

Private law and the institutional (re)turn

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Private Law and the Institutional (Re)turn

Summary

In times of crises and social transformations, private lawyers turn to analysis of the institutions of private law. They turn to the contract, property, tort, restitution, or corporate personhood for both identifying the root causes of societal problems and for anchoring change in the legal system.

My inaugural lecture discusses this frequent (re)turn to institutions in sociologically informed private law scholarship. I trace the institutional turn as a strategy to be able to understand, formulate critique and reveal the constitutive and transformative role of private law. I then continue to argue for the need to return to institutional analysis in the current moment of socio-economic transformations. However, I dare to suggest that we may need to return to institutional analysis in a different guise. Relying on new institutionalism in political and social theory I propose that we may need to draw our attention to the function of institutions in embracing conflicting societal demands. Such institutional approach will require us to adopt a new institutionalist approach to private law doctrine. Throughout the lecture, I will exemplify the return to institutions and the new institutional analysis by focusing on climate change and supply chain responsibility in the institution of the wrongful act known as tort.

Samenvatting

In tijd van crises en sociale transformaties wenden privaatrechtelijke wetenschappers zich tot de analyse van de privaatrechtelijke instituties. Ze wenden zich tot het contract, eigendom, onrechtmatige daad, restitutie of rechtspersoonlijkheid om zowel de onderliggende oorzaken van maatschappelijke problemen te begrijpen, te kritiseren en als om veranderingen in het rechtssysteem te verankeren.

Mijn oratie discuteert deze veelvuldige (her)wending naar instituties in de sociologisch geïnformeerde privaatrechtelijke wetenschap. Ik traceer de institutionele wending als een strategie om kritiek te kunnen formuleren en de constitutieve en transformatieve rol van het privaatrecht te onthullen. Vervolgens pleit ik voor de noodzaak om terug te keren naar de institutionele analyse in het huidige moment van sociaaleconomische transformaties. Maar ik stel voor dat we in een andere gedaante moeten terugkeren naar institutionele analyse van het privaatrecht. Met het oog op het nieuwe institutionalisme in de politieke en sociale theorie stel ik voor dat we onze aandacht moeten vestigen op de functie van instituties bij het omgaan met conflicterende maatschappelijke eisen. Een dergelijke institutionele benadering vereist een nieuwe institutie-baseert benadering van de privaatrechtelijke doctrine. In de lezing zal ik de terugkeer naar instituties en de nieuwe institutionele analyse illustreren met het thema van klimaatverandering en verantwoordelijkheid in mondiale toeleveringsketen binnen het recht over onrechtmatige daad.

Dear Pro-rector, thank you for these very kind introductory words,

dear colleagues, students, family, friends,

Making the Institutional Case

Let me start this lecture – in the good old tradition of legal scholarship – with a case. Cases are the bread-and-butter business of us lawyers, they shape the legal and lawyers' perception of reality and cases help us – make a case.

The case I use to make my case is definitely a monumental case, one that has been stretching our legal imagination of what is conceivable though I also will argue that it is solidly legally grounded. In May 2021, a claim by Friends of the Earth Netherlands against the oil company Shell for its contribution to climate change was successful in the Hague District court. I do not think that I need to introduce the ruling in much more detail; it has become a landmark judgement in the field of climate litigation. *Milieudefensie v Shell*¹ has been coined as the first 'victory' against a private actor, a carbon major, that would be legally obliged to do its share in combating climate change. The court ruled that Shell has an obligation to effectively mitigate its global emissions by 45 % in 2030 and, importantly, it has obligations not only for its own operations but also best-efforts obligations to reduce emissions related to its suppliers and their operations as well as its customers and their product use.

But despite its revolutionary touch which includes the hero portrayal of the lawyer for claimants – a lawyer from Maastricht of course – the case remains firmly grounded in private law rules. The reasoning of the court may be huge in ambition – it integrates considerations from the IPCC, the impact of the environment on fundamental rights, international soft law on corporate responsibility – but only to trace it back to Art. 6:162 of the Dutch Civil Code and the long-standing private law tort of negligence. The court re-imagined but, at the same time, underlined, the relevance of the institution of negligence, of liability for a wrongful act, in the light of demands related to climate change.

I introduce this case because it arguably relates to a broader tendency: In times of crises, conflicts, and social transformations, as in attributing responsibility for climate change in a dispute between private parties, private lawyers seem to be drawn to revert to the core set rules of private law to ground their reasoning. I call these core set of rules, such as the wrongful act, in a Roman law understanding, the institutions of private law – and I mean here specifically contract, property, tort, legal personhood amongst others. But a characteristic of such private law institutions is that they also have a societal counterpart. Private law institutions are related to and build on social institutions. The contract, for instance, is a set of legal rules that are applicable to an agreement, but it also structures the norms for an economic transaction, and it impacts upon a social relation. It is this openness of the legal rules, and its reference to mechanisms of social institutionalisation,

¹ *Vereniging Milieudefensie and others v Royal Dutch Shell Plc*, Rechtbank Den Haag, 26 May 2021, ECLI:NL:RBDHA:2021:5337.

that make private law institutions specifically prone to adapt the legal system to changes in the social reality. In the *Milieudefensie v Shell* case, the vehicle has been the concept of 'proper social conduct' as laid down in paragraph (2) of Art. 6:162 BW. This allowed the many societal demands related to climate change to be reconstructed in the legal rules on tort.

The turn to institutions in private law scholarship is not a singular occurrence in this one climate case but arguably a more frequently occurring strategy. We may be perplexed and overwhelmed by the complex, differentiated, and fragmented world around us and its huge problems, by the climate crisis, staggering global inequality, the pandemic, geopolitical conflicts and wars, the digital transformation of society. But private law research takes solace in the fact that the complexity can be managed by turning to the set of rules in private law that we assume relate to, possibly have caused these social problems and that may be of help to bear with them, perhaps even be used to offer a viable solution. The current societal sustainability discourse lets private lawyers turn to the perceived (un)sustainable features of contracts, torts, property, company, and they argue for a re-imagination of such rules in the light of overarching (non-legal) sustainability demands.² The pandemic revealed a turn to the institution of transnational contracting³ and to intellectual property rights⁴ for identifying them as root causes for the global unequal distribution of the consequences of the pandemic. In the digital transformation, private lawyers reveal how long-standing concepts of contracting and wrongful acts with their human-centric focus on personhood led to large responsibility gaps and may require adaption in the light of newly evolving digital persons as private law subjects.⁵ Hence, the institutions of private law and their societal counterparts are of crucial importance in mediating societal stability and change within legal categories.

It perhaps has already become clear but let me begin the lecture with a definitional component to make sure that there is no misunderstanding: My use of the concept of

² See, for examples from company law: Beate Sjøfjell and Benjamin J. Richardson (eds), *Company Law and Sustainability* (Cambridge University Press 2015); contract law: Vibe Ulfbeck and Ole Hansen, 'Sustainability Clauses in an Unsustainable Contract Law?', (2020) 16 *European Review of Contract Law* 186; private international law: Ralf Michaels, et al. (eds), *The Private Side of Transforming Our World: UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2021); property law: David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers 2011).

³ Mark Anner, 'Power Relations in Global Supply Chains and the Unequal Distribution of Costs During Crises: Abandoning Garment Suppliers and Workers During the COVID-19 Pandemic', (2021) 161 *International Labour Review* 59; Christian Scheper and Carolina A. Vestena, 'Die Pandemie offenbart die Defizite des transnationalen Menschenrechtsschutzes: Ein Plädoyer für eine Konfliktperspektive auf globale Lieferketten', (2020) *Zeitschrift für Friedens- und Konfliktforschung* 1. I myself have worked on this question of transnational contracting, normality and pandemic exceptions from a contract law perspective Anna Beckers, 'Towards Constitutionalizing Global Value Chains and Corporations: The State of Exception and Private Law', (2020) *Verfassungsblog*, 08 April 2020, <<https://verfassungsblog.de/towards-constitutionalizing-global-value-chains-and-corporations/>>.

⁴ Siva Thambisetty, et al., 'Addressing Vaccine Inequity During the COVID-19 Pandemic: The TRIPS Intellectual Property Waiver and Beyond', (2022) 81 *Cambridge Law Journal* 384; Peter Drahos, 'Public Lies and Public Goods: Ten Lessons From When Patents and Pandemics Meet' in Gustavo Ghidini and Valeria Falce (eds), *Reforming Intellectual Property* (Edward Elgar, Cheltenham 2022), 30-44.

⁵ Very early on this diagnosis Andreas Matthias, 'The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata', (2004) 6 *Ethics and Information Technology* 175. See also, for the argument, with references to the current debate Anna Beckers and Gunther Teubner, *Three Liability Regimes for Artificial Intelligence: Algorithmic Actants, Hybrids, Crowds* (Hart Publishing, Oxford 2021) ch 1.

institutions and the institutional (re)turn is grounded in a sociological⁶, economic⁷ and political economy⁸ understanding of institutions. I hope my EU and international law colleagues will forgive me that I am not addressing the turn to institutions for the purpose of locating the origin of private law in the state and public law. As a sociological category, institutions are a self-standing concept that is neither identical to structure, such as systems or orders, nor to agency, such as collective organisations or actors. Institutions bridge systems⁹ and create stable sets of expectations¹⁰ in several systems that may shape actor's choices. Institutions are located on the meso-level. To go back to my initial example, the bilateral contract is an institution that relates to normative expectations of legal enforceability in law, structures a market-based price transaction in economic exchange and creates a socially binding commitment in the relation between the parties. Because of its recognition in different spheres of society and scholarly disciplines, I consider the institutional vocabulary very helpful for bridging legal scholarship with economic and social theory. In legal scholarship, I thus relate to the approach of legal institutionalism in the 'old' tradition of Maurice Hauriou and Santi Romani. Both are known for their theory on legal institutionalism that traces back law to societal relations, not necessarily to the state.¹¹ Society is thus capable of institutional ordering and private law plays a decisive role here. I also build on the institutionalist tradition of legal sociology, specifically Philip Selznick's call for an institutional analysis of law that recognises private modes of governance as legalisation opportunities for a responsive law.¹² And I also take note of the economic tradition in institutional economics with its law and economics counterpart that identifies institutions as 'the rules of the game in a society'¹³ which impact upon economic exchange, behaviour and costs. In all these traditions, the turn, and (re)turn, to institutions in private law scholarship is one that recognises and productively builds on the intricate stable relation between societal ordering processes and legal rules.

In the remainder of this lecture, my aim is to,

- 1) trace the turn and return to institutions in sociologically and economically informed private law scholarship and identify the different scholarly aims that are pursued with it,
- 2) develop an own theoretical suggestion on how to return to institutional analysis of private law today and – hoping you have beard with the more theoretical elaborations until then –

⁶ Niklas Luhmann, *A Sociological Theory of Law* (Routledge, London 2013 [1982]).

⁷ Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge 1990); Oliver Williamson, *The Economic Institutions of Capitalism* (Free Press Mac Millan Publishers, New York 1985).

⁸ Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, Oxford 2005), 1-39.

⁹ Gunther Teubner, 'Legal Irritants: Good Faith in English Law or How Unifying Law Ends Up in New Divergences', (1998) 61 *Modern Law Review* 11

¹⁰ Luhmann (n 6), 49 ff.

¹¹ Maurice Hauriou, 'La Théorie de l'institution et de la fondation: Essai de vitalisme social' in Maurice Hauriou (eds), *Aux sources du droit* (Bloud & Gay, Caen 1986 [1933]), 89-128; Santi Romano, *The Legal Order* (Routledge, London 2017 [1918]).

¹² Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, Berkeley 1969).

¹³ North (n 7), 3.

- 3) relate this theoretical argument back into the concrete demands towards private law doctrine including in the most concrete manner to the *Milieudefensie v Shell* case.
- 4) I will end this lecture with some further areas of research I will be invested in the coming years for which I deem such institutional analysis of importance.

(Re)turning to Institutions

In legal scholarship, the turn to the institutions is certainly not a new phenomenon. It is – as the title of my lecture also suggests – in fact a frequent return.

One reoccurring strand of institutionally informed legal scholarship is certainly the field of law and economics. Institutional economics, specifically through the works of Oliver Williamson¹⁴ and Douglass North¹⁵, has pointed to the fact that institutions are part of economic governance and shape economic behaviour. And of course, one may not forget Ronald Coase's ground-breaking work that shows how different institutional arrangements relate to costs in the economic system.¹⁶ In a legal-economic reading of this institutional turn, legal rules appear as influential factors for structuring economic institutions and such institutions can and should be evaluated from a cost perspective.

Another frequent turn to institutions characterises the opposite, critical legal scholarship. In 1949, Karl Renner provided such explicit critical account on the institutions of private law. His legal understanding of private law institutions emphasised legal positivism by viewing private law rules as formally stable, but in this capacity as capable of stabilising different socio-economic realities. This is why, Renner argues, property, the institution he focuses on centrally, may have been formally largely unchanged but still fulfilled vastly different social functions in feudal and capitalist societies.¹⁷ Accordingly, he suggests – and I quote 'The change in the social functions of legal institutions takes place in a sphere beyond the reach of law'¹⁸. The recent literature encounters a return of such critical institutional positivist thinking. Jean-Philippe Robé has, for instance, engaged in analysing property as power and politics by emphasising the historical stability of the legal institution of property but its changing societal function towards recently stabilising in the global economic system mainly multinational corporations with their economic power.¹⁹ And there is Katharina Pistor who has returned to the core institutions of private law to show their significant impact on stabilising the unequal system of global financial capitalism.²⁰ And, very recently, a whole movement has formed, now establishing in different parts of the world, building on political economy concepts of institutions, that seek to analyse the laws

¹⁴ Williamson (n 7).

¹⁵ North (n 7).

¹⁶ Ronald Coase, 'The Nature of the Firm', (1937) 4 *Economica* 386.

¹⁷ Karl Renner, *The Institutions of Private Law and Their Social Functions* (Routledge & Kegan Paul Limited, London 1949)

¹⁸ Renner (n 17), 52.

¹⁹ Jean-Philippe Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Policy Press, Bristol 2020).

²⁰ Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, New Haven 2019); earlier Simon Deakin, et al., 'Legal Institutionalism: Capitalism and the Constitutive Role of Law', (2017) 45 *Journal of Comparative Economics* 188.

related to political economy.²¹ The movement has the ambition to identify the stable underlying legal-institutional structures of our political economic systems, the constitutive role of law, as a prerequisite for anchoring change and transformation. Institutional analysis of private law in this guise has returned in critical legal scholarship, and it has returned to show us, again, – to put it very colloquially – how positive and formal private law rules are complicit in stabilising institutions that purportedly relate to highly unequal socio-economic systems.

Yet, what does this strand in the literature with its frequent return to institutional analysis leave us with? Institutional analysis in economics may provide us with instruments of understanding, for describing, the role that institutions play in shaping behaviour and provide guidance on how institutions relate to economic costs; in the critical political economy turn institutions are used to anchor critique of and through positive law. But so far, these returns to institutions in private law scholarship show us more a vague hope rather than a roadmap, theory or methodology, for anchoring change and normative guidance in law. The law and institutional economics perspective does engage in normative proposals, but it remains limited to considering the narrow economic and cost perspective rather than an overarching societal perspective. Hence, institutional analysis may need a stronger socio-theoretical grounding, a normative orientation and doctrinal methodology.

Unsurprisingly, we also may find guidance in previous turns to institutional analysis. In 1971, Ludwig Raiser already interrogated the 'future of private law' by outlining the conditions under which the central institutions in private law adapt in relation to societal demands.²² Raiser's work – which I am attached to, having read the text as a young student as one of my first formative works on private law – demonstrates that private law is not only oriented on individual (economic) interests but should also aim at protecting the integrity of social institutions.²³ Here is a first institutional normative argument at play: Private law not only relates to institutions in stabilising a given socio-economic reality, but also needs to actively protect social institutions and their public dimension. One return of this tradition is perhaps Dan Wielsch's proposal of an institution-preserving and institution-generating approach in contract interpretation.²⁴

A different normative position, and probably most prominent legal work on institutional analysis, is Roberto Unger's 1996 work on legal analysis as 'institutional imagination'.²⁵ In this masterpiece, Unger suggests tapping the inherent political and imaginative potential within the stability of institutions and re-imagine them from within. As Christodoulidis has

²¹ Jedidiah S. Britton-Purdy, et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', (2020) 129 *Yale Law Journal* 1784; Poul F. Kjaer (eds), *The Law of Political Economy* (Cambridge University Press 2020); Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe', (2021) 1 *Journal of Law and Political Economy* 301.

²² Ludwig Raiser, *Die Zukunft des Privatrechts* (Walter de Gruyter, Berlin/New York 1971).

²³ Ludwig Raiser, 'Rechtsschutz und Institutionenschutz im Privatrecht' in Ringvorlesung gehalten von Mitgliedern der Tübinger Juristenfakultät im Rahmen des Dies academicus Wintersemester 1962/63 (eds), *Summum Ius Summa Iniuria. Individualgerechtigkeit und der Schutz allgemeiner Werte im Rechtsleben*. (Mohr Siebeck, Tübingen 1963), 145-167.

²⁴ Dan Wielsch, 'Contract Interpretation Regimes', (2018) 81 *Modern Law Review* 958.

²⁵ Roberto Unger, 'Legal Analysis as Institutional Imagination', (1996) 59 *Modern Law Review* 1; Roberto Unger, *What Should Legal Analysis Become?* (Verso Books, London 1996).

described it in a comment– Unger’s idea is to understand ‘the institution as law but undertaking it as politics’²⁶. This is a powerful normative direction that suggests that private law scholars should engage in ‘re-imagining institutions’, hereby realising political-normative demands through institutional legal analysis. And, in this guise, institutional analysis has equally encountered a return, not only but also here in the Netherlands. The concept of ‘transformative private law’, an approach not unlike Unger’s idea, has become a core theme of the private law research at the University of Amsterdam. Similarly, recent legal theory, such as Poul Kjaer’s theoretically sophisticated claim that the next law is to be understood as transformative law,²⁷ seem to move into a similar direction. According to this understanding, law would remain stable in form-giving but change in its substantive core in being re-oriented towards sustainability as its normative horizon. And also some recent projects of normative sustainable private law in Maastricht appear committed to a similar tradition of infiltrating the private law rules with overarching normative values and letting private law embrace specific desirable social imaginaries and imaginations.²⁸ Of course, the concrete and practical process of this transformation is still a matter of debate, legal instrumentalism, political programming or evolutionary variation, selection, and retention are equally on the table and put up for grab.²⁹

In this normative reading of private lawyers’ return to institutions, we thus may identify institutional analysis as a strategy by which external normativity on ‘what should become’ is read into purposes of social institutions with the goal to transform them from within.

New (Re)turns: Towards ‘New Institutional Analysis’

This brings me to the second objective of my lecture and the discussion of private law and the institutional (re)turn today. I share a lot with these recent directions of reading normative and transformative goals, programs, policies into social institutionalisation processes and draw conclusions for private law. But as persuasive as this may sound – we all may, on a surface level, agree on the laudable normative visions of sustainability, equality or justice as guiding what institutions should be – I dare to suggest that institutional analysis may not be able to adhere to such universal goals. Instead, it may need to return in private law scholarship with slightly different premises. These premises are

- 1) an increasing fragmentation and differentiation of society and, as a result conflicting normative demands in institutions, and
- 2) an insistence on the law and its autonomous performative force in stabilising certain institutional paths.

²⁶ Emiliios Christodoulidis, ‘The Inertia of Institutional Imagination: A Reply to Roberto Unger’, (1996) 59 *Modern Law Review* 377, 378.

²⁷ Poul F. Kjaer, ‘What is Transformative Law?’, (2023) 1 *European Law Open* 760.

²⁸ Bram Akkermans, *Sustainable Property Law: Reckoning, Resilience, and Reform* (Inaugural Lecture, Maastricht 2022).

²⁹ See, for those different suggestions Poul F. Kjaer, ‘Three Models of Transformative Law’, (2024) Transformative Private Law Blog, April 24th, 2024, <<https://transformativeprivatelaw.com/three-models-of-transformative-law/>>; Ioannis Kampourakis, ‘The Market as an Instrument of Planning in Sustainability Capitalism’, (2023) 2 *European Law Open* 511; Martijn W. Hesselink, ‘The Idea of Transformative Private Law: Some Critical Observations’, (2020) Transformative Private Law Blog, June 16th, 2024, <<https://transformativeprivatelaw.com/the-idea-of-transformative-private-law-some-critical-observations/>>.

On this first point, we are currently facing crises, in plural, for which the overarching political, social or economic vision or even a tentative answer is lacking. Global society and the legal rules relevant to them are shaped by plurality, fragmentation and by incompatibility. As Luhmann, the founding father of social systems theory, has once indicated, functional differentiation cannot be undone, Pandora's box has been opened.³⁰ The consequence is that in institutions, we identify different, conflicting demands from various spheres of society. For legal scholarship, Gunther Teubner has underlined repeatedly that private law needs to be responsive to polycontextuality and different, partly conflicting, societal demands.³¹

To make this concrete again, let me take the contract as an example: Is it not somewhat peculiar and difficult to bear with that analysing the private contract does not provide a normative indication of whether it ought to be protected, transformed or abolished? The contract operates as an institutional mechanism that stabilises social connectivity in the world through the common language of bilateral enforceability and has turned in the economic system into a tool for global value chain trade that fosters economic exploitation and serves as an instrument of economic power. Similarly, there is a gradual societal institutionalisation of evolving expectations related to climate change, sustainability and the need of living within the planetary boundaries. But, at the same time, we also begin to see that this evolving understanding of planet and determining the boundaries faces significant contestation for its partial and partly neo-colonial view on what is the planet, who is affected and who is left out. And when we turn to the digital transformation of society, we encounter the problem of an open, yet to be institutionalised, sphere. There seem no pre-defined expectations that provide the clear-cut answers on what to expect from digital technologies. Demands surround broad claims of curbing of economic power of 'big tech' but also a recognition of an increasing 'datafication' of society that even 'big tech' seems not to be able to handle. Hence, when returning to normative institutional analysis of private law, we may need to return in a guise that recognises the uncertain and conflicting demands that derive from social processes of institutionalisation.

With this understanding, I strongly build on the new theory of institutions, very prominently put forward by the Italian political philosopher Roberto Esposito. Esposito treats institutions as made up of internal fluidity and conflict and qualifies them as a constantly 'instituting praxis (or practice)'.³² Esposito thus provides us with an account of social institutions that portrays them as having an inner-dynamic ('between stasis and movement'³³) by which different types of expectations – cultural, economic, political, legal – are related to one another. It is by recognition of these different expectations and their accumulation, not necessarily under one directing idea (an *idée directrice* in the sense of Hauriou), but rather a guiding conflict and the force of constantly and reflectively taking position, that we may initiate change. Esposito describes this as the political being not just an expression of the

³⁰ Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Suhrkamp / Wissenschaftliche Buchgesellschaft, Frankfurt 1988), 344: 'Wie immer aber das System eigene Komplexität aufbaut: nie kann der Sündenfall der Ausdifferenzierung selbst zurückgenommen werden. Man kehrt nicht ins Paradies zurück.'

³¹ Gunther Teubner, 'After Privatisation? The Many Autonomies of Private Law', (1999) 51 *Current Legal Problems* 393.

³² Roberto Esposito, *Instituting Thought: Three Paradigms of Political Ontology* (Polity Press, Cambridge 2021), 13.

³³ Roberto Esposito, 'The Creative Force of Institutions', (2022) 115 *Cultural Critique* 143, 148.

social, but a reoccurring instituting of the social with knowledge of the conflicting lines and the need for taking position.³⁴

Second, in institutional analysis we also must remain committed to understanding the specific role of the law in institutions and its normativity, the 'strictly legal point of view' that lawyers adopt. I am convinced that even under globalisation and a plurality of legal orders, legal doctrinal arguments will have its role and a performative force. In an easily to overlook footnote in 'law as a social system', Niklas Luhmann has reflected in this way on institutional approaches. He refers to the fact that institutional theory, while opening up legal analysis to new sociologically grounded sources of law has not led to significant legal development.³⁵ Institutional normativity needs to be uncovered and be spelled out for the law. Phillip Selznick has recognised this with the idea of the 'conceptual readiness of the law'.³⁶ *But also Neil MacCormick and Ota Weinberger's approach to an institutional theory of law rightly emphasises the need to consider the law as part of the institutional order and take seriously legal normativity in institutional analysis.*³⁷ The task of the private lawyers in the current institutional return remains then to emphasise and to do the hard and often dry work of spelling out consequences of uncertain and conflicting institutional demands and the need for taking position within legal doctrinal categories.

I suggest, and that is what the core aim of my research in the coming years will be, that we need to develop a legal language, a doctrinal configuration, in private law that allows us reflecting the conflicting and uncertain societal institutionalisation processes and relate them to legal form(s). This task for us lawyers, and private lawyers in particular, is of utmost importance because – Esposito has reminded us of this as well – law and legal concepts do have a performative force that neither sociology nor economics nor studies on information technology have.³⁸

Alternative – Instituting – Private Law Doctrine

This brings me back to the more concrete – thank you for bearing with me on my elaboration on abstract sociological categories and normative demands – to the questions of how to analyse private law doctrine from such an institutional perspective.

I would propose that a good start for such grant endeavour may be a revitalising – also a return if you want – of spelling out doctrinally how private law rules are situated within its socio-economic context, what work they do in society and what they could do. In the 1970s, at the University of Bremen – coincidentally also a partner of Maastricht in the YUFE alliance – private lawyers had started such an ambitious project. They worked on an alternative private law doctrine in the form of a commentary on the German Civil Code. This commentary would not be concerned with commenting on the interpretation of the rules, on the internal structuring of the law and coherence and the documentation of precedent; instead, the commentary would cover a deep analysis of the rules on private

³⁴ Roberto Esposito, *Institution* (Wiley, London 2022), 39 ff.

³⁵ Niklas Luhmann, *Law as a Social System* (Oxford University Press, Oxford 2004), 69, n 41.

³⁶ Selznick (n 12), 243.

³⁷ Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, Oxford 2007).

³⁸ Esposito (n 32), 13, 206 ff.

law from the perspective of the social context.³⁹ As the name suggests, the commentary also aimed to reveal different alternatives and contingencies in legal reasoning. New institutional analysis of private law could be understood concretely in such a manner, but one may need engage in such doctrinal work under the new conditions of institutional conflictuality and uncertainty that I have outlined.

My personal aim in the next years on this chair is perhaps not to edit a commentary on either the German civil code or a sociologically grounded Asser Series on the Burgerlijk Wetboek although I hope that this lecture may perhaps open a collaborative start for this with my private law colleagues. I more aim – committed to remaining legal in times of social transformation – to offer a legal-doctrinal analysis of cases, legislation, but also private ordering in how the legal categories develop relate to the conflicting demands of social institutionalisation processes, what legal options result from this and what position-taking may follow for the law. My colleague Malte Gruber has already been suggesting a similar direction in his inaugural address, which he called the 'The futurities of law'⁴⁰: What we may need is an alternative and new doctrinal approach that is capable to keep us understand the law of the 'next society'⁴¹ and its institutional configurations and develop a language for the unspeakable.

What does this concretely mean? Let me now take my argument back to the case, to making the case, to showing what is at stake for concrete – alternative – private law doctrine. I opened the lecture with the *Milieudefensie v Shell* case as an example for how private lawyers turn to private law institutions. But I chose this case not only because of its turn to institutions, but also because the reasoning and decision of the court is illustrative precisely because it contains elaborations on the conflicting social institutionalisation processes as I defined above. The case, I mentioned this before, is based on Art. 6:162 BW, which is a legal rule specifying the conditions of a tortious act but, at the same time, referring to 'proper social conduct', allows integration of societal considerations and expectations into how to conceive wrongful acts in society.

This may suggest that the institutional analysis is mainly a turn to closer analysing 'good old' general clauses in law that reference to societal norms. This is, indeed, one aspect, but there is more: Relying on 'proper social conduct', the Dutch court has been making visible in the wrongful act several new guiding conflicts in society that shape the evolving institutional expectations around climate change, namely in terms of responsibility (who commits the wrongful act?), affectedness (who is entitled?), and action (what needs to be done?) to then develop a position.

Let me unpack these aspects:

³⁹ Rudolf Wassermann (eds), *Kommentar zum Bürgerlichen Gesetzbuch (Reihe Alternativkommentare)* (Luchterhand 1979-1990).

⁴⁰ Malte Gruber, 'Fururities of Law: Towards the Legal Design of the Next Society', (2023) *Ancilla Juris* 19 July 2023, 1.

⁴¹ Dirk Baecker, *Studien zur nächsten Gesellschaft* (Suhrkamp, Frankfurt am Main 2007).

First, the court has used the wrongful act as an entry point for reflecting on responsibility attributions and affectedness of a wrongful act in relation to climate change. A careful reading of the judgement shows that the court identified and included in its reasoning a core societal controversy related to climate responsibility. It recognised that there is an independent responsibility of all different actors for addressing the global problem of climate change⁴², only to continue with justifying the singling out of Shell as a core head of the global production system that would be an emerging specific and circumscribable action centre. The court thus recognised the societal expectations of treating climate change as our common task, which may of course have led to the option of principally initiating a liability claim against each of us, to then turn the essence of the question of responsibility into one of gradualisation. Control and capabilities are important for accelerated responsibility. The normative criterion for bringing Shell into the realm of a wrongful act was seen in the broad international consensus, expressed through international soft law frameworks and scientific climate reports, that relate heightened responsibility with factual control⁴³ and influence over the global production, distribution and consumption.⁴⁴ It is astonishing how the court managed to institutionalise fluidity and the current perplexity on how to legally pinpoint down the contradictory demands of 'we are all responsible for climate change' to emphasising the special role that lead firms in global production play. And this delineation of actors with accelerated responsibility only started: With a similar case being initiated against ING, we may see the next phase where the question is put to the test whether other systemic actors may be identified with an accelerated climate responsibility for the network of global production. But of course, the case may also give rise to critique because the Court omitted addressing certain societal conflicts within the institutionalisation of climate change when it comes to affectedness. The case is a transformation of an individual private law case, claimant and defendant, into tort law's institutionalisation of the societal conflict between those affected by climate change (including perhaps rights of nature and future generations), and a carbon major representing a responsibility subject. However, as Phillip Paiement has been emphasising, for the delineation of those affected and entitled the court chose a restrictive approach and an avoidance of the conflict in terms of delineating affectedness by only mentioning the current and future inhabitants of the Wadden Sea while ignoring the Dutch Oversea constituent countries and special municipalities as territories, actors, that would more imminently affected.⁴⁵

Second, the Court is also responsive to the normative institutionalisation of private governance. In the absence of any global steering instance that would be able to dictate Shell how to take action and no clearly delineated idea of what to do to reduce emissions, the Court reverted to the corporate governance structure of the company and the private

⁴² *Milieudefensie v Shell* (n 1), para 4.4.33: 'The parties agree that dangerous climate change is a worldwide problem, which RDS cannot solve on its own. There is broad consensus on this too'.

⁴³ *Milieudefensie v Shell* (n 1), para 4.4.21: 'RDS' responsibility is defined by the influence and control it can exercise over the Scope 1 through to 3 emissions of the Shell group.'

⁴⁴ *Milieudefensie v Shell* (n 1), para 4.4.24: 'As regards the business relations of the Shell group, including the end-users, RDS may be expected to (...) to use its influence to limit any lasting consequences as much as possible.'

⁴⁵ Philip Paiement, 'Reimagining the Energy Corporation: Milieudefensie and others v Royal Dutch Shell plc', (2021) *Netherlands Yearbook of International Law* 281, 287.

mechanisms for controlling the system of global production. It obliged Shell essentially to develop 'effective policies' that would extend the legal obligation to the functional territory of Shell's own operation and its production and consumption. With this concept of the 'effective policies' the Court simultaneously relied upon the corporate self-organisation to realise climate goals but adds to this a normative demand of 'effectiveness' coming from societal critique on corporate self-regulation in a different, more collective, direction. The further qualification of 'effectiveness' is, of course, still open.

Third and finally, the court also has adopted an interesting doctrinal reasoning to address the paralysis of society in how to address climate change. Relying on the rules of tort law suggests that the doctrinal language in which we speak is one of *ex post*, the damage is here, we need to aim for compensation, possibly deterrence. This is also the institutional contribution of negligence in society; it stabilises the expectation that when there is wrongful behaviour, there is sanctioning, and compensation and the integrity of appropriate conduct is preserved. However, how to deal with this mechanism when the damage we face may not be compensated, when it is not even possible to engage in fully preventive action? Can we find a language in private law, a doctrinal concept, for the societal unconscious knowledge that there is no repair and no compensation in climate change but still a need to reinforce the expectation that 'something has to be done'? The Dutch court has, at least, made a noteworthy attempt to take a position here. The ruling in *Milieudefensie v Shell* anchors the doctrinal contours of an unspeakable and uncertain future through what is doctrinally possible in tort law. Tort law, but no damage compensation; remedial measures on forward-looking action instead. Thus, the court worked with relating the societal narrative about the certainly coming but uncertain timing of 'tipping points' to the legal concept of the 'imminent damage' and an 'imminent violation' on the side of Shell- and I quote here - as 'the best possible chance' to prevent the most serious consequences of climate change.⁴⁶ The reduction obligation is thus the integration of a future-looking remedy into tort law in the face of a common knowledge that the disaster will come which we may not prevent but still legally relate to an obligation to 'do something about it'.

Research Fields

I have used this lecture to illustrate my vision on institutional analysis with the *Milieudefensie v Shell* case. But this case is of course just one example for a wider research agenda. Within the context of research on private law and social theory, my aim is to further look at this intersection of such emerging conflictual social institutionalisation processes in other societal transformations. In the remaining minutes, please allow me to sketch two of my further research fields in a very cursory fashion:

Amongst the different transformations that characterise our society, a strong research interest is in understanding what the digital transformation requires from private law. In this context, analysis of institutionalisation processes requires relating technical

⁴⁶ *Milieudefensie v Shell* (n 1), para 4.4.29.

affordances⁴⁷, invitations of use, to institutionalisation processes as a way to structure the society-technicality interface and draw consequences for private law. This equally requires us to develop a legal language, this time for capturing the materiality of technical artifacts, possibly subjectivity, within private law doctrine.

And then, there is my large project for the next five years in which I aim to develop private law rules for the socio-economic and increasingly digitalised phenomenon of interconnected global value chains. Value chains, so I hypothesise, also provide different forms of institutionalisation that we may need to include in our private law rules applicable to them. For sustainability and climate demands, as I discussed above, we may see a move towards individualised responsibilities grounded in the lead firm, but in other areas, such as requiring global fairness in value chain trade, institutionalisation relates to unpersonalised market practices and market competition.⁴⁸ I am happy to have recruited a team of talented junior and senior researchers on my ERC project CHAINLAW that embark with me upon this endeavour.

While I do not claim that developing such legal doctrinal concepts for institutional conflict and uncertainty may help us solving all problems that I have enumerated in the beginning of the lecture, it may allow us to find a way of expression, a way of describing – in a literary fashion but also one that is grounded in the normativity of law – to bear with an uncertain future, uphold a degree of legal force in the conflicting institutional demands we face and identify legal concepts that may help us navigating an uncertain future.

The Institutional and the Personal

I am very happy to be able to pursue my research at Maastricht University's Faculty of Law. It is a faculty committed to open discourse, plurality and to speaking multiple languages – both academically and linguistically, and to work with a strong sense of collegiality. It is an honour to be here and to be able to contribute to strengthening legal-sociological research at the Faculty in the different research groups that I am working in and to establish connections – as I hope I have done in today's lecture as well – fundamental theoretical research with concrete legal doctrine.

I hope that even though the reception is imminent, the remedy should be future-looking and societal self-organisation is certainly possible with this audience, you may allow me to conclude with the obligatory last minutes of personal reflection and express my words of thanks.

My first thank you is addressed to the university board of Maastricht University and faculty board of the Faculty of Law for the trust they have put in me with establishing this slightly unusual chair aiming to bridge private law and social theory. *Hartelijke dank gaat aan de Decaan Jan Smits en de capgroepvoorzitter Jos Hamers voor de steun in de laatste jaren en*

⁴⁷ Christoph B. Graber, 'How the Law Learns in the Digital Society', (2021) 3 *Law, Technology and Humans* 12; Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, Oxford 2019); Mireille Hildebrandt, 'Law As an Affordance: The Devil is in the Vanishing Point(s)', (2016) 4 *Critical Analysis of Law* 116.

⁴⁸ Anna Beckers, 'Global Value Chains in EU Law', (2023) 42 *Yearbook of European Law* 322.

voor het vertrouwen in mij en de idee van een hoogleraar positie in recht en sociale theorie binnen, en dat is belangrijk voor mij, de capaciteitsgroep Privaatrecht.

There have been many colleagues, mentors, supervisors who have accompanied and supported me on my way to becoming a professor, current and former faculty colleagues in Maastricht but also colleagues now spread over the Netherlands, Europe and the world. To mention all the people would be impossible but to single out just some of them would leave me with a taste of arbitrariness. Hence, you must remain an anonymous collective. I will make two exceptions, however. There is no justification needed to single out my PhD supervisor, mentor and, recently, co-author, Gunther Teubner. Gunther, you have been an immense source of inspiration the traces of which, I am sure, you have found in today's lecture. To take up a chair in private law and social theory would have been impossible without your support, intellectually, organisationally, personally, over all the years after you selected me as a student assistant to work at your institute at the famous 3rd floor at the University of Frankfurt. I also need to single out my mentor during the postdoctoral phase who, unfortunately, cannot join me today. Hans Micklitz has taken me up as a mentee during my postdoctoral fellowship at the EUI and has since been a strong guidance to navigate private law, regulation and globalisation. Gunther and Hans, I am not sure whether without the two of you, with your very different understandings of private law and the role of sociology, I would stand here today.

I also have benefitted from the mentoring, support, supervision and exchange with different colleagues at the faculty and other Dutch faculties. Within the context of the sector plan on transformative effects of globalisation on law, I cherish the many collaborations and collaborators from the University of Amsterdam and Tilburg University, several of who are here today. Thank you for travelling here.

In the faculty, there are many colleagues in the different research institutes and groups that I participate who deserve to be mentioned, but also here, a collective thanks to the colleagues in the Maastricht European Private Law Institute, the Globalisation and Law Network, the Institute for Corporate Law, Governance and Innovation Policies and the Graduate School of Law would need to be sufficient. But from the many, I again will make exceptions by mentioning by name Nicole Kornet – my co-supervisor in the PhD, line manager, vital support in so many different ways – thank you for your mentor- and friendship – as well as the Vice-Deans of Research of the Faculty that I had the pleasure to work with and grow in the Graduate School, Hans Nelen, Monica Claes and now Anke Moerland. And I do not want to forget René de Groot and Hildegard Schneider, Hildegard as the former Dean and René as my first head of my department and, in fact, the first person I met when I came to the faculty of law as a PhD researcher. Thank you for your constant investment in young researchers like me.

And, besides my academic mentorship, there is a regularly remaining invisible group of what we have come to call 'support staff'. This group is not often mentioned by name in such events, but it is the group forming silent true building blocks for allowing us academics to do our work and excel. For me, this has been throughout the years the support of

specifically, Licette Poll, Diana Schabregs, Michael Erard, Jolande Pletzers, Patty Dautzenberg and, in their help for today's lecture, Fabienne Dingena and Bernd Kapeller.

Finally, a personal ending of an inaugural lecture is never complete without also mentioning the closest personal context: Friends and family. In my case, this is a thank you to friends – outspokenly my friend Maria and Julia who unfortunately cannot be here today. To my brother Max and my mother Gabriele. You both have never ceased to believe in me and my capability to become a professor and, more importantly, have assured me that also without titles and everything I am always a valued human being. *Liebe Mama und lieber Max, vielen Dank für eure Unterstützung.* And while this is a joyful moment, I would like to also express the sadness that there is one person who would have been more than anyone else proud on this day but has not lived to see it happen: My father Christoph who I have to thank in spirit. I am sure that he will watch me proudly from somewhere, probably shouting in at some point a big "wow" and applause that I may not hear but I am sure is there.

And the truly last words are owed to my own family, to Bert, Alma and Theo without who life would be meaningless. Bert, you have been my support along all easy and difficult times, my soulmate for life and my essential support whenever imposter syndrome, a common academic disease, kicked in. Your calmness has allowed me to focus and rested me assured in so many ways. And, finally, Alma und Theo, *an euch ein Dank. Ihr seid das Wichtigste auf der Welt.* I hope that my work that you may not yet understand in today's lecture but hopefully will at some day, will end up revealing to you my immense commitment to invest in your future through research.

And with these last words to my family, I close by thanking you all for being here today, for having accompanied me through the journey of institutions, private law today and the long journey to becoming a professor. I am eagerly awaiting the debate that we engage in the future over this topic, be that in the very near future during the drinks that will follow now or the later future when we discuss research. Such academic debate is the lifeblood that made me choose this profession, so please do challenge me.

Ik heb gezegd.

Note on the author

Prof. Dr. Anna Beckers is Professor of Private Law and Social Theory at Maastricht University, Faculty of Law, The Netherlands. Her major research fields relate to European Private Law, Transnational Law, Legal and Social Theory, Corporate Responsibility, Digital Technologies and Private Law.

Anna was born and raised in Darmstadt, Germany. She studied law at Goethe-University Frankfurt am Main, Germany, and Linköping University, Sweden. Following the completion of the German law degree (*erstes juristisches Staatsexamen*), she followed the German practical training in law (*Referendariat*) by working in different institutions of legal practice: the civil court, the public prosecutor, the Federal Foreign Office Berlin as institution of public administration, a large commercial law firm and the European Institute of Public Administration in Maastricht. Anna completed the practical training with the German bar exam (*zweites juristisches Staatsexamen*). After this German legal education, Anna moved to Maastricht to work as a PhD researcher at Maastricht University, Faculty of Law. She defended her PhD (*cum laude*) in 2014 based on a dissertation on the legal enforcement of private corporate social responsibility codes. Her PhD was awarded the German Dissertation Prize by the Körber Foundation. Following a postdoctoral phrase as a Max Weber Fellow at the European University Institute Florence, Anna returned to Maastricht to work as an Assistant (2015-2022) and later Associate (2022-2023) Professor in Private Law and Legal Methodology. She was appointed Professor in 2023. Anna Beckers is Principal Investigator of the CHAINLAW project on the interaction of global value chains and private law, funded by the European Research Council (2023-2028).