Preface

Since this book is the fruit of a career in law, its purpose can be explained biographically. When I took up the study of law in the middle of the 1970s in the Netherlands, it turned out to be a doctrinal education, which I found rather boring at the time. I sought distraction in philosophy, got familiar with the work of Wittgenstein, the philosophy of language, and analytical philosophy. After publishing a book on the concept of action in law, I took Wittgenstein seriously by turning to practice (in my case by entering the judiciary). Here I was confronted with the strengths and weaknesses of doctrinal law, both facilitating and frustrating the administration of justice. I found that in hard cases, when judges run out of doctrinal arguments, they turn to moral/political and empirical/pragmatic arguments (explicitly or implicitly). Private law seemed to be embedded in a nest of non-doctrinal convictions, values, and attitudes.

This idea developed during my years on the bench in the Caribbean area. As a former Dutch colony, the Dutch Antilles has by and large the legal system of the Netherlands, with the same rules, precedents and doctrines; however, put into action, they have different meanings. Private law is deeply rooted in context, I learned, and I continued reflecting on that relationship. Although the doctrinal approach has its drawbacks, the only viable alternative – the interdisciplinary study of law – has its limitations too. Surely, it is worthwhile to study *Law and Economics* to learn another way of thinking (to mention one option). But taking over private law as just another domain of economics doesn't do justice to private law. For lawyers it seems more fruitful to 'broaden the study of private law from within', as William Twining has phrased it. This implies an extension of our internal perspective, rather than switching to an external perspective. I hope this approach does not just forge the middle ground between doctrinal law and its interdisciplinary competitors, but that it also offers a kaleidoscopic perspective on private law. Moreover, it might help us to understand ourselves, as private lawyers.

The rest is history. I made another tour to university, the bench, and back to university again. As Professor of Jurisprudence at Erasmus School of Law, I had the privilege of developing these ideas in cooperation with both my students and colleagues. The students kept challenging me to address the important questions beyond doctrine: how would you decide this case? How would you justify this decision? I owe many thanks to my colleagues Jeanne

Gaakeer and Sanne Taekema with whom I developed the educational material for the law-in-context approach that has rooted in Rotterdam. After my switch to the Hoge Raad der Nederlanden (the Dutch Supreme Court), I was offered the opportunity to deal with hard cases on a daily basis and to get used to thinking in and outside private law. I am grateful to my former colleagues who taught me by example when to stay within doctrinal limits and when and how to transcend the doctrinal arena. Private law is not just doctrine but that does by no means imply that ‘anything goes’. Back at the university – as Professor of Private Law at Tilburg Law School – I particularly enjoyed the opportunity to develop these ideas in the course on Advanced Private Law for Master’s students. I thank my colleagues Stephanie van Gulijk, Eric Tjong Tjin Tai and Rob van Gestel (amongst others) for their constant support in every way. Moreover, I thank Jeanne and Sanne for meticulously reviewing the draft of this book. Of course, its final content is my responsibility.

At the end of the Preface of *The Province and Function of Law* (1947), Julius Stone wrote that his book has a kind of interlocutory character. He states that he is ready to be more doubtful where he has shown certainty and to be persuaded where he was in doubt, whenever cause is shown for further thought. He then asks his readers to adopt a similar mood, so that for them (as for him) the pages of his book may provide a *point de vue*, and perhaps a *point d’élán*, but not necessarily a position to be defended or attacked for its own sake. It is in this spirit that I present this book to you.

Marc Loth, Tilburg, 1 July 2021