules of the game are at the very least not normative in the legal sense because they do not form part of the legal system. The basis on which to compare legal rules and rules of the game norms is therefore lacking (Arnauld 2003, p. 35 f. Transl. R.B.).

Andreas von Arnauld’s comments on the normative status of rules of the game are extremely helpful; they point to the criteria that could be important in classifying a regulatory regime as law or non-law. These criteria are the following:

- Do the rules have general application?
- Do they have a clearly identifiable source, a “rule-maker”?
- Are the rules codified?
- Is there a specific procedure to be followed in changing them?
- How high is the degree of compliance with them?
- Are sanctions provided for in the event of the rules being breached? If so, what sanctions?

This is a good place to start, and we shall be expanding this catalogue of criteria below.
D. Capturing Transitions: A Key Methodological Challenge

As we shall see, categorial oppositions and conceptual dichotomies can adequately convey the nature neither of the state nor of the law. As Patrick Glenn has put it, what we need is a “degree-theoretic” approach (Glenn 2013, p. 273), that is to say, thinking in transitions rather than in dichotomies: the key methodological challenge is to convey such transitions. Three examples show why this is so.

I. The Need to Overcome Thinking in Categorial Dichotomies: Three Examples

1. The Questionable Distinction between Premodernity and Modernity

This was a subheading in an article by historian Steffen Patzhold examining whether it still makes sense in history to assume a dichotomous divide between premodernity and modernity. He sees this question as closely connected to the other standard problem of medieval studies: whether medieval rule can be described in terms of the state (Patzold 2012). He has this to say on the question of “Predmodernity versus Modernity?”:

Fundamental categories that the social sciences have used to describe modernity are clearly losing their self-evidence in the course of recent changes in statehood. ... This has also led to reassessment of what a state can be. The discussion in German medieval studies lags behind this more recent development: it is still marked by the criteria established in the nineteenth century – and against which, in the 1930s, New Constitutional History took up arms. But the current political science debate on the state no longer argues only about the “modern state” à la Jellinek or Weber or “no state at all.” Things are no longer only black and white – there is a broad and subtle spectrum of grey tones, from the deep anthracite of Somalia to the fresh ash grey of the Federal Republic of Germany (Patzold 2012, p. 420. Transl. R.B.).

Discovery of such a broad spectrum of grey tones invalidates thinking in dichotomies:

To bring it to a point: we ourselves no longer have the “modern state” with full sovereignty and a full monopoly of authority; but this does not mean that we have relapsed into “premodernity.” The dichotomy of “modern”/state versus “premodern”/non-state thus loses plausibility. For medievalists this is a spectacular situation: we have to describe the political orders of the Middle Ages no longer in analogy to the “modern state,” as Georg Waitz and others have done since the nineteenth century, and as Hubert Mordek has done recently in his study of the
Capitulary of 779. But, unlike Otto Brunner in the 1930s, we need no longer describe them as other, premodern, non-state. Our own world knows a broad spectrum of possibilities for and limits to political organization for establishing certainty. Instead of squeezing history into two big drawers, we can compare political orderings in broad diachrony without losing sight of historical differences in the process. This allows us to develop a new, more differentiated typology beyond the dichotomy of premodernity and modernity (Patzold 2012, p. 420f. Transl. R.B.).

After these preliminaries, he turns to the question whether the governance structures of the Middle Ages can be compared with those in fragile states; an extremely interesting question the present author has looked into with Stefan Esders in “Modern Governance in the Middle Ages or Medieval Governance in Modernity?” (“Modernes Regieren im Mittelalter oder mittelalterliches Regieren in der Moderne?”) (Esders and Schuppert 2015).

In concrete terms, this means, for example, that we need no longer discuss whether the territory dominated by Charlemagne around 778 was a state (or only an empire) or not. Instead, we can ask about grey tones as we know them in the here and now. We can, for instance, investigate parallels and differences between Charlemagne’s empire and fragile states: Charlemagne organized his power from the mid-790s essentially from a single centre, namely Aachen. In some regions his influence was weak or absent. What medievalists call “nobility” or the “imperial aristocracy” were an interesting parallel to present-day warlords: aristocrats operated on the periphery as warlords for their own account – and nevertheless accepted offices and titles from the court. As in current fragile states, we see in the late 770s in Central and Western Europe the political importance of clan structures, the meshing of religion and politics, on the periphery omnipresent and persistent, low-intensity violent conflict. It should be noted: this is not to assert that Afghanistan or Somalia are premodern or even medieval. It is a matter of comparing political orderings beyond this duality of epochs in order to achieve a new typology (Patzold 2012, p. 421. Transl. R.B.).

Instead of thinking in terms of “black” and “white,” Pathold plausibly recommends studying the “grey tones” in the search for a typology of governance regimes.

2. The Questionable Distinction between Public and Private

We have been addressing the distinction between public and private since my habilitation thesis, which was concerned with the phenomenon of satellites of the administrative system (Schuppert 1981), independently of the question whether a particular satellite was organized under public law – either as institution or corporation – or under private law as association,
From the administration-science perspective this study adopted, the question of the public status of certain administration satellites could be addressed not in terms of dichotomous oppositions but in terms of *gradation or scaling*:

The literature has less to offer [than with respect to “discovering” the public sphere] on the question of how the public sphere is to be delimited as exactly as possible in concrete and functional terms. In effect, this is not surprising: the problem lies precisely in defining the point at which an organization leaves or enters the sphere of pure privateness or the sphere of public administration. This is a problem that cannot be resolved and would, moreover, be misunderstood if we were to replace the public-law/private-law dichotomy by the trichotomy of public-law, public, and private. To the extent that this would sustain traditional thinking in spheres – with a new dimension added, it represents a small but not decisive step forward. A *problem area of fuzzy transitions* can be handled only by a method of classification that includes such transitions and can also capture the circumstance that organizations can and actually do develop in one direction or another (e.g., by broadening their goals as in the case of civic action groups or trade unions). In other words, only a methodological approach that considers the extent of the publicness of an organization as a question of gradation or scaling will get us further (Schuppert 1981, p. 92. Transl. R.B.).

In keeping with this approach, we have attempted to produce a scaling table (following Schuppert 1981, p. 98; the arrows show that organizations in the state/public sector can also grow into or out of it):
Private Law Organizations with a Degree of Financial Dependence

Instrumental Institutions and Corporations (Broadcasting)

Group Representation Institutions

Private-law Organizations in the Nationalization Process (Intermediary Organizations, External Cultural Administration)

Federal Authorities with Collegial Structures and Discretionary Powers

Big Companies

Charitable Associations

Private Organizations of Public Importance: Trade Unions

Financially Dependent Private-law Organizations with Considerable Decision-making Autonomy (DFG, Max Planck Society)

Nightclub

Government Department

Federal Authorities with Collegial Structures and Discretionary Powers

Private-law Special Purpose Establishments (Major Research, Development Aid)

Interest Representation Corporations
The question of distinguishing between public and private, however, arises not only in administrative organization but also, for example, with regard to whether private and public spaces can be distinguished; this is by no means an arbitrary question: application of the “appropriate” legal regime will depend on the answer: private law or public law. In “Basic Rights in Privatized Public Spaces” (“Grundrechte in privatisierten öffentlichen Räume”, 2007) Jens Kersten and Florian Meinel consider the example of railway stations and airports:

The spatial structure of the public sphere is changing. The political debate on the “public space” is lively: some see a crisis, the “demise of the public space” while others evoke its “renaissance.” There is, however, far-reaching consensus on the hybridization of public and private spaces: the dividing line between private and public space is becoming blurred. In cities and their surroundings, semi-private and semi-public spaces are coming into being: private spaces are opening up to the general public. For example shopping malls are taking on business district functions. By contrast, previously genuinely public spaces have been privatized: not only inner cities but also railway stations and airports are changing their social functions in the course of the material privatization of public sector tasks. Railway stations, in particular, are becoming consumer temples, “malls and urban entertainment centres with rail access.”

In this new world of urban governance, not only spatial functions overlap but also the once conceptually separate legal regimes of public and private spaces. Thus private means and public ends meet in public-private partnerships. They make it easy to cut through the ties and restrictions of public regulatory and road traffic law by using the flexible tools of house rules and restraining orders to prevent jeopardizing the attractiveness of such models through the stricter rules of public law. However, if restraining orders become a key regulatory tool in the public space, this indicates that the functional hybridization of public and private spaces entails convergence between the different regulatory regimes (Kersten and Meinel 2007, p. 1127. Transl. R.B.).

The separation of public and private is made completely obsolete by the Internet, whose social networks have led to the development of a genuine novelty, so-called personal public spheres (Schmidt 2009); the phenomenon of digitalized blogs are a particularly striking example (see Schuppert 2015).
3. The Questionable Distinction between State and Non-State

a) From State to Varieties of Statehood

Some time ago the concept of statehood began to gain in popularity, probably because it frees us from the predicament of having to opt for “state” or “non-state”; in “State as a Process” (“Staat als Prozess”) I noted under of the heading “State of Statehood”:

These observations on the semantic decoupling of law and the state necessarily bring a parallel process to our attention, namely the increasing use of the term “statehood” instead of or alongside that of “state”. This usage often appears to be unthinking, or at least without decided views on why the one term is to be used rather than the other. ...

And we must admit that we have also failed to define a sufficiently clear distinction between the concepts state and statehood.

But there are lessons to be learned from the “semantic shift” from the constitutional state to constitutional statehood. The most important lesson would seem to be that the terms state and statehood should not be use synonymously, but that statehood can be applied to structures – “étatique ou non-étatique” – that are either not states in the legal sense of the word or which only partly or deficiently provide what we normally associate with the concept of state and the type of services that we expect from a state in the modern, Western sense. What the statehood concept thus permits is to enter the whole motley world of “varieties of statehood,” to study the various “configurations of statehood,” and not to limit oneself to the narrow perspective of the state as defined by the OECD (Schuppert 2010, p. 127 f. Transl. R.B.).

In their ground-breaking article on “The Return of Leviathan: The History and Methodology of Comparing Late Antiquity and Early Modern Statehood” (“Der wiederkehrende Leviathan: Zur Geschichte und Methode des Vergleich spätantiker und frühneuzeitlicher Staatlichkeit” Eich et al. 2009), Peter Eich, Sebastian Schmidt-Hofner and Christian Wieland argue in precisely this vein. The key concepts of this article and of the volume edited by the authors under the title Der wiederkehrende Leviathan are “statehood and state formation.” They are concerned not with the end product ‘state’ but with “processes of institutional stabilization and consolidation” (Eich et al. 2009, p. 13) and with the development of state structures:

There can be no doubt that the existence of modern statehood cannot be adequately described if the history of premodern state formation is ignored, and that, when describing developments, preliminary phases, climaxes, and processes of decline as such have to be identified and explicitly named. However, precisely this categoriza-
tion of early modern times as “prehistory” always runs the risk of overlooking phenomena that do not point in the direction of modern statehood or – with foreknowledge of what is to come – of treating them as anachronistic. One way out of this “teleology trap” is to compare early modern state structures with contemporary but geographically and culturally remote state structures such as those of the Ottoman Empire, India, or China; another is to compare these structures with chronologically remote ones such as that of the Roman Empire in Late Antiquity. With the help of such comparisons, awareness of the historicity of one’s own perspective is sharpened. The perspective shaped by the “modern state” of the nineteenth and twentieth centuries, too, is precisely this: a vantage point, and consequently needs to be relativized (Eich et al. 2009, p. 16. Transl. R.B.).

There is hardly any mention of the state as such, but of statehood, state formations, or state structures; if the state concept is not or cannot be avoided, it is used only as an extremely capacious conceptual umbrella under which “variable historical political communities” can shelter.

**b) From the State via Governmental Structures to Governance**

Another possibility for escaping the categorial trap of “state or non-state” is to use the governance concept. The charm of the governance approach is that it always presents itself as “free from state,” as we have already discussed in the first chapter of this book – a concept that does not replace the state, but one that relativizes it, being essentially concerned with interaction between state and non-state governance actors. The key concepts of the governance approach are regulatory structures and governance regimes (see Schuppert 2005b), which brings us directly to the article by Peter Eich et al., which is about power structures and institutional concentrations. This approaches us to the governance concept.

Christoph H.F. Meyer can be said to have made the connection. He concludes his review essay “The Dispute about the State in the Early Middle Ages” (“Zum Streit um den Staat im frühen Mittelalter”) as follows:

[R]eservations about the state concept are quite understandable – at least to the extent that the literature is concerned with early Medieval law per se. If, however, one considers individual sources, the fundamental certainties evaporate. ... There are also findings that do not fit the overall picture. What about societies like that of the West Goths, in which a social enforcement mechanism like the feud played no special role? Obviously, under these circumstances one can come to quite different conclusions about statehood on the Iberian Peninsula, for instance, in Carolingian Friesland, and in Carolingian Northern Italy.
This consideration raises the question of more extensive perspectives. In the conclusion to his overview of the research... Rudolf Schieffer makes a distinction that is simple but worthy of consideration: “The question of the existence and quality of state theoretical concepts is to be kept separate from examination of the structure and efficiency of the apparatus of power.” If we leave aside terms and concepts, knowledge and ideas and focus on the second point, the possibility of differentiation becomes apparent, and thus the question of “more-or-less” rather than “either-or”. Such a perspective would not only have the advantage of allowing the epochs preceding and following the Carolingian period to be taken more strongly into account. More justice could then perhaps be done to the institutional achievements of the Early Middle Ages in comparison to a prepotent second millennium. This path touches not least on the sort of fundamental questions raised in the dispute about the state in the Early Middle Ages” (Meyer 2010, p. 174, Transl. R.B.).

A recent quite explicit commitment to the governance concept by historian Christoph Lundgreen is to be found in “State Discourses in Rome? Statehood as Analytic Category for the Roman Republic” (“Staatsdiskurse in Rom? Staatlichkeit als analytische Kategorie für die Römische Republik,” Lundgreen 2014):

That the state is under discussion cannot be disputed, that its role and “nature” are again being discussed and measured is evidenced not least by the work of two collaborative research centres: “Governance in Spaces of Limited Statehood” (SFB 700 in Berlin) and “Transformations of the State” (SFB 597 in Bremen). Worth mentioning are two lines of debate: the discussion on governance and the talk about statehood. According to Renate Mayntz, governance is “the totality of all coexisting forms of collective regulation of societal matters from institutionalized civil-society self-regulation and various forms of collaboration between state and private actors to the sovereign action of state actors.” This broad definition of the concept is important: governance is not to be seen, according to Schuppert, as a concept that ignores the state but one that relativizes it, a concept that seeks to avoid the risk of adopting too narrow a view that comes with all state-centricity and whose added value lies in the processuality and dynamism of the perspective (Lundgreen 2014, p. 28f. Transl. R.B.).

Shortly afterwards, he adds, under the heading “Once Again: ‘State’ for (Ancient) Historians?”:

What are the conclusions to be drawn from this sketch? The modern debate shows in all clarity that, although it makes sense to understand “state” as a product of history, it should not be seen as an epoch-bound phenomenon. Statehood should, furthermore, be seen first ... as a process and not as a state. Movements within this process should, second, not be coupled with the figure of thought of rise and fall or other teleological concepts but be treated analytically as weaker or more intensive statehood (with specific advantages and disadvantages). If, moreover, political science sees varying statehood as characteristic of the present day and comparative
history as typical of the nineteenth century, the strict “state/non-state” dichotomy ought to be abandoned in analysing Antiquity, as well – Odysseus in Ithaka and Rome under Diocletian could thus be presented with greater differentiation (Lundgreen 2014, p. 34f. Transl. R.B.).

4. An Interim Conclusion

The three examples discussed – modernity or premodernity, public or private, state or non-state – demonstrate that, given a complex reality, thinking in categorial oppositions and dichotomies can tell us little about the state, at least not if the subject is tackled, as in this book, analytically rather than normatively. Empirically saturated analysis must take an interest in the grey tones and not in black and white; in our experience this is where things happen, where transformations of statehood become visible in the shifting of sectors and the dissolution of familiar boundaries. We therefore need a methodical approach that is “degree-theoretical” and allows for transitions, scaling, and gradation.

II. The Need for a Sliding Scale Approach

1. Thinking in Gradations and Transitions: More than an Expedient

If this book and particularly this chapter so urgently advocate thinking in gradations and transitions, it is not as a stopgap solution when and where oppositions and dichotomies get us no further. This is illustrated by Markus Meumann’s and Ralf Pröve’s discussion about the ideal type of absolutism and the embarrassment among historians when ideal type and researched governmental practices diverge:

If we ... renounce establishing an ideal type in favour of a more open, phenomenologically oriented heuristics, we soon realize that by no means did Europe consist solely of states under monarchical rule as was still assumed in the nineteenth century. Suddenly we discover a varying landscape of differently constituted polities, which included not only the Western and Northern European monarchies (such as England, France, Spain and Denmark) but also republics like the Netherlands and Switzerland, urban governments (Venice and Genoa), and aristocratic regimes (Poland), as well as the Old Empire. The problem posed by a seemingly inevitable dualistic approach naturally also arises when conceptually classifying divergent findings about the “internal” exercise of authority: that is to say, about participation in or collaboration with government by estates, the commitment of the ruler to nat-
ural law, the failure of regulation to take effect “on the ground,” local resistance, etc. Research committed to the “absolutism” paradigm has yet to find a better solution than filing these phenomena away under the heading “the non-absolutist in absolutism” – a pretty helpless reaction in the 1960s by Gerhard Oestreich to research findings on the subject (Meumann and Pröve 2004, p. 29. Transl. R.B.).

What we want to show with this example is that thinking in gradations and transitions should not come to bear only when black-and-white categorial pictures fail to capture a situation; this approach should be adopted from the outset to ensure the realistic analysis of the realities of state and law, be it examining varying degrees of “étatisation” (Chevallier 1999) or rules with varying “degrees of binding force and de facto binding effect” (Röhl 2007 with reference to international standard setting).

2. From Binary Logic to Cosmopolitan Logics?

In The Cosmopolitan State, H. Patrick Glenn, who like the present author pleads in favour of thinking in gradations and transitions, calls for classical binary logic in “cosmopolitan thought” to be superseded by “cosmopolitan logics” (2013, p. 295 ff.). Although the debate on the right methodological approach is in our view not a problem of confrontation between different logics, his basic concern is highly relevant to the issue under discussion.

He has this to say about binary logic:

From the law of identity are logically drawn the two further “laws of thought”: the law of non-contradiction and the law of the excluded middle. Given A, which is radically distinct from not-A, the two cannot be affirmed at the same time, or overlap, so we cannot have A and not-A: Not [A and not-A], since this would be contradictory, affirming at the same time a proposition and its negation. Given the law of identity and the law of non-contradiction, what we therefore must have, and which is where many current legal problems arise, is A or not-A, which is the law of the excluded middle. There is no middle ground between contradictory positions. Why must we have a logical rule for A and not-A? It flows from the principal of radical separation or identity. Since A exists, independently of that which is not-A, the boundary of not-A begins precisely where the boundary of A ends and there can be no middle ground between them. Not-A is galactic in character and devours any possible middle ground. As recently put, you either have $3.75 to buy a latte or you do not (Glenn 2013, p. 262).

This binary logic also has its heroes, whom Glenn refers to as “notorious dichotomizers”; in his list he includes Jean Bodin with his sovereignty theory, Thomas Hobbes with his opposition between “amoral anarchy or
Leviathan” and – in the legal field – Hans Kelsen with his legal-philosophical basic norm theory.

This classical binary theory, according to Glenn, cannot capture present-day realities:

There has recently been a “many valued turn” in logic, accompanied by development of “new” logics. It is a turn away from classical or binary logic and towards recognition that the world is a more complex place than that contemplated by Plato’s methodology of divisio. It has come about because classical logic was inherently vulnerable as a general intellectual instrument. It inevitably came to be challenged, ontologically, logically, and legally (Glenn 2013, p. 265).

A “multi-valued world” needs a “multivalent logic”. The “turn” to multivalent logics mentioned by Glenn is in fact not as new as all that. As long ago as 1920, the Polish philosopher and logician Jan Łukasiewicz formalized a first multivalent logical calculus and knowledge in this field has since made progress (Gottwald 2015). However, that this insight had not everywhere reached the social sciences is clear. Glenn’s comments are therefore all the more informative and useful for us:

The essential characteristic of multivalent logic is that it is “degree-theoretic” in replacing a binary option with one that tolerates degrees, usually expressed as degrees of truth (as in the statement “there is some truth in that”). Where different and contradictory laws are seen in conflict under classical logic, a multivalent logic would admit assessment of relative degrees of applicability and more nuanced means of choice ... (Glenn 2013, p. 267).

He then cites a number of authors he considers to be on the right track:

Michael Taggart has decided that contemporary administrative law in New Zealand is no longer well served by dichotomies that have prevailed in the past – appeal/review, merits/legality, process/substance, discretion/law, law/policy, fact/law – and that they should be replaced with a “sliding scale or rainbow” of possibilities of review, from correctness review at one end of the rainbow to non-justiciability at the other. Moreover, as in a rainbow, colors or internal categories ‘imperceptibly blur or merge into one another’; there are no ‘jolts’. Joseph Singer has written of the need to create ‘a middle path’ based on reviving the notion of ‘practical reason’, and in a construction of a law of peace or lex pacifica Christina Bell has written of the need to straddle binary distinctions and to develop ‘constructive ambiguity’. Binary distinction in the law of citizenship have been particularly criticized and Neil Walker has expressed dissatisfaction with the “dichotomizing language of membership,” arguing for denizenship as an “in-between concept, one that challenges the series of binary oppositions ... that reflect the political imaginary of the Westphalian system of states.” Linda Bosniak deliberately uses a notion of “alien citizenship” to accommodate an “ascending scale” of the rights of aliens who gradually augment
their identification with a local society. Nick Barber writes of the dichotomy of citizen or subject but prefers to think of them “as poles on a spectrum rather than as hermetically sealed categories” (Glenn 2013, p. 270f.).

These samples of Glenn’s thinking should suffice to show his intentions. If we want capture the realities of a transnationalizing world, we need a *sliding scale approach*. We fully endorse this finding; but whether new logics are called for remains to be seen.

3. Thinking in Terms of Scaling Calls for Plausible Scaling Criteria

The primary example is again the *state*: innumerable authors have concerned themselves with the question of what attributes a political community has to display to be able to describe itself as a state. There is an outstanding overview in the introduction to “Studying the State” by Walter Scheidel in *The Oxford Handbook of the State in the Ancient Near East and Mediterranean* (2013), to which we refer the reader. Instead, we turn once again to the historian Christoph Lundgreen, to his outline of a habilitation project on “Statehood in the (Early) Greek World,” which he has kindly made available.

The first paragraph is concerned with escaping the “state or non-state” trap through use of the statehood concept, which opens up new perspectives for historians:

The question of what counts as a state is pursued by historians and archaeologists, political scientists and lawyers. In recent times, the latter have been debating the role and conception of the EU as well as the phenomenon of “failing” and “failed” states around the world. The resulting categorization problems have led to reassessment of the concept of sovereignty and concepts of *Staatvolk*, *Staatgebiet*, and *Staatsgewalt* – state citizenry, state territory, and state authority – which have formed a classical triad since Max Weber (and Jellinek). Despite all conceptualization difficulties, this offers a major opportunity for addressing so-called premodernity. Historians can ask old questions quite differently if, as in more recent governance research, a teleological (and mostly positively connotated) line of development by all political entities towards the state of Western prenance is superseded by the notion of “the state as a process” and *the dichotomy of “state or non-state” replaced by the concept of “statehood,”* which is concerned (only) with the gradual imposition of key monopolies. In concrete terms, the efficacious notions of the “state as a universally accepted organizational stage for every human community” (inter al. Eduard Meyer) like that of the “state as a genuine product of early modernity” (inter al. Christian Meier following Carl Schmitt) are both overcome or queried anew (Lundgreen, p. 1. Transl. R.B.).
Lundgreen consequently wishes to examine the different dimensions of statehood, and proposes nine indicators that can help define statehood:

III. Dimensions of Statehood
   a) From an external perspective (de facto statehood/measured by: decision-making power, organizational power, legitimation capacity)
   b) From an internal perspective (own perception, symbolic side, “identity”)
      1. Taxes/charges/duties
      2. Civil rights
      3. Military service
      4. Political institutions/legislation/administration of justice
      5. Mintage
      6. Educational/burial regulations
      7. Colonization
      8. Monumental buildings and public space

This is a fascinating approach and fully in line with the proposed procedure for examining the field of “law or non-law.” With this encouragement, we turn to the development of definitional and transitional criteria in the World of Rules.

E. Developing Gradation and Transitional Criteria in the World of Rules: “If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.”

Thinking about what indicators invite us to treat systems of rules as law will facilitate orientation in the World of Rules. The focus is therefore not on clear cases recognized by sources of law theory, such as state-made law, customary law, and divine law, but rules whose normative status is uncertain: Should they be regarded as law, and if so, what sort of law? This second question, too, needs to be answered: it is not a matter of simply rounding out the domain of state law with selected cases, only to file away the rest under the capacious heading “law in the sociological sense,” but, within the legal universe, to distinguish various types of law that stand in varying proximity to state-made law. In order to define this proximity more exactly, powerful indicators need to be developed, a task the present author has

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2 This pithy aphorism introduces a study by Andreas Engert on private norm-setting power (2014, p. 301).
addressed under the headings “What is good governance?” and “What are failing states?” (see Schuppert 2010).

When developing indicators, it clearly makes little sense simply to collect them, list and number them: a more systematic approach is called for from the outset. The first step is therefore to consider what should count as law from three different points of view: the perspective of the addressees of regulation, the perspective of rule-setting authorities, and what can be called the functional perspective, since it is concerned with functional similarities between various types of regulation. Following Paul Schiff Berman’s proposal “to treat as law that which people view as law,” we turn first to the perspective of the addressees of regulation.

I. The Perspective of the Addressees of Regulation

1. Why Non-State Law is Obeyed

Law made by the state is legally binding; it demands general obedience from all members of the community of law. But why should the addressees of non-state rules obey them and – to go by actual behaviour (high compliance rates) – treat them as law? Examining “standards” as a type of regulation, Oliver Lepsius (2007) identifies three reasons for compliance:

- first, the binding force of standards can result from societal or economic power concentration, producing what we shall call factually compulsory compliance:

  We comply with standards that fail to convince us for reasons of social conformity: because others comply with them, because we want to stay in business, because we want to be present in certain markets; in brief because we otherwise risk social or economic disadvantages. This form of binding force can also be regarded as classic: action governed by private law has always been shaped by the power relations prevailing in society, which lead to factual heteronomous obligation (Lepsius 2007, p. 366. Transl. R.B.).

- Second, there is what we shall call avoidance strategy behaviour: non-state rules are obeyed because, if the ordering and control effects expected of them do not materialize, the state is likely to take legal steps to enforce compliance. Lepsius:

  However, this presupposes that standards can be made part of the legal order by formal transformation. ... Thus the legally enforceable application of standards need
not result from abstract-general validity in a legal order; it can just as well be the consequence of case-by-case reception in the course of a differentiated process of law concretization as regards institutions and competence (Lepsius 2007, p. 365. Transl. R.B.).

- Thirdly and finally, self-commitment to standards can be due to a belief in their rationality:

One submits to standards because they are developed in a neutral, rational procedure directed by experts and taking diverse interests into account. The decisive factor is the detailed design of the institutions that develop standards and of the procedures that they employ. Does the procedure used to set standards satisfy the demand for neutrality, interest plurality, and representativeness? Is standard development based on the participation of the interested parties or on the specialist knowledge of experts?

The literature on standard setting rightly insists on such aspects, which, however, are difficult to generalize. Not infrequently, standardization organizations rely on the principles of administrative procedural law – such as the American Administrative Procedure Act (APA) – to generate faith in procedural neutrality as a precondition for the binding force of standards. ... Röhl, too, stresses that the structural demands made of international standard setting are also consequences of the democracy principle, so that standard-setting procedures are demanded that compare well with national norm-making procedures in transparency, in the account taken of interests, and in the use of made of expertise. Standardization organizations borrow tools and provisions from state lawmaking to generate faith in the legitimacy of the results they produce, which leads in turn to self-commitment (Lepsius 2007, p. 365 f. Transl. R.B.).

Particularly interesting is naturally the third point. The ‘standards poultry’ clearly assert their membership of the world of ducks by borrowing tools and provisions from state lawmaking. Harm Schepel (2005) calls this strategy for promoting the legitimacy of standards “normative borrowing between the public and private spheres” (Schepel 2005, p. 6); and, as we saw in chapter 3, the processes of producing standards do indeed resemble the process of producing state law in many points.

2. Heteronomy as Proof of Relatedness

In his groundbreaking and convincing study of the standardization of market rules as a form of heteronomy, Andreas Engert (2014) has identified the heteronomy of non-state rules obtaining from the perspective of addressees of regulation as a criterion for establishing that they relate to law:
The following inquiry is primarily concerned with gaining theoretical/conceptual knowledge. The aim is to show why rules made by private parties can under certain circumstances be called “norms,” even if they are not legal norms within the meaning of the theory of legal sources. The decisive characteristic of a norm is considered to be heteronomy, that is to say, the binding effect of the rule on outsiders unable to influence its content. Heteronomy can result from directives under state-made law. But – the key thesis – it can also arise from the need to standardize rules. The economic theory of network effects helps explain that the mere dissemination of a rule can impose a certain constraint to use the same arrangement in private autonomous transactions. Heteronomy can thus also arise from supra-individual market practices. In addition, private institutions can influence norm-formation and thus exercise private norm-setting power. The heteronomous effect of private norms gives rise to a common interest in the given ambience. Private norms hence resemble state-made law, for instance dispositive enacted law (Engert 2014, p. 303. Transl. R.B.).

To keep this from remaining too abstract, Engert presents three examples, of which the following is particularly relevant for our purposes (the other two are the rules of the German Corporate Governance Code and the international accounting standards):

A well-known example of a transnational regulatory regime is the rules of the International Swaps and Derivatives Association (ISDA), a worldwide organization of banks, service-providers, and demanders for over the counter (OTC) derivatives. Regardless of the financial crisis, risks continue to be traded in these markets on a massive scale. The ISDA rules are standard provisions for derivatives contracts. The kernel is a master agreement on uniform rules for all derivatives transactions governed by the law of obligations concluded between the contracting parties. It contains provisions on, inter alia, performance modalities, the consequences of default in performance, and clearing and netting. Apart from the master agreement, the ISDA rules include contractual documents on credit guarantees, as well as definitions of individual derivatives describing the risks traded. The ISDA estimates that 90% of all OTC derivatives contracts worldwide are concluded on the basis of their rules (Engert 2014, p. 304f. Transl. R.B.).

If the addressees of regulation feel that such regimes are heteronomous law, this is, as Engert explains, because of so-called network effects:

A network effect is when the utility of an asset depends not only on its properties but also on how many other demanders opt for the same or a compatible asset. An obvious example of network effects is telephony: a telephone on its own is useless; its utility arises only and grows with the connection of other people to the same telephone network (Engert 2014, p. 310. Transl. R.B.).

There are direct and indirect network effects:

Direct network effects arise only when the decision in favour of an arrangement commits the given market participant for future transactions in relation to different
market participants – at least in the sense that using any other arrangement would be more costly (Engert 2014, p. 311. Transl. R.B.).

Still more interesting are indirect network effects, which arise when market participants use certain rules because it allows them to participate in tried and tested collective regulatory knowledge:

An arrangement that has been long tested and tried in the market also offers a strong guarantee of correctness. It can store practical legal experience when the original events have long since been forgotten. For individuals it can therefore be wiser to trust blindly in collective regulatory knowledge accumulated over decades than to check things out themselves. This offers a parallel to state-made laws, on whose adequacy the parties often also have to rely blindly. It will therefore prove difficult to dissuade market participants from repeatedly using differentiated, tried and tested arrangements (Engert 2014, p. 316. Transl. R.B.).

In sum, standards seem indeed to belong to the family of ducks.

II. The Perspective of Rule-Setting Authorities

In this field, too, we have chosen two examples. We shall be taking a look at two rule-setting authorities with a marked will to make “law” for their domain that is binding on their members.

1. Sports Associations as Rule-Setters

Whether the rules of competitive sport count as law is not very easy to say, but there are two very good reasons to believe it is so.

As far as the legal situation in Germany is concerned, associational law in the field of sport can hardly be denied the status of law, since the bridges of both contract law and associational law lead to the same result. In chapter 3 we had seen what Klaus Vieweg had to say and here, too, we cite his cogent treatment of the subject.

Since Vieweg sees his work as a study in judicial facts, he rightly places great emphasis on the interests of associations and their self-conception. Over and again, he underlines that internal sports associations in particular regard themselves as autonomous lawmaking and enforcing authorities:

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

In brief, we could say that sports associations are rule-making authorities with a marked will to make law, which finds expression, for instance, in the fact that they used the language and concepts of state lawmaking and have also established their own systems of jurisdiction.

2. The Catholic Church as a Church of Law

Perusal of the literature on the self-conception of the Catholic Church reveals that three things are constantly evoked as if in abiding harmony: divine foundation, the Church as an idiosyncratic institution and its legal constitution. It is interesting to leave the formulation of this state of affairs to a non-Catholic observer. The Protestant theologian Friedrich Wilhelm Graf has listed everything that is for him particularly Catholic; here an excerpt:

Roman Catholicism thinks quite differently about the Church than the various Protestantisms. The Roman Church is a legal institution, which considers itself to be grounded directly in divine law (lex divina), and to the present day has claimed normative ethical authority vis-à-vis state and society ... (Graf 2008, p. 137. Transl. R.B.).

But that is not all. In the form of the “Codex Iuris Canonici” the Catholic Church has its own legal order, which is understood as a necessary component of the identity of the institution “church.” The Catholic author Joseph Listl comments:

The Church is ... not a merely external and, as it were, purely additive assembly of two per se heterogeneous elements: it is essentially and therefore necessarily both a community of salvation and a legally constituted society. ...

Although canon law by its very nature is spiritual law in the service of the Church and its mission of preaching the Word of God, the fact that the Church is also a hierarchically organized societal association means that, from a phenomenological point of view, canon law has a structure similar to that of state law. This means that, as Hans Barion has rightly noted, the provisions of the Codex Iuris Canonici have exactly the same authority for Catholics – not associational but sovereign, not requiring recognition but given – as the provisions of state law for the citizens of the state (Listl 1991, p. 459 f. Transl. R.B.).

In short, sports associations like the Catholic Church are governance collectives, characterized firstly by a marked will to regulate themselves and which
regard the rules set autonomously or semi-autonomously in their respective domains to be binding law for their members.

III. The Function-Oriented Perspective

1. Functional Equivalence

We can speak of functional equivalence where non-state regulation substitutes for state-made law because the state cannot or does not wish to regulate matters itself and therefore does not act as lawmaker. This can, as in the case of transnational rule-setting, be simply because the state lacks the relevant regulatory competence or because it leaves it to private organizations and/or civil society to regulate certain matters that require specific expertise and epistemic authority. Three examples illustrate this.

a) Filling the Regulatory Gap I: 
   *Private Normative Orderings as Placeholders for State-Made Law*

The formulation “private normative orderings as placeholders for state-made law” is taken from the study by Nils Ipsen on private normative orderings as transnational law. He has this to say:

Society is in constant development. In its lawmaking, the state cannot keep pace with this development. ... It is therefore only natural that new developments in society or technology are not immediately regulated by the state, so that a legal lag occurs. Private normative orderings can close this gap; but in some cases only temporarily (Ipsen 2009, p. 211. Transl. R.B.).

A good example of such a placeholder function for private normative orders is the so-called *Takeover Code*, a set of rules elaborated by the Exchange Expert Commission, and which to a large extent was incorporated in the Securities Acquisition and Takeover Act of 1st January 2002.

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

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

Be that as it may, this hybrid norm-setting body issued the Takeover Code, which, as we have seen, was superseded by the Securities Acquisition and Takeover Act, since the Federal Government considered it suitable and right to have the pending EU Directive transposed not into an informal code but into statute law, which, however, largely incorporated the provisions of the code. The adoption of the Securities Acquisition and Takeover Act thus illustrates “a normative regulatory technique by which the preexisting self-regulatory mechanisms are appropriated by the state and transposed into statute law” (Augsberg 2003, p. 289. Transl. R.B.).

b) Filling the Regulatory Gap II: Standard Terms of Contract

In the introductory chapter we addressed this topic under the heading of the gradual decoupling of state and law; we shall therefore be brief. According to Tilman Röder, such standard terms of contract, used above all in insurance and transport, owe their rapid spread to two main factors: the need for standardization in sectors strongly integrated in the global economy, and the lack of legislative regulation, which produced a regulatory gap economic actors had to fill. Thus, according to Röder, standardized contractual elements perform “essentially different functions from those of individual agreements between two contracting parties. Their purposes were in-house rationalization, the exercise of economic power, the systematic displacement of state regulation; and they provided room for permanently updating law. Only
on the basis of standard form contracts could the more and more complex cooperation, investment, and exchange relations be handled that developed in doing business” (Röder 2006, p. 320 f. Transl. R.B.).

With this in mind, there can be no doubt that these standardization practices have to do with a process of norm-formation. Standard contracts steer the behaviour of the market player, who is guided by them and relies on them. What is agreed under them is regarded as the authoritative regulatory regime, which substitutes for, further develops, or even circumvents existing statutory law. We are therefore dealing with a type of rule-setting which recalls “legislative processes rather than contractual practices in industry” (Röder 2006, p. 319. Transl. R.B.).

2. Type and Intensity of Regulatory Intervention

a) Type of Regulatory Collective

It is obvious that the intensity of regulatory intervention depends very much on what type of regulatory collective is intervening. It clearly makes a great deal of difference whether one joins a voluntary association to pursue a hobby and socialize – such as an angling or mountaineering club – or enters a “total institution” in the sociological sense of the term such as a prison, monastery or boarding school (Goffman 1961, p. 1 ff.).

Of particular interest in this connection are collectives that depend on and demand a high degree of identification on the part of members with “their” institution or community. We have already discussed this in Chapter 2 under the heading of community-forming normative orders. A contemporary example throws light on the link between community and regulatory intensity.

An article from the Süddeutsche Zeitung, headed “In the Kingdom of Equality” (“Im Reich der Gleichen,” Ulrich 2014) on a fundamental Christian community founded in Tuscany after the Second World War by the Catholic priest Don Zeno, which seeks to present an alternative to capitalist meritocratic society. Ulrich describes the underlying concept of community as follows:

Welcome to Nomadelfia, a community without fences or walls, which wishes to be neither unworldly nor fully of this world. A microstate whose constitution is the Gospel and whose driving force is not competition and consumption but brotherli-
An alternative concept to global capitalism, a microcosm in which there is no unemployment, no pension scheme, no grades or failing at school, no family names, no money, no private property, no careers, and no shops – but also no perfume, no new brand-name clothes, no family vacations, little privacy, and hardly any room for individuality. All have to contribute to the life of the community in accordance with their abilities, all are provided for in keeping with their needs; a van drives through the village distributing toothbrushes, soap, pasta, milk, bread, wine, and olive oil; and 80 per cent of produce is grown locally. No-one is alone, no-one has to feel superfluous. “Neither servant nor master” is the motto of Nomadelfia, where everyone takes a turn at the heavy work, and even the president has to muck out the stable (Ulrich 2014, p. 11. R.B.).

The point that interests us, however is that such close community life has to be organized and regulated. On the subject of organization we read:

If one asks the president of Nomadelfia why his post exists at all in this community of equals and how obedience is to be reconciled with brotherliness, he answers: “Every community life needs a minimum of organization.” That is why he has taken on the job. That is why there is a sort of minister of finance and judge to handle disputes. They are all elected by the assembly of Nomadelfians. And there is also a priest to watch over the heritage of Don Zeno, who has a right of veto over all decisions. He recently vetoed the cultivation of a poisonous African plant to produce biofuel. This just had to be accepted. Francesco, as the president is called, sits at a wooden desk in a cool, bare office under neon lighting. From here he leads the small community in collaboration with a board. They decide who has to do what: take care of the children, run the school, work in the fields, the workshops, or the offices (Ulrich 2014, p. 12. Transl. R.B.).

Above all, rules are needed. The communication expert Sefora Sbaraglea reports on her childhood in the community:

An education in the big group had many advantages, she said. You never felt lonely. And there were no “mammoni,” no mummy’s boys in Nomadelfia. Later, as a student in Rome, she managed far better with being away from home than her fellow students from classical families. However, things were not all rosy in her youth. “We children from Nomadelfia felt we were different from the others, and not in a positive sense. As an adolescent you always want to be like the others.” And there were the many rules and prohibitions of the community, starting with television. “Often I didn’t understand why I wasn’t allowed to do something.” Pubescent youth rebels in Nomadelfia just as it does everywhere. “Perhaps more strongly because here there are more rules” (Ulrich 2014, p. 12. Transl. R.B.).

This Tuscan excursion is instructive. It shows that community life in such social utopias is extremely needful of regulation and that such a regulatory regime addresses the whole human being and not only individuals in a particular social or professional role. This brings us to the next point.
b) The Object of Regulatory Intervention:
The Social Role, the Whole Human Being, the Human Being Robbed of Dignity

Here too, brevity is called for, as much of the subject matter has been already discussed. As we have seen in detail in chapters 2 and 4, occupational law arrangements, in particular, affect people only or primarily in their social roles as members of a certain profession (summary May 2008). Such occupational law used to go by the name of “Standesrecht” in German and was once closely associated with the concept of honour, whereas nowadays it is understood more and more as a tool of professional quality assurance (see also Schuppert 2011e). Religious communities, by contrast, tend to address the faithful not in a given social role but to make their entire conduct of life the object of regulation, including rules and prohibitions on dress and food. We need not go into that here.

From the point of view of regulatory intensity, rules need to be mentioned that treat people solely as exploitable labour and rob them of their dignity with incredible determination and severity. A much discussed example, slavery, will suffice to illustrate this.

Sven Beckert has written a fascinating book on the cotton industry as a prime example of globalizing capitalism (Beckert 2014). Under the heading “privatized violence and the slave trade” he describes the beginnings of the industrial revolution: European states supported merchants and settlers in their search for new sources of wealth, but asserted their own sovereignty over foreign territories and people in remote areas only weakly. Privatized violence (often legitimimized by royal warrant), aiming at the dispossession of land and labour, characterized this phase of capitalism. At its heart was slavery (Beckert 2014, p. 51).

As the economic backbone of cotton-produced industrial capitalism, slavery was a legally recognized and well-developed institution, which enable the violent supervision and boundless exploitation of forcibly recruited work slaves. Indeed, slavery was as indispensable for the new cotton empire as good climatic conditions (Beckert 2014, p. 100).
c) Differences in the Degree of Regulation

That various sets of norms show differences in the degree of regulation is a phenomenon familiar from national legal systems. In administration science, for instance, it is usual to distinguish between conditional programming, which operates with clear “if-then” propositions and final programming, which works only with targets (see Schuppert 2000). Whereas criminal and fiscal laws require precisely formulated definitions, laws regulating economic affairs generally cannot manage without so-called indeterminate legal concepts, since the complexity and dynamics of the regulatory area would otherwise be unmanageable. This is all well-known and need not be repeated. We have therefore looked for an appropriate example elsewhere, and have found an extremely instructive one in Islamic law, which also provides a bridge to the next point in our study, the sanction system.

As Mathias Rohe writes (Rohe 2009, p. 7), “Islamic law shows varying degrees of regulatory density even at its core.” Family law and the law of succession, as well as religious rules and prohibitions are regulated particularly thoroughly. However, caution is called for with respect to the use of our “concept of law”:

In its broadest sense, the sharia covers all religious and legal norms, the norm-setting mechanisms and interpretational rules of Islam, and thus also the rules on prayer, fasting, and the prohibition of certain foods and beverages such as pork and alcohol, the pilgrimage to Mecca, as well as contractual law, family law, and the law of succession. The corresponding concept of regulation (ṣūr, pl. aḥkām) also means both legal arrangement/regulation/regime and religious obligation. Thus translating “sharia” by “Islamic law” is a simplification. In substance it would be quite wrong to assume identity with the usual concept of law. “Law” lives essentially from its secular peacemaking function, and in fulfilling this it also makes use where necessary of the coercive authority of the state. What is thus characteristic of law is its enforceability here on earth. This applies to mutual relations between people and other legal subjects and their relations with the institutions of the legal system, nowadays principally the state and its subdivisions.

Compliance with religious rules, by contrast, can be enforced here on earth not through law but at best through social pressure; and contravention otherwise generally has consequences only in the hereafter. This changes only if religious rules are enforced by secular means at the behest of those in power. The essential difference therefore lies not in any claim to binding force – both religious and legal rules are regarded as binding – but above all in the sanction system (Rohe 2009, p. 9. Transl. R.B.).
But it is not only this varying density of regulation that characterizes the Islamic normative order. It is also marked by a considerable measure of ambiguity: Islamic law is to be discovered “less in specific provisions than through the theory of legal sources and adjudication (uşūl al-fiqh)” (Rohe 2009, p. 6. Transl. R.B.). There is therefore often no certainty as to the law:

‘Before the courts and on the high seas we are in the hands of God’ is therefore more likely to apply to Islamic law than to many European legal systems. A Muslim jurist will at any rate not object to the dictum. In applying the law, the notion dear to the philosophy of law that there is only one right decision is generally at odds with reality even where those on the bench have the best of wills and greatest competence. Judicial experience shows that the difficulty of ascertaining the facts of a case and the room for interpretation offered by many norms allows a certain range of possibilities in finding the ‘right’ tenable decision. The more limited the possibilities are for establishing the relevant facts and the less clear the normative situation is, the greater this range will be (Rohe 2009, p. 7. Transl. R.B.).

For this phenomenon, Thomas Bauer (2011a; 2011b) has coined the term ambiguity tolerance, which is one of the characteristics and benefits of the Islamic normative world:

Differences of opinion are inherent in the system of traditional Islamic law. Within religious norms, too, normative plurality is assumed. Precisely this ambiguity of Islamic law ensures flexibility. The plurality of norms facilitates the adaptation of religiously grounded law to changing everyday life (Bauer 2011b, p. 175. Transl. R.B.).

At this point we will do no more than note the importance of the existence of a specific sanction system for determining the “hardness” of a normative system. Since we have devoted an entire chapter to the plurality of norm enforcement regimes, we refer the reader to that chapter.
F. Interim Appraisal and Summary

I. Interim Appraisal: Overview of Indicators

Listing the indicators identified so far in context and weighting them subjectively (* = low; ***** = high) produces the following overall picture:

Overview of Indicators

<table>
<thead>
<tr>
<th>Indicators</th>
<th>Counts as LAW</th>
</tr>
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<tbody>
<tr>
<td><strong>Addressee perspective</strong></td>
<td></td>
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<tr>
<td>Extent of acceptance of non-state rules</td>
<td>••</td>
</tr>
<tr>
<td>Voluntariness of compliance with rules</td>
<td>•</td>
</tr>
<tr>
<td>Perception of rules as heteronomous lawmaking</td>
<td>*****</td>
</tr>
<tr>
<td><strong>Rule-setter perspective</strong></td>
<td></td>
</tr>
<tr>
<td>Intensity of lawmaking will</td>
<td>•</td>
</tr>
<tr>
<td>Claimed autonomous or semi-autonomous regulatory power not seriously questioned by third parties</td>
<td>*****</td>
</tr>
<tr>
<td>Self-assessment of own rule-setting as lawmaking</td>
<td></td>
</tr>
<tr>
<td>→ Borrowings from state procedures, language, and conceptuality</td>
<td>•</td>
</tr>
<tr>
<td><strong>Function-oriented perspective</strong></td>
<td></td>
</tr>
<tr>
<td>Functional equivalence: filling the regulatory gap</td>
<td></td>
</tr>
<tr>
<td>→ Private normative orderings as placeholders for state law; standard terms of contract as substitute for enacted law; transnational regulatory networks as substitute for lacking state regulatory competence</td>
<td>*****</td>
</tr>
<tr>
<td>Type and intensity of regulatory intervention</td>
<td></td>
</tr>
<tr>
<td>→ Type of regulatory collective</td>
<td>•••</td>
</tr>
<tr>
<td>→ Object of regulatory intervention: social role, whole human being, human being robbed of dignity</td>
<td>•••</td>
</tr>
<tr>
<td>→ Differences in the degree of regulation</td>
<td>•</td>
</tr>
<tr>
<td>Existence of a specific sanction system</td>
<td>•</td>
</tr>
</tbody>
</table>

This table is not a subsumption machine, where inputting a certain body of norms produces the only correct answer. It is rather to be seen as a first step towards clarifying what criteria need to be used for locating a body of norms on a continuum:
The distribution of points is merely a suggestion on how indicators could be weighted.

However, it is up to the reader to test the usefulness of the table; we have tried it out on three example and are more than satisfied with the clarity of the results. The three candidates are the following:

- Standards practised and generally complied with on the market, such as the those mentioned by Andreas Engert (2014): the rules of the International Swaps and Derivatives Association (ISDA) and the international accounting standards (independently of their later “promotion” to legal norms of Union law): they not only look like ducks, they are ducks.

- *Associational law* such as the rules of international sports associations or the standard terms of contract in the insurance and transport industries examined by Tilmann Röder (2006): they not only look like ducks, they are ducks.

- The general principles of the “lex mercatoria”: at least at present, their score does not justify classifying them as “law”: they are “ducks” propagated by certain institutions, nothing more.

So far so good.

What still needs to be done is to draw the appropriate conclusions for legal theory.

II. Conclusions: Summary

In the light of these considerations, we must plea for a broad concept of law that goes beyond state-made law, which nonetheless remains a particularly important type of law. Alongside state-made law, there are undeniably other types:

- Customary law
- International law
- Divine law
If we exclude from the law concept bodies of norms that are purely social norms, such as certain rules of etiquette or social conventions, we are left with the norms “likely” to be law we have been examining the whole time. Our overview table is intended to help investigate the justification of this “likelihood.”

Should it turn out that certain bodies of norms work in practice as law – functional equivalence – and are experienced as heteronomous legal norms by the addressees, then from an empirical point of view we have no problem with seeing them as law. They are manifestations of law different from state-made or customary law, but count as law in the sense of maxims with binding force that control behaviour – the addressee perspective – and order certain areas of life through rules.

Over and above this general conclusion and the oversight table, the reader is owed a definition:

Rules should count as law:
- If they can be clearly attributable to a rule-making authority (rule-setter)
- If the rule-making authority intends them to be law: intentional lawmaking (→ use of the language and concepts of state-made law)
- If they are more or less universally obeyed by the addressees
- If the addressees experience them as law, and specifically as heteronomous law
- If they substitute for state-made law and fill a regulatory gap
- If they display a certain regulatory density and certainty
- And if they are backed by a sanction system of their own.

We believe that such an empirical, indeed empirically saturated concept of law (Duve 2012) gets us further than merely distinguishing between state-made law to be seen as ‘law proper’ and all other bodies of norms that look as if they could be law to be regarded as ‘law in the sociological sense.’ This also challenges legal science to gain an understanding of itself as a science of regulation – naturally with state-made law as the principle field of study.

This brings to an end our search for the “right” concept of law, in the hope that the reader has been convince that only a broad concept of law embracing various types of law can do justice to the complex and dynamic World of Rules.

What still needs to be done is to examine in greater detail a little regarded aspect of governance collectives as regulatory collectives. As we shall be
seeing in the final chapter of this book, communities of law are also communities with specific ideas about justice, and can therefore be understood as communities of justice. We shall be looking at what this means.
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