ABSTRACT. Nowadays, neo-institutionalistic approaches are prominent in economics, political science, the science of public administration and sociology. There is a general complaint about the vagueness of the concept of institutions and the apparent disparity of phenomena falling under it. This article shows how institutional legal theory provides a typology of institutions as sets of rules and corresponding patterns of regulated behaviour that can help to avert much confusion. The typology's usefulness is tested by applying it to an array of private governance structures distinguished by transaction cost economics.

KEY WORDS: governance, institution, institutional legal theory, legal person, neo-institutionalism, organization, rules of the game, transaction cost economics

INTRODUCTION

Under the wide term ‘governance’, a diversity of significant changes in public and private institutions has become a central topic of present-day public policy-making. At the same time, social sciences concerning themselves with the public and private spheres in modern societies, such as economics, political science, the sciences of public and business administration and organization sociology, are all experiencing a revival of ‘institutionalistic approaches’ that were supposed to have been definitely superseded by other approaches. To mark the difference with their remote predecessors, the descendants present themselves as ‘neo-institutionalists’ or ‘new...
institutionalists’. One factor has remained constant, however: the rediscovery of institutions is accompanied by the same confusion about what institutions are that could already be observed in classical institutionalistic times. If it is true that institutions do matter, it is still far from clear what it exactly is that matters.

Richard Nelson and Bhavan N. Sampat have conducted an extensive survey of conceptions of institutions presented by economists. The impression conveyed by the survey is that the term ‘institution’ is employed with so many different meanings that one might well ask whether the term still designates a single coherent concept. The situation is not quite as hopeless as Nelson and Sampat suggest. On the basis of his survey of neo-institutionalistic approaches, the sociologist Keman formulates a covering concept of ‘institutions as sets of rules that occur in social reality in the form of recurrent behavior that complies with those rules’. This formulation offers an important point of departure for tackling the question of how to make systematic distinctions between different kinds of institutions, namely, their characteristic as ‘sets of rules’. An important objective of this article is to make clear how different sets of rules lead to different institutions. To avoid confusion we shall make use of a terminological distinction made by the legal theorist Ota Weinberger between, on the one hand, normative institutions – that is, institutions as distinct systems of rules – and, on the other hand, real institutions – that is, institutions as enduring patterns of social behaviour. With the exception of Elinor Ostrom’s game-theoretically inspired work, analysis of institutions as systems of rules is widely neglected in the social sciences. The neo-institutionalistic approach within legal theory

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