A. Summary

I. Summary 1: Revisiting the Four Key Concepts of Chapter 1

Chapter one introduced four key concepts that were to accompany us over the course of this book:

- Multinormativity
- Governance
- Science of regulation
- Law as communication.

Looking back over chapters two to five will show whether or not this accompaniment has “worked” and the four concepts have proved a feasible conceptual framework for surveying the World of Rules. We believe it to be the case.

- It is quite obvious for multinormativity, which runs like a thread though the entire book. Adopting the multinormativity perspective leads us to consider not only the “usual suspects” presented as evidence of normative multiplicity, but also and precisely such regulatory regimes as the codes of honour of officers and thieves (“thieves in the law”). These examples examined in chapter two demonstrate with particular clarity the key link between the plurality of regulatory collectives and the plurality of normative orders.

The plurality of what we have called “norm producers” – the focal topic of chapter three – ushered different, comparatively “more modern” members of the World of Rules on stage, namely the world of standards and the world of codes of conduct, two realms increasingly flanking the world of state law. Since the entire book is really about normative plurality, no further evidence is really needed to underline the central importance of the key concept multinormativity.
• The governance perspective, whose usefulness the present author has repeatedly lauded, most recently in “Globalization as Governance History” ("Globalisierung als Governance-Geschichte,” 2014), has also proved extraordinarily helpful in writing this book. This is particularly true for the ordering and systematizing force of two central governance concepts: regulatory structures and regulatory regimes.

Regulatory structures is an especially useful concept where the clear typology of state law no longer adequately captures the diversity of normative orderings. This is particularly true for fields in which the gradual decoupling of state and law – dealt with in chapter one – is strongly evident, for instance in normative orderings usually referred to by such familiar acronyms as:

– www – the regulatory structures of the Internet
– ISO – the regulatory structures of international standardization
– IOC – the regulatory structures of international sport.

These and many other examples show the need for a concept that goes beyond the familiar pattern of primary and secondary legislation, and unfurls an umbrella under which novel and different sorts of regulation find a place that are to some extent “wild,” which, in other words, develop without supervision by some sort of lawmaker. Secondly, the concept of regulatory structures draws attention to the institutional component of rule-making and rule-enforcement, because under the conditions of changing statehood, control through the law operates increasingly in the form of structural control (Schuppert 2004a), which steers the the behaviour of chiefly non-state actors not by settling all particulars but by providing a framework for doing so (regulated self-regulation).

Governance regimes are task-related institutional arrangements that need not be legally binding in nature. The concept of regulatory regimes has been used above all in connection with the multiplicity of norm enforcement regimes examined in chapter four. However, it has proved indispensable where – for instance with the Internet – different types of regulation meet to constitute a regulatory regime in their functional interplay.

• If these comments on the key concepts of multinormativity and governance are even halfway right, they suggest that a new understanding
of legal science is needed for our times: the development of classical legal science into a science of regulation. If describing and analysing the World of Rules calls for a wide-angle lens, only a science of regulation can ensure the necessary keenness of vision. To be quite clear from the outset, this is not an appeal for the abdication of classical jurisprudence and its dogmatic competence. But the field of vision needs to be broadening to capture the plurality of regulation types and regulatory regimes in their distinctness and interaction. Our concern is therefore not the “everyday” solution of legal problems, for which practice-oriented legal science remains indispensable: we are interested in the conditions for law in a more and more differentiating and globalizing world. The development of legal sociology into a sociology of regulation – a project Max Weber would surely have welcomed – is accordingly indispensable.

We have not been alone in propagating a science of regulation. The Max Planck Institute for European Legal History, as we recently learned, has long been discussing an understanding of legal science as a science of normativity, presenting our project in different terminological guise, one perhaps one more acceptable to the legal science community. We shall see.

- The key concept law as communication is not as easy as multinormativity and governance to ascribe to specific areas and regulatory regimes. Communication about the law is a more omnipresent phenomenon, although more frequently background music than resounding trumpet solo. Application of the law always involves a multiplicity of interpreters of the law, whether in collegial judicial panels or the successive stages of appeal in the courts, or in dialogue between courts and legal science, which comments on and critically accompanies their rulings. However, there are areas of law production, application, and enforcement in which the communicative dimension of law is particularly prominent. As Thomas Duve has shown, for example, local law is made, handed down, and developed communicatively. The cooperative state, which often seeks cooperation with the addressees of its norms, uses the tool of the legislative deal, the phenomenon of negotiated law (e.g., nuclear phase-out).
And in law enforcement – for instance with regard to environmental and climate protection – it is quite usual to discuss the acceptability and feasibility of conditions in advance with the parties affected.

So much for the key concepts introduced in chapter one. Another field also needs to be considered: the justice discourses omnipresent in a pluralistic society. We shall be looking at them in depth in concluding this chapter.

II. Summary 2: The Close Link between Community Formation and Rule-Setting

One leitmotiv is particularly prominent throughout this book: the link between community formation and rule-setting. Four observations and findings justify this emphasis.

- The double perspective of legal sociology and group sociology reveals that in most cases rule-formation is group-specific rule-formation: groups give themselves rules to stabilize themselves internally while marking themselves off externally. As chapter five has shown at length, the representatives of classical legal sociology are almost unanimous in the view that law has always primarily come into being as group law and that it is legal or factual group pressure that ensures compliance with these group-specific rules. The example of “thieves in the law” considered in chapter two demonstrates the vital importance of group membership and group solidarity: in more general terms we can speak of the community-stabilizing function of rules regarded as binding by members. This is also why, in the parlance of governance research, we speak of governance collectives and regulatory collectives, since according to our observations every collective constituted in group form has what we could call a regulatory gene.

- But it is not only a matter of the community-stabilizing function of rule-formation. Rules also have a constitutive function for communities. This can be demonstrated particularly well by two examples: specific personal governance collectives and their constitutive notions of honour (a prime example being the group-specific honour of the officers corps); and community-constitutive normative orderings such as religious orders (a prime example being the often highly elaborate rules of religious orders or of missionary societies such as the Basel Mission).
• Recalling the apt expression “encased in belongingness,” this raises the somewhat communitarian question of how much community people really need. The ubiquitous rule-making in which people indulge suggests that, at least in their capacity as members of groups, social circles (Simmel) or social figurations (Elias), they need not only institutions, as Arnold Gehlen remarks, but also – which often amounts to the same – rules.

• This brings us to the fourth and final point of this second summary: the observation that there are many communities that see themselves decidedly as communities of law, communities governed by law. This is the case – as Paolo Prodi has shown – both for the urban communities that emerged from “sworn associations/coniurationes” (Schwur-einungen) and for the Catholic Church, which had always understood itself to be a church governed by law.

So much on the link between community formation and rule-making.

What is still missing from this review of pluralities, however, is a look at the justice dimension of every normative ordering, since – it would seem – no normative order can manage without evoking the topos of justice in its particular justificatory narrative (see Forst 2013). But if this is so, the question is whether the World of Rules is also characterized by plural notions of justice, and whether the plurality of legal communities must be seen in conjunction with a plurality of what we shall call communities of justice. It makes sense to turn to this question in concluding this book because considering examples of justice discourses will once again underline the importance of the key concept “law as communication.”
B. Outlook: From Plural Communities of Justice to Plural Types of Justice

The aim of the following reflections is relatively modest: to consider whether it makes sense to distinguish not only – as in chapter 2 – between different normative orders, each with its own justificatory narrative, but also between variants of justice and injustice as elements in communication about law. The second aim, taking the actor perspective, is to discover who are, or feel themselves to be, affected by various types of injustice, and what they consequently demand of justice in their critique of society.

The objective can therefore not be to contribute to the highly bifurcated debate on theories of justice (see Ladwig 2011 and the Gosepath 2008). The reader is therefore referred to the relevant literature in legal and political philosophy only where it is pertinent to our “lesser” topic: types of justice and communities of justice.

I. The Plurality of Injustice and its Mirror Image: The Plurality of Claims to Justice

Bernd Rüthers and Christian Fischer point out in their textbook on legal theory that there are “many injustices” (Rüthers and Fischer 2010, p. 25). The various types of injustice incompatible with our notions of justice of whatever provenance clearly show this. Iris Marion Young addresses the subject in Justice and the Politics of Difference (1990): setting out from typical injustice situations, she identifies five “types of injustice.” Her approach is carried by the conviction, which we fully share, that the dominant role played by distributive justice in justice discourse risks eclipsing other types of justice and consequently other types of injustice. To counteract this, she chooses as point of departure not ideal conceptions of justice but two societal phenomena that generally lead to certain forms of injustice, namely injustice not towards individuals so much as towards groups. These two phenomena are oppression and dominance.

While these constraints [through oppression and dominance] include distributive patterns, they also involve matters which cannot easily be assimilated to the logic of distribution: decisionmaking procedures, division of labor, and culture. ...

In this chapter I offer some explication of the concept of oppression as I understand its use by new social movements in the United States since the 1960s. My starting
point is reflection on the conditions of the groups said by these movements to be oppressed: among others women, Blacks, Chicanos, Puerto Ricans and other Spanish-speaking Americans, American Indians, Jews, lesbians, gay men, Arabs, Asians, old people, working-class people, and the physically and mentally disabled. I aim to systematize the meaning of the concept of oppression as used by these diverse political movements, and to provide normative argument to clarify the wrongs the term names (Young 2011, p. 39 f.).

Young lists the following five types of oppression and domination:

- **Classical Exploitation**
  According to Young, there are three varieties of “classical exploitation”: since the Marxist conception of exploitation (no. 1) is too narrow, exploitation on grounds of gender (No. 2) and exploitation on grounds of race (No. 3) are included. But these varieties of oppression are only the most obvious. More dangerous are the following manifestations of unjust oppression:

- **Marginalization**
  Marginalization is perhaps the most dangerous form of oppression. A whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination. ... [E]ven when material deprivation is somewhat mitigated by the welfare state, marginalization is unjust because it blocks the opportunity to exercise capacities in socially defined and recognized ways (Young 2011, p. 53 f.).

- **Powerlessness**
  Powerlessness also designates a position in the division of labor and the concomitant social position that allows persons little opportunity to develop and exercise skills. ... This powerless status is perhaps best described negatively: the powerless lack the authority, status, and sense of self that professionals tend to have (Young 2011, p. 56 f.).

- **Cultural Imperialism**
  Exploitation, marginalization, and powerlessness all refer to relations of power and oppression that occur by virtue of the social division of labor – who works for whom, who does not work, and how the content of work defines one institutional position relative to others. These three categories refer to structural and institutional relations that delimit people’s material lives, including but not restricted to the resources they have access to and the concrete opportunities they have or do not have to develop and exercise their capacities. ... [T]heorists of movements of group liberation, notably feminist and Black liberation theorists, have also given prominence to a rather different form of oppression, which ... I shall call cultural imperialism. To experience cultural imperialism means to experience how the dominant
meanings of a society render the particular perspective on one’s own group invisible at the same time as they stereotype one’s group and mark it out as the Other (Young 2011, p. 58f.).

- Violence

Finally, many groups suffer the oppression of systematic violence. Members of some groups live with the knowledge that they must fear random, unprovoked attacks on their persons or property, which have no motive but to damage, humiliate, or destroy the person. ... What makes violence a phenomenon of social injustice, and not merely an individual moral wrong, is its systemic character, its existence as a social practice.

Violence is systemic because it is directed at members of a group simply because they are members of that group. Any woman, for example, has a reason to fear rape. Regardless of what a Black man has done to escape the oppressions of marginality or powerlessness, he lives knowing he is subject to attack or harassment. The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation, solely on account of their group identity. Just living under such a threat of attack on oneself or family or friends deprives the oppressed of freedom and dignity, and needlessly expends their energy (Young 2011, p. 61f.).

We have gone into these five variations of oppression in relative depth because they show two things very clearly: the conceptualization of justice as distributive justice is far too narrow, and the people who experience oppression do so not as singular individuals but as members of a specific group. As Iris Marion Young puts it in “Five Faces of Oppression” (Young 1990, p. 39f.) it is about “oppression as a structural concept” and “the concept of a social group.” This brings us back to the group-sociology approach that plays such an important role in chapters two and five of this book.

II. Communities of Justice and their Conceptions of Justice

1. The Community-Boundedness of Notions of Justice

The reader is invited at this point to return to chapter two, where governance collectives were examined above all as regulatory collectives. The point of departure was the thesis that, without exception, governance collectives give themselves rules to consolidate their internal cohesion and to mark themselves off externally. Generally speaking, governance collectives are also communication communities, since collective identity is generated and
perpetuated first and foremost through communication (see Schuppert 2015). But governance collectives are not only regulatory and communication communities, they are also what we could call justice communities, in the sense that “the self-conception of specific communities is important in grounding norms of justice” (Gertenbach et al. 2010, p. 120. Transl. R.B.). In our view, which we share with such authors as Michael Sandel (1982) and Charles Taylor (1989), there is a direct link between “the question of the role of the social context ... in the self-conception of society members on the one hand and the grounding of norms of justice on the other” (Gertenbach et al. 2010, p. 125. Transl. R.B.). In what follows we pursue the thesis that notions of justice – we are not speaking about an established concept of justice – are community-determined ideas and values; that justice as we understand it is therefore always context-dependent justice. A typology of types of justice demonstrates this.

2. Plural Types of Justice – An Attempt at a Typology

A first attempt to distinguish between different types of justice could take the following form:

- Distributive justice
- Procedural justice
- Recognitional justice
- Participative justice
- Retributive justice
- Reconciliatory and compensatory justice

To begin with distributive justice: there are two reasons not to go into any detail here on this variety of justice. First, the concept so dominates all expositions of justice theory that yet another thumbnail sketch would be superfluous. Second, the discourse on the criteria of distributive justice is above all a global one (Hinsch 2001; Rogge 2001); this means that it is a discourse about criteria for universal validity (see Gosepath 2001, p. 153 ff.). An unstructured global arena is too vast a framework for the majority of discourses on justice: what is needed for purposive debate on justice is a common structural and institutional framework.

[1] It is not geographical ties that make a group of people into common subjects of justice but their mutual admission to a common structural or institutional framework; this framework provides the basic rules that guide their social interaction and
shape their mutual life opportunities in the form of advantages and disadvantages (Fraser 2007, p. 361. Transl. R.B.).

After these preliminaries, we turn to the range of generally group-specific types of justice:

\[a) \textbf{Procedural Justice}\]

Since a generally accepted substantive definition of justice is lacking and indeed impossible for democracy-theoretical reasons, it seems obvious that the justice problem needs to be \textit{proceduralized}. However, proceduralization is not to be understood only as an emergency exit in a compensatory, instrumental sense, but – as social-psychology studies have shown (Bierbrauer 1982) – also has the charm of increasing the \textit{acceptance of distributive decisions} where the people involved feel the procedures used to be fair and reasonable. Recognition of this functional link has triggered broadly based research in the United States into procedural justice and in Germany to a marked upgrading of the procedure concept (Lerche et al. 1984); Klaus Röhl:

In the United States, far-reaching empirical research has developed on “procedural justice.” Studies have shown that the people involved and observers alike judge procedures, regardless of their outcome, as more or less just or fair, and that this assessment is of considerable importance for the question of whether the outcome is accepted as just or not. In Europe, the perspective of proceduralization has been elaborated in the sociological discussion on “reflexive law,” and here as in the USA, “procedural justice” has become an important topos in legal philosophy. It is asserted that modern society lacks any objective or generally agreed yardstick for the just distribution of life opportunities and risks. It often seems easier to reach agreement on procedure than on distribution itself. As a consequence, material distributive criteria are elaborated only during proceedings; or completely replaced by procedures. Last not least, jurisprudence has discovered the “added value” of procedures. One need only recall the buzzword “protecting basic rights through procedure” (Röhl 1993, p. 1 f. Transl. R.B.).

In determining what constitutes just procedure in the eyes of the parties involved, procedural justice research offers two approaches: the \textit{self-interest model} and the \textit{group value model}.

The self-interest model, propagated principally by Thibaut and Walker (1975), assumes the existence of the utility-maximizing individual, familiar under the label “\textit{homo oeconomicus},” who faces conflict management procedures in which a third party – a judge and/or jury – settles the conflict; so that the egoistic utility maximizer has little scope for influencing the out-

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come of proceedings. The obvious strategy is therefore – as Astrid Epp explains Thibaut and Walker’s argument – to exert as much influence as possible on decision-making proceedings (Epp 1998, p. 28 ff.). This model grounds in ideal-typical notions about American and Continental European legal procedure; the American model under which the parties have considerable control over proceedings is “naturally” given preference over the European model. Astrid App comments:

At the heart of studies ... was a comparison of two types of legal procedure: the adversary model and the inquisitorial model. The adversary model, the “prototype” of American legal procedure, gives parties much of the control over the course of proceedings with respect to the presentation of evidence, the calling of witnesses, and discovery of facts. Moreover, the opposing parties decide themselves when fact-finding is concluded. The inquisitorial model is closer to Continental European legal procedure in the field of public law, under which the court or administrative authority has sole control over proceedings and also decides when to conclude examination of the facts of the case. The decisive difference between the two types of legal procedure lies in the level of influence that parties have on proceedings. The results of this comparison, which shows a marked preference for the adversary model, leads to an instrumental view of what constitutes fair proceedings; proceedings are accordingly fair if the parties are given the opportunity to assert their interests to at least some extent (Epp 1998, p. 29 f. Transl. R.B.).

As the name of this model indicates – and this is the decisive point – it is a question of the values that play a role in assessing the adequacy of the procedure: group values or community-specific values. The parties to the proceedings who are to be treated justly are thus not atomistic individuals but individuals who are members of a specific group or community. In “Intrinsic Versus Community-Based Justice Models: When Does Group Membership Matter?” Tom R. Tyler and E. Allan Lind (1990) clearly state that:

Group-value theory draws on findings from the literature on group identification effects in its attempt to explain when and why people are concerned with procedural justice. Group-value theory argues that people are concerned about the fairness of procedures not only because they care about the outcome of those procedures. They also view procedures as one of the most important defining features of groups and societies: procedures are seen as a manifestation of the group’s underlying values. How a person is treated under a given procedure is thought to be indicative of the person’s status within the group, and people regard receiving unfair treatment as threatening to their status within the group or society. Because group-value theory views group-related variables as especially powerful determinants of procedural justice concerns, it predicts that group membership and a sense of community will be crucial variables in justice-related attitudes and behavior (Tyler and Lind 1990, p. 87).
Some have had serious reservations about this group value theory (Epp 1998, p. 36 f.), and “group” does indeed remain a vague concept; however, what is important for our purposes is only to clarify within procedural justice the shaping force of community-specific notions of justice and the importance of respecting them in the given procedures. We shall be dealing with this in greater detail when looking at recognitional justice.

b) Recognitional Justice

aa) From the Struggle for Recognition to the Status Injury of Social Groups

With regard to recognitional justice, Axel Honneth’s important contribution to the subject in The Struggle for Recognition (Kampf um Anerkennung, 1994) immediately comes to mind. Rainer Forst sums up Honneth’s line of argument as follows:

Honneth’s interpretation of the struggle for recognition ... is the most comprehensive attempt to distinguish between different stages of reciprocal recognition that develop in a dialectic of interchanges about the mutual recognition claims for autonomy and individuality. These stages correspond – in positive regard – to different self-relationships and – in negative regard – to differing experiences of the denial of recognition, which in the struggle for recognition of equal rights and unique individuality drive each stage attained to go beyond itself. From this perspective, it is possible to distinguish between the following stages: love, mutual recognition as legal person, and the solidary recognition of individuality on which the self-confidence, self-respect, and self-esteem (or self-overestimation) of persons build (Forst 1996, p. 416 f. Transl. R.B.).

Honneth, like Charles Taylor (1989), is primarily concerned with the demand for reciprocal recognition among individuals, that is to say with recognition as a prerequisite for what Nancy Fraser calls self-realization (Fraser 1998). With Nancy Fraser, we consider this problem of granted or denied recognition outside the narrow context of personal self-realization, treating it as a justice issue involving above all the recognition or non-recognition of social groups. Nancy Fraser:

On the first question ['Is recognition really a matter of justice, or is it a matter of self-realization?'], two major theorists, Charles Taylor and Axel Honneth, understand recognition as a matter of self-realization. Unlike them, however, I consider it an issue of justice. Thus, one should not answer the question “what’s wrong with misrespect?” by saying that it constitutes an impediment to the self-realization of the oppressed. One should say, rather, that it is unjust that some individuals and
groups are denied the status of full partners in social interaction simply as a con-
sequence of institutionalized patterns of cultural value in whose construction they
have not equally participated and which disparage their distinctive characteristics or
the distinctive characteristics assigned to them (Fraser 1998, p. 3).

This approach, according to Nancy Fraser, has two main advantages. On the
one hand, it becomes clear that a lack of recognition is really a problem of participative justice:

What makes misrecognition morally wrong, on my view, is that it denies some
individuals and groups the possibility of participating on a par with others in social
interaction. The norm of participatory parity is nonsectarian in the required sense. It
appeals to a conception of justice that can be accepted by people with divergent
views of the good life, provided that they agree to abide by fair terms of interaction
under conditions of value pluralism (Fraser 1998, p. 3).

On the other hand, it becomes clear that the “misrecognition” – for example
of Blacks, women, Latinos, or homosexuals, is less a problem of individual
misrecognition than a question of misrecognition of individuals as members
of a given social, ethnic, or religious group. Fraser aptly calls this status
injury:

Treating recognition as a matter of justice has a second advantage as well. It con-
ceives misrecognition as a status injury whose locus is social relations, not individual
psychology. To be misrecognized, on this view, is not simply to be thought ill of,
looked down on, or devalued in others’ conscious attitudes or mental beliefs. It is
rather to be denied the status of a full partner in social interaction and prevented
from participating as a peer in social life as a consequence of institutionalized
patterns of cultural value that constitute one as comparatively unworthy of respect
or esteem. This approach avoids difficulties that arise when misrecognition is under-
stood psychologically. When misrecognition is identified with internal distortions in
the structure of self-consciousness of the oppressed, it is but a short step to blaming
the victim. Conversely, when misrecognition is equated with prejudice in the minds
of the oppressors, overcoming it seems to require policing their beliefs, an approach
that is authoritarian. On the justice view, in contrast, misrecognition is a matter of
externally manifest and publicly verifiable impediments to some people’s standing
as a full member of society. As such arrangements are morally indefensible whether
or not they distort the subjectivity of the oppressed (Fraser 1998, p. 3 f.).

bb) The Struggle for Recognition as a Struggle for Respect of Collective Identity

As a rule, the struggle for recognition is preceded by experience of misre-
cognition for the individual or collective identity. But what exactly is to be
understood by identity?
Identity, according to Hartmut Rosa, is “the specific individual relation of social subjects to themselves and the world. It is not about the external identifiability of a person but about his or her self-image and self-conception, i.e., about a person’s lived and only partly reflected-upon question ‘Who am I?’ Collective identity can similarly be described as the answer to the question ‘Who are we?’ (as cultural, ethnic, religious, or political group) (Rosa 2007, p. 47. Transl. R.B.).

Thus an individual and a collective “sense of identity that provides orientation” can be distinguished (ibid, p. 49). But the two are not unrelated: they interact. Harmut Rosa:

Whereas individual identity addresses the question ‘Who am I?’ collective identity is concerned with ‘Who are we?’ a question that arises and is expressed in joint practice. The process by which individual identity emerges from collective identity to then shape the latter in return, is a key subject of dispute in the “battle for the self” between liberals and communitarians ... The “we” of the collective self-determination process varies with categories of identity: we “Catholics,” “men,” “students,” “environmentalists,” “ravers,” “Europeans,” and so forth: the categorical building blocks of individual identity always relate to collectives, which are actually or supposedly connected by common experience, practices, language, notions of the Good, etc. At the same time, however, such groups are clearly not to be understood as “super-subjects”: every allegation of unity is potentially ideological and normative in nature, or suppresses or denies differences; every possible definition of “being a Christian,” for instance, excludes deviating self-conceptions. The concept of collective identity is accordingly controversial in the social sciences ... It should, however, be remembered that individual identity formation is not only a process of identifying the particular individual, a process of personal identification, but always one that ascribes a social identity to that individual (“you are a women,” “a Jew,” “gay”). Individuals and groups are therefore always obliged to engage in dialogistic (and conflictual) clarification of collective identity: What does it mean to be a woman, a Jew, a gay? The result is the struggle in identity politics for the recognition of minorities, which has gathered momentum in the political debate since the 1990s in democratic countries. Authors who incline towards communitarian-republican positions also argue that a discursively open self-understanding about who we are and want to be is a precondition for policy-making in democratic politics ... (Rosa 2007, p. 51 f. Transl. R.B.).

Caroline Emcke (2000) distinguishes two – often overlapping – ideal types of collective identity: “intended, self-identified collective identities and ways of life” (type I), and the “unintended, subjectivizing construction of collective identities” (type II) in which identity is ascribed – willy-nilly – from without. She sees the two types of collective identity as generating different demands for recognition:
Type I cultural collectives want to be recognized in this identity. Individual members accordingly want to be recognized as belonging to it. The recognition relationship these groups aspire to is confirmation of their identity and legal protection for their practices and convictions. They wish to be recognized as equal members of society in their capacity as individuals and as members of a distinct group. In this case, recognition consists in affirmation of cultural difference in conjunction with acceptance of parity as morally responsible individuals entitled to cooperate and participate on an equal footing in a culturally differentiated society (Emcke 2000, p. 320. Transl. R.B.).

Things are different in the case of ascribed, heteronomous collective identities:

Type II collective identities, by contrast, do not wish to be recognized as “what they are”; “what they are” is the ambivalent product of acquired offensive description and assessment and rebellion against an alien, humiliating identity and life situation.

To recognize the members of such groups in their cultural distinctiveness in the above sense would merely reproduce the experience of misrecognition that had contributed to forming their identity, and continues to confirm individual persons in identitary contexts with which they do not wish to identify. If a recognition relationship requires recognition of the constitutive connection between identity and the “responsive behaviour of the Other,” the members of type II collective identities must be recognized differently than members of type I collective identities. No positive, substantive definition is needed of “who they are.” Wendy Brown fears that the recognition of injured identity serves only to stabilize this unwanted identity, thus driving members to “voluntary” commitment to their own subjection (“assujetissement”).

The danger can be avoided by not recognizing members in the sense of “confirming” their identity as “what they are” but in what has been done to them. To this end, this study attempts to define the various forms of moral injury and social exclusion (Emcke 2000, p. 321 f. Transl. R.B.).

We shall be coming back to the recognition of injustice done under the heading “reconciliatory and compensatory justice.”

c) Participative Justice

Nancy Fraser points out that recognitional justice is closely related to so-called participative justice. It nevertheless makes sense to treat it under a separate heading for two reasons. First, the concept of participative justice takes us into the broad field of participation in democratic decision-making processes, and in this context to the much discussed phenomenon of falling voter turnout and the still unsolved problem of how social selectivity can be
avoided in civic participation, a selectivity that has been discussed in depth by Johanna Klatt and Frank Walter (2011) under the heading: “Superfluous in Civil Society?” (“Entbehrliche der Bürgerschaft?”). Second, the concept of participative justice leads us to another interesting strand in the justice discourse, namely the so-called capability approach developed above all by Amarty Sen (1993) and Martha Nussbaum (2000).

In the current justice discourse, the former chairman of the Council of the Evangelical Church in Germany, Wolfgang Huber, published an article on “Just Participation” (“Gerechte Teilhabe,” Huber 2015) that captures the general mood of the present debate. Under the heading “From Distributive Justice to Participative Justice,” he argues in three steps:

First he discusses what is to be understood by “social justice,” addressing the function of distributive justice:

[Social justice] is associated with the sort of guarantees the political order gives individuals to ensure a life under fair conditions. The mitigation of serious social differences comes into focus. Distributive justice comes onto the agenda. The state is called upon to overcome social discrepancies, close the gap between rich and poor, and save people from poverty. Some see this as a bottomless pit. Major questions arise: Who are the intended beneficiaries of distribution by the caring state? All citizens or all human beings? Both refugees and the established population? Both young and old? Talk about the “boat being full” or a “Methuselah plot” paint the shibboleth of the overburdened state on the wall. A population under pressure ask themselves when the strain of high taxes and charges will be lifted. When will the demands of the distributive state transmute into restrictions on the freedom of those up front called upon to pay? This, too, is a matter of justice. The people affected must at least be convinced that their money is well invested.

However, Huber continues, distributive measures alone will not bring justice:

Distribution is indispensable to alleviate the consequences of poverty and give people a halfway acceptable standard of living. But overcoming poverty requires more than that. In the long run, the state will manage to preserve its citizens from poverty only if it succeeds in activating them. Taking care of their immediate needs cannot suffice; this depends on enough people being in a position to care for themselves and others. Distribution alone brings no justice; it presupposes that enough people can contribute to the national product by their own efforts. A society can muster the strength for solidarity only if it gives the citizenry opportunities for active participation.

Because redistribution alone does not suffice, it is necessary to move from distributive to participative justice:
The step from distributive justice to participative justice is therefore necessary. Participation is as important as distribution, enablement as important as securing the necessities of life. If we are to understand justice as a community virtue, then it must be above all an activating justice that enables people to make use of their gifts and to contribute to the life of the community. Whoever wishes to escape the revolving door effect of the welfare state must open the way to social participation and prevent it from immediately slamming shut again (Huber 2015, p. 7. Transl. R.B.).

After considering these three frequently discussed types of justice, we conclude our *tour d’horizon* with two further varieties of justice that demonstrate particularly clearly the community-boundedness of notions of justice and the link between collective identity and claims for justice.

d) Retributive Justice

aa) An Introductory Tale

In “Revenge, Compensation, and Punishment: An Overview” (“*Rache, Wiedergutmachung und Strafe: ein Überblick*”), one of the two authors gives the following account set in Somalia:

In the early 1990s, when an international force was in Somalia in the context of the UNOSOM Operation, a Somali boy once got into the Bundeswehr camp in Beled Weyn and was shot dead by the guards. The local elders insisted that the boy had been unarmed and had had no evil intentions. They demanded blood money from the Germans. The weregild for a boy or man among Somalis was one hundred camels. The Germans refused to pay on the grounds that the boy had entered the camp without authorization and that the soldier who had fired the lethal shot had acted in keeping with regulations and therefore bore no guilt for what had happened. Payment of blood money amounted to a confession of guilt and was therefore out of the question.

In an interview with me, the broadcaster Westdeutsche Rundfunk wanted to learn who was in the right. I explained that blood money had nothing to do with a confession of guilt in the moral sense. In the event of killing or injury through accident, with or without gross negligence, compensation was also claimed. To pay weregild is therefore not dishonourable, and no face is lost. ... The Germans would therefore have to admit to no more than a simple misunderstanding and would have cut a good figure by expressing their regret over the loss of a human life and their willingness to provide compensation. And the hundred camels? Wouldn’t that have exceeded the defence budget? They would probably never have had to be paid, for there is room for negotiation or discursive strategies. One could have pointed out that the Germans prefer economic activities other than camel breeding and
therefore have no camels. In converting the compensation to be paid into monetary terms, there would have been a great deal of leeway for reduction. I could imagine at $100 per camel, a total of $10,000 would have been a good, round, symbolically acceptable sum (Schlee and Turner 2008a, p. 49 ff. Transl. R.B.).

Whether one finds the proposed solution convincing or not is beside the point. However, it does away with a number of obvious misunderstandings.

- Since the retribution concept often has an archaic aftertaste, it should be made clear that – with the exception of the blood feud – it rarely involves excessive violence.
- Claims for compensation relate not to guilt but to the consequences of an act that constitute an injury of legal interests; the amount can – not unlike penance – be established on the basis of a scale of rates.
- Compensation is essentially negotiable and offsettatable.

This tale having disposed of the bloodthirsty and archaic reputation of the retribution concept, we turn briefly to the functional logic of the principle of retribution; after all, the great legal theorist Hans Kelsen asserted that retribution was the key, essential characteristic of justice (Kelsen 1941, 1953).

**bb) The Functional Logic of the Retribution Principle**


- The first is the principle of reciprocity:

  The point of departure for modern social-scientific research on retribution rules is realization of the fundamental importance of the principle of reciprocity, of balancing performance and counter-performance, action and reaction. Retribution is a part of this.

  Reciprocity is thus the really fundamental axiom. Actors evoke human interaction in every conceivable constellation. In various social fields and contexts of action, it assumes specific form. The balanced or symmetrical exchange of gifts in the form of strongly formalized exchanges of presents and economic forms of cooperation are an expression of this. The ethical norm requires one to “do as one would be done by”. This is often called the golden rule, an expression of mutual respect that provides a basis for modern human rights (Schlee and Turner 2008b, p. 7 f. Transl. R.B.).
The second characteristic of retribution is the proportionality of injustice and compensation, a relationship that is open to legal regulation:

Retribution is grounded in the proportionality of injustice and compensation – which presupposes the fundamental social equality/equivalence of actors – and not a proportionality of reaction that weighs up differences and takes account of differences in rank. This tension is to be found throughout the sources and contributes to the diversity to be found in the concrete application of the retribution idea.

Since the earliest old-oriental and biblical times, the sources show a consistent tendency towards strict regulation of retributive practices. However, the rules do not indicate whether they apply to a prior state of unregulated retribution. By far the most frequent matters requiring settlement are determining who is party to a conflict, the legitimate aims of retribution, and the compensation due for precisely defined violations of norms (Schlee and Turner 2008b, p. 12. Transl. R.B.).

The third aspect important for the logic of the retribution principle is that assertion of retribution claims and their execution are a matter for the collective to which the injured party or victim belonged; to exercise retribution is a matter for the given solidary community.

In societies without central political authorities or acephalous societies, responsibility for deviance is, at least largely, conceived of as a collective capacity. What is more, disputes are not settled in anarchy or by bowing to the right of the stronger. Conflicts confront groups or constellations of groups of solidary members in negotiations on potential courses of action ranging from escalation to compromise, and who have to keep public opinion in mind; to take into account what the views of the majority of society not involved in the conflict (Schlee and Turner 2008b, p. 25. Transl. R.B.).

3. Reconciliatory and Compensatory Justice

This heading points to a specific case of historical injustice concerned primarily not with claims to justice of persons or groups who have suffered or are suffering this injustice themselves but with claims of later generations who demand amends or compensation for injustice done to earlier generations. This is the topic addressed by Lukas H. Meyer in “Historical Justice” (“Historische Gerechtigkeit,” 2005), to which we shall be referring in what follows. Meyer is concerned with a variety of intergenerational justice, not with single individuals but with ethnic and/or social groups seeking justice. The two groups or communities Meyer looks at are the Sami (Lapps) and the
Sinti and Roma, groups that have played a prominent role in a recent migration debate in Germany (in early 2014).

Meyer outlines the collective identity of the Sami as follows:

The Sami see themselves as a particular ethnic group and wish to retain their identity. As a group they have certain objective characteristics, namely their own language, common descent, and a common material and intellectual culture. Their traditional way of life differs from that of the surrounding population in both socio-cultural and socio-economic regard. The Sami have experienced and are menaced by considerable discrimination and policies that undermine their traditional way of life. In effect, the Sami have always found themselves in an economically and socially subordinate position, namely as non-dominant minority in the national societies in which they live. The surrounding population regard the Sami as indigenous and treat them as such in law and administration. At least in comparison with other indigenous peoples, the Sami have recently been quite successful in attaining a certain measure of internal self-determination or autonomy. In Finland, Norway, and Sweden they have been able to establish elected representative bodies, the Sami parliaments (Meyer 2005, p. 142 f. Transl. R.B.).

Things are somewhat different for the Sinti and Roma:

The majority of the Roma population in Europe lives in Central and Eastern Europe and in the Balkans. Except in Spain, the Roma have never constituted a notable section of the population. However, they are considered a significant minority in most Central and Eastern European countries. In Western Europe, the Roma and Sinti have developed a form of service-oriented nomadism as a way of life and survival strategy. In Central and Eastern Europe, the Roma have frequently been incorporated in the local labour market, which has meant abandoning their nomadic way of life and gathering in large Roma ghettos.

The Roma lay claim neither to a particular cultural affinity with a given territory nor to historical continuity on the basis of descent from earlier inhabitants of the countries in which they live. They do not assert any territorial claims. They differ from other minorities and national minorities in that they have no homeland or “mother country.” The fact that they lack a “Romanistan” has frequently led to the Roma being denied the status of a “people,” a “nation,” or even a “minority.” The concepts “people” and “nation” are closely associated with that of a home country. Even the concept “minority” is understood as requiring a connection with a certain territory or mother country. Only recently have a number of European countries come to recognize the Roma as a legitimate minority.

There can be no doubt that they are a cultural and ethnic minority. The Roma see themselves as a distinct ethnic and cultural group. As groups they display certain objective characteristics. They are of common descent and share a culture. They have their own language, a specific organizational structure, their own legal system, their own literature, music and special customs. How the Roma see their own identity is strongly influenced by their historical experience of the worst forms of exploitation,
discriminatory politics, and forced assimilation, and continuous defencelessness against these and other violations of their rights (Meyer 2005, p. 143 f. Transl. R.B.).

Now that we have more of an idea about the groups involved, we turn to two aspects Meyer addresses that are important for our discussion.

- **The first point** is that the groups that derive claims from historical injustices done to earlier generations can be understood as *communities of remembrance*; the ties that establish the common collective identity are ties of memory. Meyer:

  Living members of transgenerational groups assert claims in their capacity as descendants of the victims of historical injustice. Being an indirect victim is considered relevant for justifying specific claims for restitution and compensation. ... People can have a sense of togetherness on the basis of shared experience. If this is indeed the case, such experience is often one of extraordinary if not traumatic nature. Now it is important that it is the significance given to the event and not the event itself that can create a remembrance community. Collective remembrance is not to be understood as a collection of individual memories but rather as a social practice of articulating and maintaining the “reality of the past.” Often it is the narrative itself, the continuous articulation of the asserted “reality of the past” that forms and shapes a community. Active, shared commemoration regarded as important for the self-definition of the community is needed. This community is defined by the personal importance of remembrance and not by personal testimony to past events. The relevant collective remembrance relates to the shared understanding of the heritage regarded as binding.

  Even if remembrance communities do not have to be grounded in a history of suffering, there are some very convincing examples of the supportive force innate in the shared remembrance of oppression. More perhaps than anything else, living commemoration of suffering creates solidarity. The remembrance of oppression and suffering serves to unify the community because of its particular emotional strength and because self-definition as a victim permits the dividing line between “us” and “them” to be clearly drawn (Meyer 2005, p. 137 f. Transl. R.B.).

- **The second important point** has to do with the content and objectives of the demands made, which range from symbolic justice to material compensation:

  It is always a matter of fulfilling historical duties and realizing the corresponding claims. Sometimes symbolic justice has priority for (indirect) victims, who may demand, for instance, that the still dominant group admits its guilt. In other cases, it is about redistributing power and material compensation. In still other cases, (indirect) victims see their low status as a particular ethnic and cultural group and their attitude towards the surrounding, still dominant population as consequences of the historical injustice suffered. They may demand that their just claim to
autonomy and special rights to representation in decision-making and advisory bodies be recognized. Moreover, the group can find themselves illegitimately denied access to their historical territory or denied the exercise of political sovereignty over this territory. The members of the group can call for territorial concessions, for cultural and political autonomy, or for the right to self-determination by secession (Meyer 2005, p. 140. Transl. R.B.).

This brings us to the end of our journey through the various types of injustice and to the end of our exploration of the World of Rules. Our expedition concludes with confidence that we have gained at least some understanding of the diversity and multiple facets of the World of Rules. Many readers will not have agreed with every twist and turn we have taken; yet this book is the outcome of long and not always straightforward cogitation, reflecting what has preoccupied the author for many years. He wishes to thank all his readers for patiently accompanying him on his intellectual perambulation.